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WITH

A large number of extra Rulings not reported elsewhere.

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899	Muthu Karuppan Chettiar v Muthuraman Chettiar	26	282
900	Venkatappa Nayanim v. Thimma Nayanim	27	379
903	Venkoba Row v Nataraja Chettiar	27	109
906	Swammadha Iyer v Appasami Iyer	27	305
909	Kuttavakath Vvia v. Erimbal Karuwante	26	239
910	Muthu Pillai v Sandanam Pallai	26	507
910	Narayana Singh v. Ayyasami Reddy	27	265
911	Venkatarama Raju v Bapamma Raju	26	888
912	Ramakrishna Patter v Narayana Patter	26	883
915	Abbakka v Seshamma	25	944
916	Rami Reddi v. Venkatesam	27	274
919	Narsi Reddi v. Virareddi	25	893
919	Ramasundaran Pillai v Savundearthammal	27	440
921	Rosamund Rhodes v Padmabha Chettiar	26	369
931	Krishna Reddy v Sundara Reddy	26	384
936	Mrutyanjudu v. Raja of Pittapuram	26	78
939	Jagannaikulu v The Manager of Nandigam	27	122
948	Nalini Kanta Lahiri v. Sarnamoyi Debia	24	294

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111	Jiwanlal v. Chudaman ..	26	835
112	Ramchandra v. Vinayak	25	290
129	Tikaram v. Seth Ghasiram	26	810
133	Husen v. Rajaram	26	813
137	Gokalsingh v. Kanhayalal	26	816
139	Raghu v. Madhgia .	26	819
144	*Musammat* Manjula v. Shankar ...	26	830
146	Jairam v. Sunderlal	26	698
150	Balkishan v. Atmaram	26	701
159	Vishwanath v. Sitaram	26	708
161	Bapu v. Bhiwaji	26	709
166	Rajaram v. Vithal Rao	26	712
170	Jamnadas v. Paiku	26	715
173	Narayan v. Mahadeo ..	26	720
177	Emperor v. Shioshankarpuri	27	545
185	Ram Gulam v Balaprasad	27	498
188	Sambhakco v Mahadeo .	27	706

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299	Data Ram Tiwari v. Deokali Tewari ..	25	855
303	Ramadhin Misra v. Sitla Bakhsh Singh .	25	905
306	Ghazaffar Husain v. Lala Ram Ratan ..	25	907
309	Shahamat Khan v. Gulab Khan .	26	1003
311	Muhammad Ali Muhammad Khan v. Emperor	25	1005
313	Durga Singh v. Nawab Mirza Muhammad Raza Husain Khan	25	912
318	Gur Narain v. Gulzari Lal	25	917
327	Sheo Dat Singh v. *Musammat* Sidhau Kunwar ...	25	503
331	Kailasa v. Raghubar .	26	526
336	Rajman v. Brahm Surat ...	26	621
339	Bakkha Singh v. Gaya Din Singh.	26	517
343	Laltu Singh v. Hazari Singh .	26	242
347	Vidyasagar v. Ratipal	25	752
354	Ori Lal v. Mohammad Yakub	25	908
363	Puttu v. Emperor ..	27	196
369	Amar Chand Pal v. Secretary of State ..	27	354
374	Piare Lal v. Mohammad Mahmud .	27	363
377	Hasibunnissa v. Mahmudunnissa	27	419
379	Hazari Lal v. Ram Narain	27	420
386	Chet Kunwar v. Puttu Singh ...	27	424
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583	Beni Madho v. Kanhaiya Lal .	26	536
585	Ram Prasad v. Sarjoo ..	26	542
587	Raghunath Kuar v The Court of Wards ...	26	683
589	Narpat Singh v Gur Bakhsh Singh ...	26	686
591	Mir Syed Hasan v. *Musammat* Taiyaba Begum .	26	547
680	Shaikh Nisarul Rahman v. Mahant Tikam Das ...	26	860
681	Suraj Bali v. Dan Bahadur Singh	26	736
682	*Musammat* Sarupa v. Karam Ullah ...	26	872
684	Joti Prasad v. Balwant Singh ..	26	880
687	Dal v. Emperor ...	26	654
692	Nageshar v. Ram Tahal	26	722
693	Chaudharain Shaibunnisa v. Karamat Ali ...	26	722
695	Baba Ram Das v. Haji Muhammad Abdul Haq ...	27	94
696	Sultan Singh v. Thakur Chandrapal Singh ...	27	120
697	Court of Wards, Esanagar Estate v. Gauri Shankar ...	26	624
698	Surajpal Singh v. Gajraj Singh ...	26	600
701	Suraj Bali v. *Musammat* Govinda .	26	904
703	Baldeo Prasad v. Chet Ram ..	26	706
707	Raja Bhagawan Bakhsh Singh v. Chaudhri Shafiq-uz-zaman ...	26	709
708	Lal Hanwant Ram v. Raja Muhammad Abul Hasan Khan ...	26	712

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717	Raja Udit Narain Singh v. Gur Charan	26	719	745	Harjas Brahman v. Makund Sarup ...	27	73
719	*Musammat* Vishunath Kuar v. Thakur Gauri Shankar	27	376	747	Imam Uddin v. *Musammat* Mumtaz-Unnisa .	27	118
722	Rani Tulsha Dei v. Mahabir	27	382	751	Raja Rudra Pratab Sahi v. Ram Charan Pande	27	165
724	Mata Prasad v. Special Manager Court of Wards, Umraegaon Estate	27	385	753	Pattu v. Emperor	27	196
726	Muhammad Nasim v. Muhammad Ahamad .	27	389	759	*Musammat* Balrajee v. Sarju Prasad	27	20
731	Thakur Lal Muneshar Bakhsh Singh v. Gaya Bakhsh .	27	407	761	Jhandeshur v. Baij Nath .	27	121
733	Thakur Lal Muneshar Bakhsh Singh v. Shahzade Khan ...	27	175	764	Rameshar Dat v. Thakur Shyama Kumar Singh	27	102
735	*Musammat* Kailasa v. Raghubar ..	26	526	766	Marcy v. Sardar Umrao Singh	27	108

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235	Nawab Khan v. Karam Chand .	25	506	244	Secretary of State for India in Council v. Hakim ..	25	448
236	Bhagwan Das v. *Musammat* Ram Bai	25	538	245	Emperor v. Waryam Singh .	25	329
237	Nanak Chand v. Jiwan Mal ...	25	435	246	The Singer Manufacturing Co. of Lahore v. Mohammad Din ...	27	251
238	Jamal v. Qadir Bakhsh	25	437	247	Diwan Daya Kishen Kaul v. Frank B. Pool ...	27	252
239	Imam Din v. Dulo ..	25	278	248	Amir Chand v. Ram Saran Das ...	27	256
240	Amar Singh v. Bhola ...	26	341	249	*Musammat* Juggo Kaur v. Durga Das ...	27	257
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252	Fazl Hussain v. Malik Jinda	25	443
253	Bhagwan Das v. Kanshi Ram	25	180
254	Bir Singh v. Kahan Singh	25	502
255	Jalal Din v. Qaim Din	25	439
256	Bulanda v. Fateh Din	25	504
257	Abdur Rahman v. Mr. W. O'Brien	25	357
258	B. A. Gough v. H. S. Lenehan	25	355
259	Gulab Mal v. Shujawal	25	354
260	Dev Raj v. Shiv Ram	25	463
261	*Musammat* Fatima v. Emperor	25	525
262	Ahmad Gul v. Emperor	25	517
263	Nawab v. Emperor	25	522
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265	*Musammat* Sada Kaur v. Buta Singh	25	565
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273	Karim Dad v. Emperor	21	907
274	Sunder Singh v. Emperor	21	1008
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276	Banarsi Das v. Nathu Mal	26	987
277	Abdul Ali v. Puran Mal	25	560
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279	The People's Bank of India Ltd. v. Narain Das	25	553
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281	Prem Singh v. Mokand Singh	26	345
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283	Jahangir Singh v. Hira	26	282
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84	Anant Ram v. Damodar Das ...	22	797
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86	Karar Hassan v. Mustafa Hassan	26	743
87	Ratti Ram v. Kundan Lal	26	543
88	Med Singh v. *Mussammat* Kubir-un-Nisa	26	486
89	Nabi Bakhsh v. *Musammat* Mehr Bibi	26	797
90	Natha Singh v. Mangal	26	812
91	Devi Das v. Raja Khan	24	417
92	Karam Chand v. Jai Ram	24	928
93	*Musammat* Hayat Khatun v. *Musammat* Sharm Khatun	26	524
94	Bulaki Mal v. Duni Chand	22	837
95	Munshi Ram v. Rulia Ram	24	980
96	Mahomed Rashid v. Rahmat-Ullah	24	630
97	Mowaz v. *Musammat* Gulab Jan	24	920
98	Lal Singh v. Sham Lal	27	381
99	Mehra v. Mangal Singh ...	27	393
100	Shuja-ud-din v. *Musammat* Ashiabi	26	342
101	Maharaj Kishen v. Hargobind	27	69
102	Diwan Chand v. Hari Chand	24	636
103	Amar Singh v. Kishen Singh	27	93
104	Ranjha v. *Musammat* Jindwaddi	24	942
105	Fazl Khan v. *Musammat* Karm Begam	27	113
106	Jangli Mal v. Pioneer Flour Mills	27	115
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28	Ghulam Kadir Khan v. Crown	24	581
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30	Jawan v. Crown	25	634
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33	Crown v. Bhagwan Das	27	842
34	Jowala Sahai v. Crown	27	664
35	Crown v. Fazal Din	27	844
36	Municipal Committee, Jhang v. Muhammad Hayat	27	897
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38	Crown v. Khuda Bakhsh	27	901
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135	Dewan Chand v. Hari Chand	24	636
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137	Dalipa v. Rala	22	409
138	*Musammat* Sukhan v. Narain Singh	22	792
139	Amir v. Faqira	25	874
140	Jaggan Nath v. Ram Das	25	881
141	Rahim Bakhsh v. Budhan	22	712
142	Khair Din v. Ghulam-Mohi-ud-Din	22	401
143	Sunder Das v. Manak Chan	27	332
144	Imam Din v. Dulo	25	278
145	Bhagwan Das v. Kanshi Ram	25	180
146	*Haji* Abdur Rahman v. Mr. W. O'brien	25	357
147	Santa Singh v. Waryam Singh	24	361
148	Milkhi v. Ram Das	24	477
149	*Mian* Ghulam Muhyuddin v. Secretary of State	24	379
150	Devi Das v. Raja Khan	24	417
151	Prem Singh v Mokand Singh	26	345
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156	Kirpa Ram v. Kirpa Ram	27	89
57	Jahangir Singh v. Hira	26	282
158	Secretary of State v. Hakim	25	448
159	*Musammat* Juggu Kaur v. Durga Das	27	257
159	Diwan Daya Kishen Kaul v. Frank B. Pool	27	252
160	Fazil Hussain v. Malik Jinda	25	443
161	Jalal Din v. Qaim Din	25	439
162	Amir Chand v. Ram Sarandas	27	256
163	Amar Singh v. Karam Singh	25	441
164	Yaran v. Gulrang	26	882
165	Dev Raj v. Shiv Ram	25	463
166	Singer Manufacturing Co. of Lahore v. Muhammad Din	27	251
167	*Musammat* Sada Kaur v. Buta Singh	25	565
168	Shadi Beg v. Ahmed Khan	27	446
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41	Gul Shah v. Crown	26	1005	47	Ahmad Gul v. Crown	25	517
42	Sardar Ahmad v. Crown	28	154	48	Jhandu Ram v. Crown	27	154
43	Nadir v. Crown	26	667	49	Mr. M, *In the matter of* ..	27	156
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20	Mathradas Dharmdas v. Crown	25	989	86	Mir Mahomed Khan v. Pohumal Motumal	25	949
21	Crown v. Nathu	25	990	9	Mistri Mahomed Umar v. Seth Chimansing	25	935
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36	XXII	539
40	XXI	723
46	XXIII	464
48	XXI	859
51 .	XXII	622
53	„	145
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259	XXIII	589
262	„	496
264	„	429
268	„	600
272	„	329
277	„	514
280	XXIV	59
282	„	115
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350	„	649
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376	XXV	400
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461	XXIV	235
464	XXV	403
466	XXIV	632
468	XXV	336
469	„	528
471	XXIV	464
474	XXV	336
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478 .	„	426
481	XXIV	946
482	„	473
485	„	607
488	XXV	445
492	XXIV	535
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48	„	51
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239	XXIII	11
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251	XXII	964
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351	XXIII	600
355	„	4
361	„	589
365	„	496
367	„	320
370	„	102
374	„	429
378	XXIV	111
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385	XXIV	115
387	XXIII	753
390	XXIV	608
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769	XXV	353
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794	XXIV	252
798	XXV	283
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261	„	169
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810	„	504
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126	..	„	516
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133	...	XXIV	638
136		XXIII	322
139	. .	XXIV	693
140	.	„	700
142		„	704
143		„	321
155	.	„	749
160	...	XXIII	111
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242	...	„	833
245	...	XXV	48
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250	...	„	967
253		„	979
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123		XXIII	903
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135		XXV	931
138		„	933
140		„	1006
143		XXII	432
251		XXV	995
252	.	„	799
257	. .	XXIV	438
257		XXV	808
260	. .	„	810
262	.	XXIV	57
264	.	XXV	815
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66		XXII	1008
69		XIX	686
80		„	756
88		XX	138
92	.	XXIV	768
104		XXI	169
108		XX	39
113		XIX	993
130		XX	488
137		„	630
148		„	679
160		„	72
164	.	„	746
168		„	264
173		„	81
261	.	„	229
271	.	XXV	370
276	..	XX	423
286		„	650
299	..	XXV	348
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313	..	XXV	391
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342		XX	443
347	..	XXV	509
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613	XXV	1004
616	XXVII	160
617	XXIII	507
618	XXVI	87
621	„	35
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342	„	431
345	„	651
352	„	824
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365	„	184
370	„	983
375	XXV	783
382	„	417
393	„	211
397	„	618
399	XXVI	244
407	„	986
413	XXIV	999
423	XXVII	440
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427	„	999
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100	XXIV	709
102	XXII	609
110	XXI	740
119	XXII	615
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134	„	883
136	„	627
147	„	912
156	„	324
157	XXIII	409
160	„	321
162	XXII	870
166	XXIII	785
169	„	620
171	„	208
172	XXII	775
178	„	762
180	XXIV	764
181	XXII	597
191	„	692
197	„	369
203	„	799
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208	XXIII	1
212	XXII	826
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229	XXIII	208
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232	„	781
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351	XXIII	219
355	XXV	630
360	XXIV	918
363	„	935
369	„	940
371	„	879
372	XXIII	134
376	XXIV	924
379	„	927
381	XXIII	479
389	XXIV	204
394	XXIII	377
398	XXIV	316
403	XXIII	909
410	„	520
412	XXIV	44
414	XXIII	524
416	XXIV	87
419	XXIII	607
428	XXIV	519
431	XXIII	923
433	XXIV	106
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561	„	300
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619	„	451
635	„	780
641	XXVII	162
643	XXV	221
645	XXIV	504
648	„	309
649	XXVII	14
657	XXV	979
662	„	878
665	„	883
667	„	425
668	XXVI	90
670	„	87
673	XXV	434
675	XXVI	7
687	„	1
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699	XXV	573
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762	XXIII	645
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775	„	607
777	„	657
779	„	305
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831	„	290
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928	XXVI	779
932	„	81
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937	XXVI	125
939	„	156
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952	„	219
959	XXIII	642
963	„	714
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170	XXIII	396
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174	„	405
175	XXII	317
178	XXIII	409
179	XXI	833
184	XXII	293
197	„	883
198	XXI	701
200	XXII	9 2
205	„	899
216	„	775
220	„	277
221	XXIII	321
222	XXII	4
228	XXIII	806
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282	XXIII	264
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299	„	166
309	XXIII	241
310	XXII	919
314	XXIII	324
316	„	544
317	„	425
318	„	96
319	„	174
322	„	540
323	„	753
323	„	424
324	XXII	991
327	XXIII	102
329	„	82
333	XXI	432
339	XXIII	523
340	XXII	834
344	XXIII	614
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346	„	530
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348	XXII	870
351	XXIII	725
352	„	208
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354	„	280
356	XXII	555
363	XXIV	153
367	XXIII	553
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372	„	90
373	XXII	972
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506	XXIII	661
521	XXIV	547
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563	XXIII	533
565	XXV	451
581	XXIV	369
585	„	290
593	„	504
595	XXV	123
606	XXII	936
610	XXV	780
614	XXVI	106
616	XXV	396
618	XXIV	127
619	XXV	746
620	XXIV	257
622	XXIII	390
623	XXII	976
624	XXIII	713
631	XXIV	300
636	„	501
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648	„	797
651	„	979
654	„	467
671	„	206
672	„	957
679	XXIV	296
684	XXVI	35
689	XXV	755
692	„	794
695	„	305
703	„	428
705	XXV	590
706	„	726
708	„	573
711	„	608
713	XXVI	475
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715	XXV	669
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718	XXVII	755
728	XXV	109
733	XXIV	667
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779	„	747
782	„	750
782	XXV	582
784	„	934
785	„	712
788	XXVI	18
790	XXV	1004
791	„	514
792	„	927
793	„	524
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795	XXV	997
796	„	406
797	„	951
798	„	916
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8 7	XXVII	996
821	XXV	530
822	XXVI	7
831	XXV	610
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833	XXV	700
834	XXVI	207
835	XXV	290
864	XXVI	50
865	XXV	583
867	XXIV	957
870	XXVI	475
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873	„	273
874	„	66
875	„	368
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903	„	109
906	„	305
909	XXVI	239
910	„	507
910	XXVII	265
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32	„	165
35	„	719
38	„	704
39	„	878
42	„	888
44	„	893
51	XXIV	808
60	„	850
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72	„	831
74	„	863
76	„	866
78	„	868
81	XXVI	601
89	„	606
91	„	598
93	„	608
98	„	6 3
108	XXIV	506
111	XXVI	835
112	XXV	290
129	XXVI	810
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47	„	456
52	„	406
55	„	460
60	„	453
68	XXII	293
86	XXIV	223
90	„	286
92	„	975
94	„	187
99	XXIII	935
105	„	943
108	XXIV	542
120	XXIII	625
134	XXV	138
138	„	363
142	XXIV	604
148	„	119
150	„	32
153	XXV	121
157	XXIV	45
169	XXV	160
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193	„	146
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242	„	694
250	„	688
252	„	701
254	„	703
256	„	704
260	„	846
263	„	996
267	„	708
273	„	838
276	„	843
284	„	732
291	„	599
294	„	600
299	„	855
303	„	905
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63	XXIII	957
67	XXI	985
74	XXIII	1004
78	„	962
81	„	965
86	„	969
89	„	972
92	„	976
95	XXIV	146
109	XXII	293
124	XXIV	788
127	XXIII	935
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141	XXIV	156
147	XXIII	460
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159	XXII	315
163	XXIV	562
175	„	2
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191	XXIV	109
193	„	118
196	„	116
200	„	590
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218	„	595
223	„	119
225	„	45
236	„	778
238	„	172
242	„	350
244	„	28
246	„	759
248	„	790
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319	„	640
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328	„	633
330	„	638
334	„	596
335	„	316
344	„	603
352	„	138
356	„	608
357	„	644
360	„	625
364	„	646
366	„	648
383	„	660
385	„	663
387	„	624
389	„	675
397	„	680
403	„	684
405	„	718
407	„	833
416	„	840
419	„	716
421	„	743
426	„	749
433	„	752
440	„	758
442	„	816
447	„	823
452	„	827
456	„	849
463	„	855
466	„	861
470	„	869
475	„	806
481	„	996
485	„	916
487	„	838
490	„	921
493	„	904
496	„	908
503	„	917
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583	„	536
585	„	542
587	„	643
589	„	686
591	„	547
680	„	860
681	„	736
682	„	872
684	„	880
687	„	654
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693	„	722
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13	„	919
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15	„	951
16	„	944
17	„	932
18	„	972
19	*Not reportpble.*	
20	XXIII	351
21	*Not reportable.*	
22	XXIII	527
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24	XXIII	317
25	„	319
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42	XXIII	934
43	„	97
44	„	85
45	XXII	250
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47	„	403
48	„	406
49	„	409
50	„	420
51	„	415
52	„	401
53	„	495
54	„	393
55	XXIII	532
56	„	535
57	XXIV	834
58	XXII	960
59	*Not reportable*	
60	XXIII	536
61	XXIV	159
62	„	573
63	„	587
64	XXIII	471
65	„	469
66	„	473
67	„	938
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79	„	544
80	„	571
81	„	576
82	„	656
83	„	664
84	„	637
85	„	646
86	„	644
87	„	647
88	„	592
89	„	724
90	„	680
91	„	722
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93	XXIII	410
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97	„	748
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101	„	824
102	„	797
103	„	785
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105	„	805
106	XXIII	395
107	„	397
108	„	525
109	XXII	811
110	XXIII	276
111	„	940
112	„	483
113	XXIV	833
114	XXIII	950
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116	XXII	837
117	„	851
118	„	955
119	„	855
120	„	660
121	„	944
122	„	846
123	XXIV	836
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144	„	51
145	„	43
146	„	26
147	XXIV	500
148	XXIII	2.1
149	XXV	719
150	„	723
151	„	705
152	XXIII	908
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165	XXIV	236
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167	XXIII	462
168	XXV	343
169	*Not reportable.*	
170	XXIV	962
171	XXIII	550
172	XXIV	842
173	„	883
174	„	880
175	„	893
176	„	894
177	„	894
178	„	898
179	„	902
180	„	903
181	„	947
182	„	948
183	XXIII	845
184	„	835
185	XXIV	692
186	XXV	511
187	XXIII	970
188	XXIV	682
189	„	684
190	„	687
191	XXIII	902
192	XXIV	689
193	„	623
194	XXV	24
195	XXVI	512
196	XXV	710
197	„	785
198	„	622
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208	„	379
209	„	417
210	„	578
211	„	581
212	„	630
213	„	636
214	„	568
215	XXV	480
216	„	856
217	XXIV	678
218	„	9 3
219	„	926
220	„	920
221	„	912
222	„	941
223	„	980
224	„	928
225	„	930
226	„	931
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228	„	871
229	„	982
230	„	68
231	„	35
232	„	595
233	„	556
234	XXV	672
235	„	506
236	„	538
237	„	435
238	„	437
239	„	278
240	XXVI	341
241	XXV	545
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244	„	448
245	„	329
246	XXVII	251
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252	„	443
253	„	180
254	„	502
255	„	439
256	„	504
257	„	357
258	„	355
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272	„	845
273	„	907
274	„	1008
275	„	855
276	XXVI	987
277	XXV	560
278	„	515
279	„	553
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10	„	203
11	XXII	941
12	„	896
13	XX	451
14	„	564
15	„	755
16	XXIII	154
17	XX	532
18	XXIII	276
19	XX	777
20	„	817
21	XXIII	541
22	XXI	843
23	XXVI	512
24	XXV	710
25	XXIII	919
26	„	908
27	„	527
28	XXI	925
29	XXIV	2 2
30	XXIII	422
31	XXI	577
32	XXIII	317
33	„	395
34	XXI	919
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41	XXII	415
42	XXV	642
43	XXII	401
44	XXV	502
45	XXII	805
46	XXIII	532
47	„	536
48	XXIV	379
49	XXV	443
50	„	441
51	XXII	821
52	„	846
53	XXIII	927
54	XXV	437
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56	XXV	506
57	„	504
58	„	538
59	XXIV	100
60	XXIII	151
61	XXV	542
62	„	639
63	XXIII	91
64	XXV	448
65	XXII	549
66	„	647
67	XXV	595
68	XXII	795
69	XXIV	236
70	XXV	463
71	„	545
72	„	556
73	„	553
74	XXII	752
75	„	829
76	XXIII	211
77	XXV	697
78	XXIII	835
79	XXV	549
80	„	565
81	„	429
82	„	560
83	XXVI	441
84	XXII	797
85	XXIII	817
86	XXVI	743
87	„	543
88	„	486
89	„	797
90	„	812
91	XXIV	417
92	„	928
93	XXVI	524
94	XXII	837
95	XXIV	980
96	„	630
97	„	920
98	XXVII	381
99	„	393
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1 ..	XXIII	696
2	„	688
3	„	726
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5	„	971
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7	XXIV	958
8	„	568
9 ..	XXVII	203
10	XXV	525
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14	XXIII	473
15	„	4'3
16	XXII	1006
17	XXIII	508
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19 .	XXIII	468
20	XXII	748
21	XXVII	200
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23	„	515
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25	„	323
26	„	652
27 .	XXIV	578
28	„	581
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9	„	861
10	XXIII	418
11	„	422
12	„	351
13	„	950
14	XXI	719
15	„	722
16	„	951
17	XXIII	381
18	XXI	932
19	„	972
20	XXI	925
21	XXIII	89
22 ...	„	91
23	„	86
24	XXI	919
25	XX	203
26	XXII	846
27	XXIII	591
28	„	596
29 .	XXII	319
30	XXIII	938
31	„	940
32	„	525
33	*Not reportable.*	
34	XXII	4'5
35	XXIII	395
36	„	379
37	„	410
38	„	276
39	XXII	647
40	XXII	549
41	„	528
42	„	644
43	„	664
44	„	646
45	„	526
46	XXIII	445
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49	XXII	560
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70	XXIV	883
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72	XXII	855
73	XXIV	893
74 .	„	824
75	XXII	829
76	XXIV	880
77	„	898
78	XXIII	462
79	XXV	642
80	XXIV	902
81	„	903
82	„	689
83	XXIII	151
84 ..	XXIV	692
85	XXIII	97
86	XXV	511
87	XXII	406
88	XXIV	682
89	XXIII	85
90	„	109
91	XXIV	684
92 .	„	687
93	XXII	960
94	XXIV	623
95	XXII	837
96	XXV	622
97	XXIII	550
98	XXV	658
99	XXIII	458
100	XXV	616
101	XXII	412
102	XXV	672
103	XXIII	532
104	XXV	429
105	XXII	607
106	XXV	82
107	XXII	680
108	XXV	144
109	XXII	517
110	XXV	480
111 .	„	856
112	„	871
113	XXIV	236
114	„	470
115	XXIII	970
116	„	902
117	„	934
118 ...	„	927
119 ..	„	835
120 .	„	817
121 ..	XXIV	920
122 .	„	942
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137	XXII	409
138	„	792
139	XXV	874
140 .	„	881
141	XXII	712
142	„	401
143 .	XXVII	332
144	XXV	278
145	„	180
146	„	357
147 .	XXIV	361
148	„	477
149	„	379
150	„	417
151	XXVI	345
152 .	XXV	538
153	„	437
154	„	506
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156	XXVII	89
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3	„	759
4	„	754
5	XXIV	844
6 .	XXI	679
7 .	XXIV	573
8	XXII	150
9	XXIV	587
10	XXIII	469
11	XXIII	471
12	*Not reportable.*	
13	XXIII	473
14 ..	„	483
15	„	487
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30	.	XXII	724
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32		XXII	1006
33	...	„	722
34		XXV	982
35	...	„	978
36		XXIV	578
37	.	„	581
38	.	XXIII	508
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23		„	992
25		„	994
28		„	863
39		„	998
41	.	„	977
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ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 776 OF 1913.

June 15, 1914.

Present:—Mr. Justice Piggott.

BHABHUTI RAI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HARBANS RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Mortgagor's right sold at auction—Suit for sale on mortgage without impleading vendee—Subsequent suit to eject mortgagor's vendee—Cause of action.

An unregistered mortgage was executed on the 7th June 1900. In execution of a simple money decree the mortgagor's right and interest was purchased by *H* in 1901. In 1904 the mortgagee brought a suit on the basis of the mortgage of 1900 and did not implead *H* as party to the suit. The mortgagee obtained a decree and on execution thereof purchased the property himself in 1908:

Held, that the mortgagee-purchaser could not eject *H* in a suit for possession.

Hargu Lal Singh v. *Gobind Rai*, 19 A. 541; A. W. N. (1897) 154, *Madan Lal* v. *Bhagwan Das*, 21 A. 235; A. W. N. (1899) 41, followed.

Jugdeo Singh v. *Habibulla*, 12 C. W. N. 107; 6 C. L. J. 612; *Ram Prasad* v. *Bhikari Das*, 26 A. 464, referred to.

Second appeal against the decision of the District Judge of Ghazipur, dated 29th May 1913.

FACTS.—On the 7th of June 1900 certain property was hypothecated to the plaintiffs' predecessor. On the 20th May 1901, one Oma Nath purchased the property at an auction sale in execution of a simple money decree held by him against the mortgagors. On the 22nd September 1902 Oma Nath sold the property to the defendants and they obtained possession. On the 3rd of June 1904, the plaintiffs obtained a decree for sale of the same property on foot of a simple mortgage and brought it to sale and purchased it themselves. In the above mortgage suit, the contesting defendants were not parties. The plaintiffs applied to the Revenue Court for mutation of their names, but on defendants' objection their application was disallowed. The plaintiffs sued for possession of the property. The Munsif decreed the suit and gave the defendants a right to redeem within a certain period, failing which they would be foreclosed. The defendants appealed and the learned District Judge allowed the appeal and dismissed the suit *in toto*. The plaintiffs appealed to the High Court.

Mr. *Sital Prasad Ghosh*, for the Appellants.—There is no finding that inspite, of having notice, plaintiffs did not implead Oma Nath. If my clients had been found to have notice, there would be justification for dismissal of the suit. If the defendants in this suit had been made defendants in the previous suit, they would have been able to redeem the mortgage. The decree of the first Court gives them the same right now. They are not in any way prejudiced.

When the plaintiffs set forth the circumstances under which they sue, the plaintiffs should be given the relief granted by the first Court. The Munsif gave a decree that all the facts and circumstances being before him, he would give defendants an opportunity to redeem and if they did not avail themselves of it, they would be foreclosed. The defendants come only on a technical ground. He referred to *Maharaja of Benares* v. *Paspat Ram*, unreported case No. 767 of 1911, decided by Banerji, J., on 18th June 1912, and to *Jugdeo Singh* v. *Habibullah* (1).

In *Hargu Lal Singh* v. *Gobind Rai* (2)

(1) 12 C. W. N. 107; 6 C. L. J. 612.
(2) 19 A. 541; A. W. N. (1897) 154.

the suit was for ejectment but no request was made for a decree subject to redemption. When that case was decided, there was no provision as laid down in Order VII, rule 7, of the new Civil Procedure Code.

The money was due on 17th May 1901. The present suit was brought within 12 years. A decree for sale was, therefore, not barred by time and could be granted. It does not appear that in the case reported as *Hargu Lal Singh* v. *Gobind Rai* (2) any suggestion for a decree for sale was made. In this case we could ask for a decree for sale.

The lower Appellate Court put a narrow construction on Order VII, rule 7. We would institute a suit now but it would be time-barred.

Mr. *M. L. Agarwala*, for the Respondents.—We have to see in this case what was sold. Oma Nath sold the property. The effect of the auction sale was that the equity of redemption of the mortgagor was sold and he ceased to have any interest in the property. Whatever interest there was, was vested in my clients at the date of suit. The suit was previously brought against a person who had no interest and sale was of something which did not exist. The sale, therefore, did not confer any title on the mortgagee-purchaser.

The plaint discloses a simple case for ejectment. When the plaintiff went into Court, he had notice that we were purchasers.

Under Order VII, rule 7, the plaintiffs should have asked for an alternate relief. They should have asked for possession or sale subject to redemption. It does not come under the expression, "general relief." A relief for sale is not a general relief in a suit for ejectment and possession.

The ruling reported as *Hargu Lal Singh* v. *Gobind Rai* (2) was followed in *Madan Lal* v. *Bhagwan Das* (3).

If a party is in possession of a property, his possession cannot be disturbed by a decree to which he was not a party and a proper suit should be brought.

[PIGGOTT, J., referred to *Ram Prasad* v. *Bhikari Das* (4).]

(3) 21 A. 235; A. W. N. (1899) 41.
(4) 26 A. 464.

It was a suit for money or for possession. In this case unconditional decree for possession was asked.

If the suit had been brought in the form suggested in *Ram Prasad* v. *Bhikari Das* (4), a decree could have been passed for foreclosure.

Mr. *S. P. Ghosh*, in reply.—The respondents are not prejudiced by the decree passed by the first Court. In this suit, they could have put forward all pleas as in a suit for sale and they did put forward such pleas. A suit for sale is not necessarily inconsistent with a suit for possession.

JUDGMENT.—This was a suit for possession of a certain *zemindari* share to which the plaintiffs acquired title as follows: There was a mortgage dated June the 7th, 1900, by the proprietors of the share in favour of the plaintiffs' ancestors. On June the 3rd, 1904, a decree for sale was obtained on foot of this mortgage against the mortgagors. In execution of this decree a sale took place on June the 20th, 1908, when the decree-holders themselves purchased it. On endeavouring to obtain possession the plaintiffs found themselves resisted by the present defendants, who held under a sale-deed dated September the 22nd, 1902, from one Oma Nath. This Oma Nath had obtained a simple money decree against the original mortgagors, in execution of which he attached this same property, brought it to sale and purchased it himself on May the 20th, 1901. The original mortgage of the 7th of June 1900 was not registered and there was no presumption that Oma Nath had knowledge of its existence. At any rate he purchased whatever right, title, or interest the original mortgagors had in the property now in suit, so that when the mortgagors brought their suit in the year 1904 they were impleading as defendants persons who had no longer any title to the property in question. As holders of a simple mortgage they have no right to actual possession over this property, and the defendants certainly cannot be prejudiced by the result of the litigation to which they ought to have been made parties but were not. The suit for possession as brought was obviously liable to be dismissed, and if authority were needed for such a proposition it is to be found in

two decisions of this Court *Hargu Lal Singh* v. *Gobind Rai* (2) and *Madan Lal* v. *Bhagwan Das* (3). These are both Full Bench decisions and I am bound to follow them. In the present case the Court of first instance, the learned Munsif, gave the plaintiffs a decree for recovery of possession subject to the right of the defendants to protect themselves by redemption of the original mortgage of 7th June 1900, that is to say, by paying to the plaintiffs a sum found to be due in respect of that mortgage. The lower Appellate Court has held, in the first place, that the plaintiffs were not entitled to any such decree; and, in the second place, that neither such a conditional decree as has been passed by the Court of first instance, nor a decree for sale upon the mortgage to which the plaintiffs would presumably be entitled if they had asked for it, could be passed on the pleadings as they stood. I have been asked to reverse this decision partly on the strength of the Calcutta case *Jugdeo Singh* v. *Habibulla* (1) and partly on the strength of an unreported decision by a single Judge of this Court in Second Appeal No. 767 of 1911 decided on June the 18th, 1912. The case the facts of which are more nearly on all fours with those of the present case is that of *Ram Prasad* v. *Bhikari Das* (4). Many of the facts of that case bear close similarity to those of the case now before me, and it ended in a decree very similar to that which was passed in the present case by the learned Judge of the first Court, who has in fact referred to this ruling and professed to follow it. There is one distinction between the two cases on the facts, namely, that in *Ram Prasad* v. *Bhikari Das* (4) a mortgage decree had been obtained before the auction sale in execution of the simple money decree took place. Moreover, in that case the pleadings were different. The plaintiffs sued for payment of the amount due under the mortgage, or in default for possession. That suit, therefore, did not profess on the face of it to be a simple suit for ejectment, as does the one now before me. In both the Full Bench cases to which I have already referred stress was laid on the fact that in a suit which purports on the face of it to be a suit for ejectment what the Court has to consider is: whether the plaintiff had any title to possession on the date on which he brought the suit. The question of pleadings was expressly considered in both these cases and it was on the ground of the frame of the suit in the case then before them that the learned Judges proceeded to decide the case of *Ram Prasad* v. *Bhikari Das* (4). It has been suggested in argument that the law has been changed by the enactment of Order VII, rule 7, of the present Code of Civil Procedure. The earlier part of that rule only lays down in clear and stringent terms the duty of the plaintiff with regard to the framing of his plaint. The second part of the rule only makes it unnecessary to append to a plaint a prayer for general relief, such as is to be found in the plaint now before me. I do not think there has been any change in the law such as to affect the authority of the two Full Bench decisions which have been followed by the lower Appellate Court and I feel bound to follow them myself. The result is that I dismiss this appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 7 OF 1912.

April 27, 1914.

Present:—Sir Charles Arnold White, KT., Chief Justice, and Mr. Justice Oldfield.

KANDUKURI VEERA BASAVARAJU PANTULU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KANDUKURI BALASURYA PRASADARAO PANTULU AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Adoption—Sapindas—*Consent indefinite, effect of*—Sapindas *of various grades—Consent of remote and interested* sapindas—*Long interval between authority given to adopt and date of adoption, effect of—Adoption on personal caprice or advantage—Intervention of other circumstances—Power invalid.*

Where a *sapinda*, though welcoming the desire in a widow to adopt, reserves the consent to a particular adoption being made to a future date, until he obtains

details, it cannot be said that the consent of the *sapinda* is so specific and clear as to amount to an authority to a widow to make the particular adoption.

Where there are five grades of reversioners to the estate of the last male-holder and the widow contents herself with obtaining the consent of the third grade and that of only two *sapindas*, both of whom are interested in making the adoption, it cannot be said that there is such a consent by a majority of the *sapindas* as to amount to an authority to the widow to make the adoption.

Where a widow out of mere personal caprice and with a view to her own personal advantage makes an adoption on the strength of a power to adopt given thirty years ago, it cannot be said that the adoption was made in the performance of a *bona fide* religious duty either to secure spiritual benefits to her husband or to herself.

Vellanki Venkata Krishna Rao v. *Venkata Rama Lakshmi*, 1 M. 174; 4 I. A. 1; 26 W. R. 21; 1 Ind Jur. 63; 3 Sar. P. C. J. 669; 3 Suth. P. C. J. 353, followed.

Where between the date of the power to adopt and the actual making of the adoption a long time elapses and other circumstances intervene and the estate becomes vested in other persons the power becomes ineffective and cannot be acted upon.

Suryanarayana v. *Venkataramana*, 26 M. 681, *Subrahmanyam* v. *Venkamma*, 26 M. 627; 13 M. L. J. 239, followed.

Where a *sapinda* refuses to give his consent, he is not bound to state his reasons for such refusal, especially when the widow does not ask for them.

Subrahmanyam v. *Venkamma*, 26 M. 627; 13 M. L. J. 239, followed.

Appeal against the decree of the District Court of Ganjam at Berhampore, in Original Suit No. 2 of 1910.

The *Advocate-General* (with him Messrs. *K. V. L. Narasimha* and *S. Sreenivasa Iyenger*), for the Appellants.

Mr. *K. Narain Rau* (with him Mr. *P. Narayana Murthi*), for 1st Respondent.

Mr. *N. Subba Rau* (with him Mr. *S. Gopalasami Aiyanger*), for 2nd Respondent.

This appeal coming on for hearing on the 19th, 20th, 24th, 25th, 26th, 30th and 31st March, 1914, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.—The question in this appeal is of the validity of the adoption of 1st plaintiff. It is denied by defendants, who would, but for the adoption, be the reversioners of K. V. Viswanada Row, the last male owner of the suit property including the valuable Uralam and Devadi estates. The effect of the adoption, if it is valid, will be to make the 1st plaintiff a nearer reversioner, as son of his adoptive father, Pedda Sanniyasi Razu, Viswanada Row's paternal uncle. The learned District Judge has held it invalid on the ground that it was not made either with the authority of Pedda Sanniyasi Razu or with a legally sufficient consent by *sapindas*. We are prepared to accept these findings and we, therefore, need not deal with his remaining ground of decision that in any case no adoption made by the widow of Pedda Sanniyasi Razu, after the last male member of the family of Viswanada Row had died and the estate had vested in his widow, could justify the plaintiff's claim. The learned District Judge has dealt very fully with the facts and we need not repeat his reasons for holding that plaintiff's allegations, supported by interested witnesses of low credit and in parts improbable, are not proved. It is also on this account unnecessary for us to adjudicate on the legal objection to the admissibility of Exhibit B, on the ground that it is unregistered. We refer, however, to one point because stress has been laid on it here in argument. It is urged that the learned District Judge has been led by a mistaken construction of Exhibit VI (*a*), not only to find that Pedda Sanniyasi died about 1840 and, therefore, could not, as plaintiffs allege, have consented in 1853 to an adoption, but also to allow this mistake to influence his consideration of the evidence as a whole. *Firstly*, however, there were other good reasons besides those based on Exhibit VI (*a*) for his conclusions, and *secondly*, his argument from that document was, in our opinion, sustainable. It is said that it was not, because it took no account of the possibility that Pedda Sanniyasi was the son, not of Veeyamma, but of another wife of his father, and that, therefore, the reference to only one son by the former as alive in 1841 does not entail that Pedda Sanniyasi was dead then. This objection is alleged to be the stronger, because there is no reference even to Pedda Sanniyasi's widow or her right to maintenance, and because in Exhibit AA, in 1855 Veeyamma's only son, not her only surviving son, is mentioned. The sufficient answers to all this seem to us to be that (1) the reference to an only son in Exhibit AA was sufficiently explicit for the purpose of the writer; (2) no reference to Pedda Sanniyasi's widow or her maintenance was necessary in Exhibit VI (*a*), because it dealt only with the succession to the estate of Veeyamma, her mother-in-law, not with any of the ancestral property of her husband

which alone was liable for her claim to maintenance; (3) as the District Judge has shown, the suggestion that Pedda Sanniyasi was not the son of Veeyamma was made only at the hearing and was supported by no acceptable evidence.

The earliest of the consents relied on, which we can treat as proved, is Exhibit R1. It is a letter from one Borroya Bhushena Rao, now deceased, the great-grandson of the brother of the great-grandfather of Pedda Sanniyasi, to whom the adoption was made, and of the great-great-grandfather of Viswanadha Row, the last male-holder. He was, therefore, in almost the remotest class of reversioners to the latter, and accordingly even if Exhibit R1 contained everything essential to a valid consent, it could affect the justification for the widow's action only in an infinitesimal degree. It further, however, consists merely in a general statement that the writer welcomes her intention to adopt and contains no approval of the adoption of 1st plaintiff in particular or indication that his selection was known. In fact the 1st plaintiff's father deposed as the 1st plaintiff's witness that he was asked to give him for the purpose only after Exhibit A, five months later. No doubt the learned District Judge is mistaken in his statement that the other matters referred to in Exhibit R1 as reserved for discussion are shown by evidence to have included the choice of a boy. But on the evidence available and the terms of Exhibit R1, we must hold that it, at the highest, authorized the adoption of any boy at any time and, therefore, was useless, vide *Suryanarayana* v. *Venkataramana* (1), and that, as the learned District Judge opines, it expresses only a general willingness to consider the making of an adoption favourably, the necessary final consent to a specific adoption being reserved until details are available. In these circumstances Exhibit R1 must be dismissed from consideration. Exhibit B and the evidence regarding the consents of the alleged signatories to it must also, we agree with the learned District Judge, be rejected. It follows that the consents in evidence, Exhibits A and A1, are those only of the 1st plaintiff's witness who is the 1st plaintiff's father, Aiyappa Razu, and the 1st plaintiff's witness' brother, now deceased. They were members of the third of the classes into which the learned District Judge has divided the reversioners. On the other hand, it is not shown that the members of the second class the remaining members of the third class or the members of the fifth class were consulted; and, a most important fact, the nearest reversioner, defendant's father, K. Sanniyasi Razu, refused his consent. The question is whether Exhibits A and A1 are sufficient authority for the adoption in these circumstances.

As regards K. Sannayasi Razu, there is an averment in the plaint that he consented to the adoption of his own son, 2nd defendant, in 1882, the suggestion being that he has now withdrawn his consent capriciously. We do not think that the evidence of the untrustworthy plaintiff's 7th witness and the inference from Exhibit A justify even the qualified acceptance which the learned District Judge has given to this part of the case. And in any event it is clear that (1) this arrangement was abandoned before 1890, the date of Exhibit V (*a*) to be refered to later, and (2) such a consent might properly be limited to the adoption of the son of the consenting *sapinda* and would lose its validity after lapse of time during which circumstances had changed: *Subramaniam* v. *Venkamma* (2), and *Suryanarayana* v. *Venkataraman* (1). As regards Exhibit D2 in which K. Sanniyasi refused his consent, it is first material that it is not shown to have been sent in response to any request for his opinion, since its language does not imply any, and the only evidence of one, plaintiff's 7th witness, is useless intrinsically and because it relates to a request in 1894, when neither plaintiff nor any other boy had been selected. Exhibit D2, therefore, resembles the communication from the plaintiff referred to in *Subrahmanyam* v. *Venkamma* (2), and we must hold that the widow was not relieved from the duty of consulting K. Sanniyasi in consequence of it, and that he was not under an obligation to give his reasons exhaustively in it, when they had not been asked for and presumably, therefore, there was no desire to consider them fairly. In fact Exhibit D2 warned

(1) 26 M. 681.

(2) 26 M. 627; 13 M. L. J. 239.

the widow against the adoption on the ground that, as a mere maintenance-holder she was not competent to make it, a rough statement apparently of the legal argument based on the vesting of the estate in Viswanadha Row's widow, which the learned District Judge accepted. K. Sanniyasi was certainly entitled to present it for consideration, if only tentatively and as a preliminary to the making of the other objections, which were also available and to which we refer.

Those objections are material also with reference to the value of the consents obtained, Exhibits A and A1. The learned District Judge has dealt at length with the facts and it is clear that (1) Narasayamma, his widow, took no steps to adopt for at least thirty years from the later date, alleged for the death of Pedda Sanniyasi by the plaintiffs, (2) she then very possibly owing to dissatisfaction with her position on the succession of Mahalakshmamma, widow of the last male-holder of the estate, merely sent Exhibit S to the Collector, (3) she formally abandoned her intention to adopt in 1890 by Exhibit V, in consideration of the continuance of her very substantial allowance, (4) she revived that intention in 1895, only after Mahalakshmamma had taken steps towards an adoption, apparently because there was no indication that any member of her own and the first plaintiff's branch of the family would be chosen and her opportunities for deriving advantage from the estate might be diminished, (5) she then adopted the 1st plaintiff, though he would not be capable of performing her husband's ceremonies for over twelve years. The learned District Judge was apparently deterred, by the first part of the *dictum* of the Privy Council in the penultimate paragraph of *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (3), from holding that the foundation of the widow's motives in no legitimate desire for her husband's spiritual benefit or the perpetuation of his family, but in the caprice and personal advantage, was not decisive. We need not consider whether the conclusion of that *dictum* did not authorise him to do so, nor need we go through the cases to which he has referred. For though the circumstances enumerated imposed a special obligation on Narasayamma to place her conduct beyond suspicion, it is plain that, having failed to consult the 1st defendant's father, the nearest reversioner, and to obtain the consent of any but three comparatively remote *sapindas* of whom two were interested directly in approving her project, she made no such *bona fide* effort to take the opinion of the *sapindas* or a majority of them as the law requires. We, accordingly, agree with the learned District Judge that the adoption was made without the necessary authority and was, therefore, invalid.

The consequence is that the appeal fails and is dismissed with costs.

Appeal dismissed.

(3) 1 M. 174; 4 I. A. 1; 26 W. R. 21; 1 Ind. Jur. 63; 3 Sar. P. C. J. 669; 3 Suth. P. C. J. 353.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 3 OF 1914.

April 6, 1914.

Present:—Mr. Stuart, A. J. C.

INDAL SAH—PLAINTIFF—APPELLANT

versus

BHABHUTI SINGH—DEFENDANT—RESPONDENT.

Landlord and tenant—Transfer by tenant-at-will—Transfer illegal—Sub-tenant and transferee, relation between.

The relationship of landlord and tenant does not exist between the transferee of a tenant-at-will's holding and the sub-tenant of that tenant who does not admit the title of the transferee, inasmuch as there exists no contract between the transferee and the sub-tenant to hold land and pay rent therefor, and the transfer being illegal the transferee cannot be considered to be an agent or representative of the tenant.

Appeal against the order of the District Judge, Hardoi, dated 21st November 1913, reversing that of the Assistant Collector, Hardoi, dated 19th September 1913.

Babu *Basudeo Lal*, for the Appellant.

Babu *Ishri Prasad*, for the Respondent.

JUDGMENT.—Subba Singh was a tenant-at-will of a certain agricultural plot. He executed a deed which purported to be a mortgage with possession of his rights as tenant in favour of Indal Sah. It is admitted that a tenant-at-will has no transferable rights which are capable of being mortgaged. Nevertheless Indal Sah sued Subba Singh

for possession of the agricultural holding in question which was in the physical possession of Bhabhuti Singh, stated to be the sub-tenant of Subba Singh, and obtained a decree in July 1895 for possession of the same. Having obtained this decree Indal Sah issued a notice of ejectment on Bhabhuti Singh which was contested by the latter in the Revenue Courts. The Revenue Courts refused to allow the ejectment. Indal filed a further notice of ejectment which was also contested in the Revenue Courts. The Revenue Courts for a second time refused to allow ejectment. Indal Sah then instituted the present suit for arrears of rent against Bhabhuti Singh. This suit was decreed by the learned Assistant Collector, but dismissed by the learned District Judge. I do not consider that it is possible to find that the relationship of landlord and tenant exists between a party who bases his title upon a transfer of what is admittedly not transferable and a party who has never admitted his title in any way. Bhabhuti Singh had at no time agreed to hold land from Indal Sah or to pay rent to him. Indal Sah cannot be considered as Subba Singh's agent or representative inasmuch as the transfer from Subba Singh to him was an illegal transfer. There being no relationship of landlord and tenant between the parties no suit can lie in the Rent Court for arrears of rent. I agree with the reasoning of the learned District Judge and dismiss this appeal.

The appellant will pay his own costs and those of the respondent.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

June 1, 1914.

Present:—Sir Henry Hartnoll, Offg. Chief Judge, and Mr. Justice Ormond.

MA KYAING—APPELLANT

versus

MA SHWE THIN AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 104 cls. (1) (f), (2)—Appeal from appellate order.

Where a Court refuses to file an award made without the intervention of the Court and that order is set aside on appeal, there is no appeal from the order of the Appellate Court.

Mr. *Maung Gyee*, for the Appellant.

JUDGMENT.

HARTNOLL, OFFG. C. J.—I am of opinion that this appeal does not lie.

Ma Shwe Thin applied under rule 20 of the second Schedule of the Code of Civil Procedure that an award be filed in Court. The Court refused to file the award and dismissed the application with costs. A decree was then drawn up.

An appeal was then laid to the Divisional Court. It was clearly against the order refusing to file the award, though it asked for the reversal of the judgment and decree of the District Court. The order of the Divisional Court was that the decree of the lower Court was set aside, and that there will be a decree for the plaintiff-appellant for enforcement of the award, as prayed for, the costs of plaintiff-appellant in both Courts being borne by the respondents. A decree was drawn up in accordance with the order. An appeal was given from the order of the District Court refusing to file the award by section 104 (1) (*f*) of the Code of Civil Procedure. That portion of the so-called decree of the District Court, which dealt with the refusal to file the award, was not a decree, as by section 2 (2) of the same Code a decree shall not include an adjudication from which an appeal lies as an appeal from an order. The decision arrived at by the Divisional Court is not expressed in correct terms. The Court should have ordered the award to be filed and then should have proceeded to pronounce judgment according to the award, and then on the judgment so pronounced a decree should have followed. The present appeal in substance is one against the decision of the Divisional Court that the award was valid and

should be enforced. In effect it is an appeal against an order passed in appeal directing an award to be filed.

Such an appeal is forbidden by section 104 (2) of the Code. That portion of the decree of the Divisional Court which concerns the order for the filing of the award clearly comes within the provisions of section 104 (2). It is only this part of the decree that is objected to and it is not alleged that the decree is in excess of or not in accordance with the award.

I would, therefore, dismiss the appeal.

ORMOND, J.—I concur.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 124 OF 1913

March 3, 1914.

Present:—Mr. Justice Wallis and Mr. Justice Ayling.

MUNIAPPA REDDI—DEFENDANT—PETITIONER

versus

SUBBA RAO AND OTHERS—RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 3 (2) (d)—Land revenue of portion of village granted as inam—Estate—Suits for rent—Jurisdiction.

Where the land revenue only *of a portion of a village* has been granted as an *inam*, the *inam* does not become an estate within the meaning of section 3 (2), clause (*d*) of the Estates Land Act and Civil Courts have jurisdiction to entertain suits for rent.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the District Munsif of Sholingar in Small Cause Suit No. 458 of 1912.

Mr. *T. M. Krishnaswami Aiyar*, for the Petitioner.

Mr. *B. Narasimha Rao*, for the Respondents.

JUDGMENT.—Section 3 (2) (*d*) of the Madras Estates Land Act includes in the definition of estate *any* village of which the land revenue *alone* has been granted in *inam* to a person *not owning the kudivaram*, provided that the grant has been made, *confirmed* or recognized by the British Government, or any separated part of such

village. The latter words must be taken to *mean* a separated part of a village of which village the land revenue alone has been granted in *inam* to a person not owning the *kudivaram* right. In this case the land revenue of the whole village has not been granted in *inam*, but only the land revenue of a portion. Therefore the *inam* does not come within the terms of the definition—Section 3 (2) (*d*) which must be strictly construed. The District Munsif, therefore, had jurisdiction. This petition is dismissed with costs.

Petition dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 7 OF 1914

May 4, 1914.

Present:—Mr. Stuart, J. C.

SANWAL SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PRAG DUT AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 316—Civil Procedure Code (Act V of 1908), s. 65 and O. XXI, r. 94—Court-sale confirmed—Sale-certificate not obtained—Auction-purchaser, title of, not vitiated.

Where a Court-sale is confirmed, the purchaser's failure to obtain a sale-certificate from the Court does not vitiate his title.

Chiddo v. Piari Lal, 19 A. 188; A. W. N. (1897) 14, referred to

Appeal against the order of the Sub-Judge, Unao, dated 16th October 1913, upholding that of the Munsif, South Unao.

JUDGMENT.—The sole point for determination in this appeal is whether a failure to obtain a certificate under the provisions of section 316, Act XIV of 1882, vitiates the title of the purchaser at a Court-sale. In this case it is proved beyond the possibility of reasonable doubt that a certain share was purchased at a Court-sale and that that sale was confirmed. But there is no evidence that a certificate, such as is required under the provisions of section 316 of the above-mentioned Act, was ever issued to the purchaser. An exactly similar case will be found in *Chiddo* v. *Piari Lal* (1).

(1) 19 A. 188; A. W. N. (1897) 14.

There Justice Aikman decided that the mere fact of the auction-purchaser not having obtained a sale-certificate did not entitle any other person to treat the sale as a nullity. The principle enunciated by Justice Aikman appears to me to be beyond question and its acceptance involves the failure of the present appeal.

It is not necessary in the circumstances to issue notice to the respondents. I dismiss this appeal under the provisions of Order XLI, rule 11.

Appeal dismissed.

MADRAS HIGH COURT.

CITY CIVIL COURT APPEAL No. 3 OF 1914.

April 23, 1914.

Present:—Sir Charles Arnold White, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

TIRUPATI VARADACHARIAR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

A. PARTHASARATHY IYENGAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XIV, r. 3 (1) (6), O. XV, r. 3 (1), proviso—Summons to defendant for settlement of issues only - Suit finally disposed of—Jurisdiction.

Where summons was issued for settlement of issues only, a Court has no jurisdiction to make a final disposal of the suit on the day fixed for issues.

Krishnabhubati v. *Ramamurti*, 16 M. 198, followed.

Appeal against the decree and judgment of the City Civil Court of Madras, in Original Suit No. 42 of 1914.

FACTS.—This suit was for the recovery of a female child. The plaintiff is the father of the child, the defendant is the maternal grandfather. The child's mother died and on her death the plaintiff married a second wife and was living in Bangalore employed as a clerk on Rs. 20 a month. The allegation of the plaintiff was that the maternal grandfather is trying to get the girl married to his own grandson and that such marriage was not for the benefit of the child, and that he has procured a proper bridegroom for her and that the defendant would not give the child in his custody. The defendant put in a statement disputing the allegations. On the day the case came on for settlement of issues the City Civil Judge examined the plaintiff and the defendant and without recording further evidence disposed of the suit by passing a decree for the plaintiff. The present appeal is against the decree in the suit.

Mr. *G. S. Ramachandra Aiyar* (with him Mr. *N. Viswanadha Aiyar*), for the Appellants.

Mr. *V. Purushothama Aiyar*, for the Respondent.

JUDGMENT.—We do not think it was within the power of the learned Judge to dispose of the case at the first hearing. See *Krishnabhubati* v. *Ramamurti* (1).

The summons was issued for the settlement of issues only and the Vakil who appeared before the learned Judge at the first hearing tells us (and the other side are not able to say this is not so) that he objected to the disposal of the case at the first hearing. This being so we must hold that the proviso to Order XV, rule 3 (1), does not apply. Order XIV, rule 3 (6), clearly has no application to the present case. We must, therefore, set aside the decree and direct the learned Judge to dispose of the case according to law after hearing such evidence as the parties desired to adduce and as far as possible ascertaining the wishes of the child. Costs will abide the result.

Decree set aside; Suit remanded.

(1) 16 M. 198.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 48 OF 1913.

October 16, 1913.

Present:—Mr. Piggott, J. C., and Mr. Lindsay, A. J. C.

NARINDRA BAHADUR SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

HAJI ABDUL HAQ AND OTHERS—DEFENDANTS—RESPONDENTS.

"Taluqdari property"—Question of law—Affidavit on question of law, weight of—Injunction, temporary, grant of—Sale in execution, stay of—Civil Procedure Code (Act V of 1908), O. XXXIX, r. 1.

NARINDRA BAHADUR SINGH v. ABDUL HAQ.

The question whether a certain property is *'taluqdari* property" is principally a question of law.

Thakurain Balraj Kunwar v. *Rae Jagatpal Singh*, 7 O. C. 248; 26 A. 393; 8 C. W. N. 699; 31 I. A. 132; 1 A. L. J. 384 (P. C.), referred to.

Hence, an affidavit to the effect that a property is "*taluqdari* property" carries no weight as it is simply an interested party's declaration on a question of law.

The sons of a judgment-debtor filed a suit for declaration that the property notified for sale was their joint family property and applied for a temporary injunction to stay the sale. The decree-holders resisted the application and filed an affidavit to the effect that the property was "*taluqdari* property" belonging absolutely to the judgment-debtor. A counter-affidavit could not, owing to some difficulties, be filed on behalf of the sons:

Held, that under the above circumstances an injunction might properly be granted.

Brojendra Kumar Rai Chowdhuri v. *Rup Lall Doss*, 12 C. 515, followed.

Appeal against an order of the Subordinate Judge, Bara Banki, dated 11th September 1913.

Mr. *St. George Jackson* and Babu *Jiban Krishna Banerji*, for the Appellant.

Mr. *Sadiq Ali Khan*, for Respondent No. 4.

Babu *Hari Kishen Dhaon*, for Respondent No. 3.

JUDGMENT.—The question for decision in this appeal is whether on the facts as disclosed in the Court below the appellants were entitled to obtain a temporary injunction under Order XXXIX, rule 1, of the Code of Civil Procedure staying the sale in execution of certain immoveable property.

The facts are shortly as follows:—

Babu Ram Singh, the father of the appellants, borrowed various sums of money from four persons who have obtained decrees against him in respect of the debts. The decree-holders have attached three villages, alleging them to be the sole property of the judgment-debtor, and have had them notified for sale. On the 11th September 1913, the last working day before the Civil Courts' vacation, the appellants filed a suit in the Court of the Subordinate Judge of Bara Banki praying for a declaration that the villages advertised for sale are joint family property belonging to themselves and their father, the judgment-debtor, and that their (plaintiffs') interest in the property was not liable to be sold in execution of the decrees. A separate application was made on the same date asking that the execution sale should be stayed pending the disposal of the suit. The application was resisted by the decree-holders two of whom filed an affidavit to the effect that the villages were "*talukdari*" property belonging absolutely to their judgment-debtor. In his order refusing the application the Subordinate Judge states that the plaintiffs' Pleader was unable to file any counter-affidavit to rebut the assertion that the property was part of an estate which according to the law obtaining in Oudh descends to a single heir. It was for this, among other reasons, that the Subordinate Judge refused to issue an injunction. It is explained here that one of the plaintiffs is a youth of about eighteen while the other plaintiff is a minor and that it was not possible for their Counsel to obtain adequate instructions which would have enabled him to file his counter-affidavit before the Court closed for the vacation.

It is stated in this Court, and the fact is not apparently disputed, that Ram Singh, the judgment-debtor, took this estate under a Will executed in his favour by his maternal grandfather, Lal Bahadur Singh, who was the owner of property constituting an estate of the kind described in List III, section 8, of the Oudh Estates Act. The point taken, therefore, is that this property is no longer "estate" within the meaning of that expression as used in the Oudh Estates Act, inasmuch as Ram Singh is not a person who "would have succeeded" his maternal grandfather [*cf.* sections 13 and 14 of the Oudh Estates Act I of 1869 and the ruling of their Lordships of the Privy Council in *Thakurain Balraj Kunwar* v. *Rae Jagatpal Singh* (1).] If the property is no longer "estate" in the sense indicated it must be held subject to the rules of Hindu Law and it may be, therefore, that the claim of the plaintiffs-appellants that the property is joint family property is well founded. It is not for us at this stage to express any opinion as to the merits of the claim, but in the circumstances we think it may fairly be said that there is a danger of a wrongful sale in execution, and it is, we think, proper to take into consideration the difficulties which these plaintiffs may have to encounter in recovering their share of the property from the auction-purchaser, should they succeed in obtaining the declaration they are asking for in their suit. The villages, we understand, have been

(1) 7 O. C. 248 (P. C.); 26 A. 393; 8 C. W. N. 699; 31 I. A. 132; 1 A. L. J. 384.

advertised as the exclusive property of Ram Singh. As regards the affidavit filed by two of the decree-holders to the effect that the property is "*taluqdari* property" it cannot be regarded as of much weight. The question whether any property is of that description is principally a question of law upon which the declaration of opinion of a party interested is of no value whatever.

It has been held [vide *Brojendra Kumar Rai Chowdhuri* v. *Rup Lall Doss* (2)] that in a case like the present an injunction may properly issue to stay the sale of property in execution of a decree and we are of opinion that all things considered the appellants have made out a fair case for this relief. They claim to have a two-thirds share in the disputed property and allowing the appeal in part, we direct that a temporary injunction *do issue* restraining the decree-holders-respondents from bringing to sale more than a one-third share in the villages in dispute pending the disposal of the suit of the plaintiffs-appellants.

We make no order as to costs.

Appeal partly allowed.

(2) 12 C. 515.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 276 OF 1910.

October 7, 1913.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

KRISHNAPPA CHETTY—DEFENDANT—APPELLANT

versus

ABDUL KHADER SAHEB AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 60, 61, 63—Order on claim petition, nature of—Suit under r. 63—Continuation of claim proceedings—Transfer of Property Act (IV of 1882), s. 52—Lis pendens—Sale of attached property after order on claim petition and before suit by unsuccessful party—Limitation Act (IX of 1908), s. 22, Sch. I, Art. 11—Purchaser pendente lite—*Plea of limitation.*

Suits under Order XXI, rule 63, are not original suits but a mere continuation of proceedings in the claim petitions. Therefore all alienations of the attached property made after the date of order passed on the claim petition and before the institution of the suit to set aside that order are alienations *pendente lite* within the meaning of section 52 of the Transfer of Property Act.

An alienee *pendente lite* not being a necessary party cannot, if made party after the period of limitation, advance the plea of limitation under section 22.

Per *Sadasiva Aiyar, J.*—An order on a claim petition under Order XXI, rules 60, 61, is connected with rights in immoveable property attached and is not merely an affair between the parties in their personal capacities unconnected with rights to and over the properties.

Second appeal against the decree of the District Court of Salem, in Appeal Suit No. 197 of 1905, preferred against that of the District Munsif of Tirupattur in Original Suit No 927 of 1903.

Mr. *K. R. Subramania Sastriar*, for the Appellant.

Mr. *T. V. Muthukrishna Iyer*, for the Respondents.

This second appeal coming on for hearing on the 26th September 1913 and the 1st and 2nd October 1913, respectively, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

SADASIVA AIYAR, J.—The third defendant is the appellant before us. When the plaintiff attached plaint properties in execution of the decree which he had obtained in Original Suit No. 20 of 1897 on the file of the District Court of Salem as the properties of his judgment-debtor (the present 2nd defendant), the present 1st defendant put in a claim as the owner of the properties. His claim was allowed and the properties were released on the 18th December 1902. The present suit was brought on the 21st October 1903 (within the one year allowed by law) by the plaintiff to establish his right to attach the plaint properties as the property of his judgment-debtor, the present 2nd defendant. The 3rd defendant, the appellant before us, purchased the plaint properties from the claimant (namely, the 1st defendant) on the 29th December 1902, that is 11 days after the order on the claim petition in the 1st defendant's favour. He, however, never took actual possession of the lands and merely got a rent-deed, Exhibit B, on the very same date from the 1st defendant. The plaintiff, who evidently did not know of this sale-deed to the 3rd defendant by the 1st defendant, brought this suit making defendants Nos. 1 and 2 alone

parties to the suit; and when he brought the suit, the one year's period of limitation (as I said before) had not expired. The 3rd defendant applied to be brought on the record as supplemental defendant and was made supplemental defendant on the 20th March 1904. On the date when he was so made as supplemental defendant, more than a year had elapsed from the date of the order on the claim petition in the 1st defendant's favour. Both the lower Courts found all the facts in the plaintiff's favour and decreed the plaintiff's suit. Hence this second appeal by the 3rd defendant. There are 16 grounds alleged in the memorandum of second appeal. Except the contention as to limitation which I shall presently consider, the other contentions are clearly unsustainable. One contention not put forward in the lower Courts was argued before us. That was based on the following facts. One Narasinga Row claimed a charge on the plaint properties on the basis of some transactions between himself and the 1st defendant. That claim he put forward when the properties were attached by the plaintiff. His claim was allowed in December 1902. The 3rd defendant, out of the purchase-money due by him to the 1st defendant, paid Rs. 400 to Narasinga Row. The 3rd defendant's contention based on these facts is that he is entitled to stand in the shoes of Narasinga Row and, as the plaintiff has not set aside the claim order in favour of Narasinga Row by a suit against Narasinga Row within one year of the date of that order, the defendant is at least entitled to a charge to the extent of Rs. 400 on the plaint lands. I think that this fresh contention cannot be allowed to be raised in second appeal especially as the order, Exhibit A, in Narasinga Row's favour does not state what was the exact nature of the claim which was put forward by Narasinga Row, that is, whether the claim he put forward was to a charge of Rs. 400 on these plaint properties. Fresh evidence would be required, namely, a copy of the claim petition filed by Narasinga Row before we could safely find that the order, Exhibit A, gave him a charge to the extent of Rs. 400. Such fresh evidence should not ordinarily be allowed to be adduced in second appeal by a litigant who failed to raise in the lower Courts the contention in support of which the fresh evidence is required. As I said, the only contention which requires serious consideration is the contention as to limitation. This contention may be formulated thus:—

(*a*) The plaintiff's cause of action to bring the suit is the order passed in the 1st defendant's favour in December 1902. The cause of action was, no doubt, *on that date* to be prosecuted against the 1st defendant as *he* claimed then to be the owner of the property and the claim order was passed in *his* favour in respect of the property which the plaintiff attached in execution of the plaintiff's decree.

(*b*) When the 3rd defendant afterwards purchased the property, the cause of action became directed and prosecutable against the alienee (the 3rd defendant) and any suit brought by the plaintiff to set aside the order on the claim petition should be directed against the 3rd defendant who had become a necessary party defendant to such a suit. The 1st defendant's interest in contesting the plaintiff's alleged right to attach the properties as the properties of his judgment-debtor ceased with the 1st defendant's alienation of the properties to the 3rd defendant, and hence the 1st defendant was no longer the proper party to be impleaded in the suit which the plaintiff had to bring under Order XXI, rule 63, corresponding to the old section 283 of the Civil Procedure Code. As the necessary party (the 3rd defendant) was not brought on record till March 1904, that is, till after the expiry of the one year's period, the present suit is barred by limitation as against the 3rd defendant who now represents the right in the lands, the validity of which rights was established as against the plaintiff by the order on the claim petition.

Mr. T. V. Muthukrishna Aiyar, who appeared for the plaintiff-respondent, advanced in a very able manner three sets of arguments in reply to the appellant's above contentions. One argument was founded on the consideration that the suit brought under Order XXI, rule 63, is of such a peculiar nature that it can be brought only against the successful claimant in the claim petition, and that the successful claimant's alienees ought not to be made defendants as the cause of action vested in the unsuccessful decree-holder against the successful claimant personally. I am, however, unable to accept this argument. The order on the claim petition is connected with rights in immoveable property (the decree-holder claiming a right to attach it

and the claimant putting forward a right in himself in the property which entitles him to have it released). Hence the suit is not concerned merely with personal rights and personal liabilities. Coming next to the second argument of Mr. T. V. Muthukrishna Aiyar, if I understood him aright, his contention might be stated thus:—Though by the order on the claim petition, the attached property was released in favour of the claimant, it was not a *final* release. The effect of the release might be nullified if the decreeholder's suit brought within one year after the release order was successful. Hence as regards the validity of alienation between the date of the claim petition order and the date of the suit brought to set aside that order, the attachment must be deemed to be subsisting. If the attachment is in essence subsisting, section 64 of the Civil Procedure Code, old section 276, enacts that alienations of property under a subsisting attachment shall be void as against all claims enforceable under the attachment. The alienation to the 3rd defendant by the 1st defendant is, therefore, void The 3rd defendant is, therefore, not a necessary party.

I think that this argument also cannot be accepted, as section 64 clearly contemplates alienations by the judgment-debtor and not by a successful claimant as pointed out by the appellant's learned Vakil, Mr. K. R. Subramanya Sastriar. Mr. Muthukrishna Aiyar quoted before us passages from several decisions passed by the High Courts to support the above two contentions, *viz.*, (1) that the suit brought under section 283 is a sort of personal suit and (2) that the release of the attached property in favour of a claimant is not a final release. I do not think it necessary to refer to the decisions in detail. The second contention is, though correct, irrelevant to this case. As regards the first contention, loose general expressions found in judgments ought to be read in the light of the facts and circumstances of the particular cases in which the decisions were given and, so reading the passages relied upon, I cannot hold that they support the contention that the order on a claim petition is merely an affair between the parties in their personal capacities unconnected with rights to or over property.

The third argument of Mr. T. V. Muthukrishna Aiyar might be thus stated:—The suit brought under Order XXI, rule 63, is a mere continuation of the proceedings in the claim petition. As such, all alienations during the continuance of the proceedings originated by the claim petition till the disposal of the suit brought to set aside the claim petition order are alienations *pendente lite* and are affected by the doctrine of *lis pendens* formulated in section 52 of the Transfer of Property Act. If so, the alienation to the 3rd defendant by the 1st defendant was an alienation *pendente lite* and the 3rd defendant as such alienee was not a necessary party to the suit. He might be made a party defendant as an act of grace by the Court in order that he might be allowed to protect his interest; but as he is not a *necessary* party, he cannot raise the question of limitation based on the fact that he was made a party after the period of limitation had expired; in other words, he cannot take advantage of the provision contained in section 22 clause (1) of the Limitation Act. If, through the doctrine of *lis pendens*, a decree passed against the 1st defendant will be binding upon the 3rd defendant, the 3rd defendant is, of course not a necessary party.

I think that this contention is a sound one. I am free to confess that it was only after a good deal of hesitation and consideration that I was able to come to the conclusion as to the soundness of this argument. In *Kolasherri Illath Narainan* v. *Kolasherri Illath Nilakandan Namboodri* (1) Turner, C. J., and Muthusamy Aiyar, J. made the following observations: "The Code of Civil Procedure contains no provisions enabling a Court, other than a Court of Appeal or a High Court acting under section 622, to discharge an order of attachment issued by another Court. Where a person deems himself aggrieved by the issue of an order of attachment, he should apply to the Court which issued the order to recall it; if he fails to obtain relief because his right is uncertain, he must go to a proper Court to establish that right. The Court to which he may have to resort for the establishment of his right may, as it is in the present case, be the same Court by which the order for attachment was issued; it may be a Court of inferior jurisdiction. It could not have been contemp-

(1) 4 M. 131.

lated that a Munsif should be competent to make an order directing the District Judge to discharge an order made by him for attachment. In fact, no such power is given to one Court over the orders of another. What the law contemplates is that, having established his right to the interest claimed by him in the attached property by declaration of right or otherwise, the person aggrieved should carry his decree to the Court by which the order was issued, which Court would be bound to recognise the adjudication and to govern itself accordingly". If these observations are still good law, it is difficult to argue that the suit brought under section 283 is a continuation of the proceedings in the claim petition. Mr. Subramanya Sastry, though he did not cite the above case, *Kolasherri Illath Narainan* v. *Kolasherri Illath Nilakandan Nambudri* (1), quoted several subsequent cases in which similar observations occur. I do not think it necessary to deal in detail with them, as they do not carry us further than this early case in *Kolasherri Illath Narainan* v. *Kolasherri Illath Nilakandan Nambudri* (1). It appears to me, however, that the authority of the case in *Kolasherri Illath Narainan* v. *Kolasharri Illath Nilakandan Nambudri* (1) and of the subsequent cases quoted by the appellant's learned Vakil has been shaken by the ruling of the Privy Council to be referred to presently.

Before considering that ruling of the Privy Council, I shall refer to one case decided by the Calcutta High Court. In *Bonomali Rai* v. *Prosunno Narain Chowdhry* (2), the facts were as follows:—One Mozaffer Hussain was a decree-holder against certain defendants who may be called the elder *Sircars*. He attached certain properties of these elder *Sircars*. The son of one of these *Sircars* put in a claim petition, and the attached property was released. Then the decree-holder brought a suit against the judgment-debtors and Durgacharan to establish his right to attach the property in execution of his decree, and he succeeded in that suit. But between the date of the order on the claim petition releasing the property and the date of the suit, Durgacharan (the claimant) mortgaged the land to two other persons who were not made parties to the suit brought under section 283. The question in the final suit brought by the purchaser at the Court auction sale held after the success of the suit under section 283 was, whether the two mortgagees were bound by the result of the suit brought by the decree-holder against Durgacharan in which the decree-holder's right to attach the properties as the properties of the elder *Sircars* was established. The Calcutta High Court held that the mortgage by Durgacharan was invalid as against the claims enforceable under the original attachment which, though released by the order on the claim petition, was revived by the decree in the suit brought under section 283. No doubt, that case might be distinguished from the present case on the ground that the mortgage, though nominally by the claimant Durgacharan, was really by the judgment-debtors, the claimant having been found in that case to have been the *benamidar* of the judgment-debtors (the elder *Sircars*).

Coming to the Privy Council case, the following observations appear in *Phul Kumari* v. *Ghanshyam Misra* (3), the judgment in which was delivered by Lord Robertson: "For the right determination of the question at issue" (the question being as to proper Court-fees payable on the plaint in a suit brought under section 283 of the Civil Procedure Code) "it is necessary to ascertain what are the object and the nature of the suit. Now, fortunately, this is not dubious..... .. Now, the 17th Article of Schedule II of the Court Fees Act is expressly made to apply to 'Plaint or Memorandum of Appeal in each of the following suits': 'To alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent, or of any Revenue Court.' Now, this is an exact description of the effect of the appellant's suit. It is true that, instead of asking the Court to alter or set aside the decree which is the cause of action, she categorically asks from the Court the several decrees which she had asked from the Subordinate Judge, and which the Subordinate Judge had refused. But this is merely a verbal or formal difference, and section 283 of the Civil Procedure Code ..... recognises such a suit as not merely an appropriate but the only mode of obtaining review in such cases."

(2) 23 C. 829.

(3) 35 C. 202 (P. C.), 35 I. A. 22; 12 C. W. N 169; 7 C. L. J 36; 5 A. L. J. 10; 17 M. L. J. 618; 2 M L. T. 506; 10 Bom L. R. 1.

"Their Lordships are accordingly of opinion that the first head of Article 17 of Schedule II applies to the case. This view is opposed not only to that of the respondents and of the High Court but to that of the appellant. Misled by the form of the action directed by section 283, both parties have treated the action as if it were not simply a form of appeal, but as if it were unrelated to any decree forming the cause of action." Then in another sentence at page 207 their Lordships say that it is a mistake to treat the action brought under section 283 as an "original action."

I think this decision of their Lordships which is binding upon us is almost conclusive to show that suits of this class, though called original suits, are not *in their essence* original actions but merely forms of appeal allowed by the Civil Procedure Code to be brought in the guise of original suits. Though the Court in which this appellate action might be brought may be sometimes a Court which ordinarily is inferior to the Court by which the summary order was passed and though fresh evidence not adduced during the summary inquiry may be adduced by both sides in that appellate action, the suit is in essence, in the words of their Lordships of the Privy Council, "a form of appeal," and hence it is not unrelated to the original claim proceedings and it is, therefore, in essence, an appeal. The Legislature has allowed one year to file such an appeal suit which is, as I said just now, a continuation of the claim proceedings the *lis* based on the right and liabilities forming the cause of action in the claim proceedings pending till the appellate suit is finally disposed of. Though in one sense the cause of action for the appellate suit is the order passed against the plaintiff, the cause of action in another and truer sense is the dispute about attachment which was the cause of action for the claim. The right to file an appeal by a defendant who was unsuccessful in the Court of first instance arises out of the plaintiff's cause of action for the suit, though it also arises out of the decision of the first Court passed to the prejudice of the defendant. The right to bring an appeal is, however, not usually called a "cause of action" to bring an appeal.

The Privy Council ruling in *Phul Kumari* v. *Ghanshyam Misra* (3) was followed by Benson, Officiating C. J., and Bakewell, J., in *Veera Pannadi* v. *Karuppa Pannadi*(4). That the suit under section 283 is a continuation of the claim proceedings is clear also from the case in *Harishankar Jebhai* v. *Naran Karsan* (5), which decided that the rights of the parties should be decided in the suit as they stood on the date of the claim petition and that the claimant cannot take advantage of the running of time between the date of the claim petition and the date of the suit. It seems to me that having regard to the observations of their Lordships in *Phul Kumari* v. *Ghanshyam Misra* (3), which practically adopted Mr. Woodroff's arguments in *Kishori Mohun Rai* v. *Hursook Dass* (6), the remarks in *Kolasherri Illath Narainan* v. *Kolasherri Illath Nilakandan Nambudri* (1) and other cases to the effect that the suit brought under section 283 is unconnected with the claim proceedings and is not a suit to set aside the order in those petitions, must be held to have been overruled. In the result, I am inclined to uphold this contention of the respondent, namely, that the 3rd defendant must be deemed to be an alienee *pendente lite*; see *Settappa Goundan* v. *Muthia Goundan* (7)and *Govindappa* v. *Hanumantappa* (8) as to the invalidity of such alienations *pendente lite*; and he was, therefore, not a necessary party to the appellate suit. If he was not a necessary party, and if the necessary parties were brought within a period of one year, it follows that he cannot advance the plea of limitation, as section 22, clause 2, expressly excluded the operation of clause (1) in such cases.

Mr. Muthukrishna Aiyar argued at first that section 22 of the Limitation Act does not apply where a party is brought on the record by the Court under section 32 of the Civil Procedure Code (now Order I, rule 10, clause 2), but he did not press the point having regard to the Full Bench decision in *Ram Kinkar Biswas* v. *Akhil Chandra Chaudhuri* (9) and to the case of *Thekkian Rangacharlu Chettyar* v. *Muthukarnapan Kothan*(10). I have no doubt that the sweeping provision of section 22, clause 1, of the

(4) 2 Ind. Cas. 980; 6 M. L. T. 154.
(5) 18 B. 261.
(6) 12 C. 696.
(7) 31 M. 268; 4 M. L. T. 77.
(8) 17 Ind. Cas. 420; 23 M. L. J. 513; (1912) M. W. N. 1152.
(9) 35 C. 519 (F. B.); 11 C. W. N. 330; 5 C. L. J. 242; 2 M. L. T. 137.
(10) 16 Ind. Cas. 420; (1913) M. W. N. 134.

Limitation Act is likely to cause hardships in cases where the plaintiff did not know of an alienation which might have taken place a few days before he brought his suit and when he came to know of it after suit and made the alienee a party, the suit might become barred. The remedy, however, is for the Legislature to give a discretion to the Court to treat the suit as against the added defendants or by the added plaintiff as being a suit brought by such plaintiff or against such defendant from the date of the original institution, if the Court is clearly satisfied that the omission to add the plaintiff or the defendant in the beginning was not due to the laches or gross negligence of the plaintiff or plaintiffs originally on record.

In the result the second appeal is dismissed with costs.

SPENCER, J.—The question is whether with reference to section 22 of the Limitation Act, which makes the date of adding a new defendant to a suit to be reckoned as the date of institution of the suit so far as that defendant is concerned, this suit is time-barred under Article 11, Schedule I, of the Act. It is necessary to mention some of the more important dates. The 1st respondent as plaintiff in Original Suit No. 20 of 1897 in the Salem District Court and assignee by purchase of the rights of the original plaintiff obtained a compromise decree on the 27th June 1899 against the present 3rd respondent for certain immoveable property and Rs. 7,000 in cash to be paid before the 30th August. In execution of the decree for money he attached certain land, whereupon the 2nd respondent, who has died since this second appeal was filed, and the present appellant and another preferred claim under section 278 of the Civil Procedure Code of 1882. The claims of the 2nd respondent and his alienee were allowed on the 18th December 1902. On the 29th December 1902 the appellant purchased the first item of the attached property from the 2nd respondent. This suit was launched by the 1st respondent against the 2nd and the 3rd respondents on the 21st October 1903 for a declaration that the attachment of the suit properties was valid. The appellant was added on 26th March 1904 as a supplemental defendant on his own petition, in which he alleged that he was a necessary party to the suit. Though he was actually a party to the order which the District Judge passed on the 18th December 1902 on the claims under section 278, it was as petitioner in Miscellaneous Petition No. 547 of 1901 which related to property not now in suit. That claim was dismissed. He comes in now only as a purchaser from the 2nd respondent *pendente lite*, *i.e.*, by virtue of a purchase made between the date of disposal of the claim under section 278 and the date of institution of a suit which is permitted by section 283 to be brought in review of the order on the claim. Such actions are as pointed out by the Privy Council in *Phul Kumari* v. *Ganshyam Misra* (3) simply a form of appeal. The plaint in suits of this description is described in that decision as 'a plaint for review of a summary decision'.

The doctrine of *lis pendens* extends to purchases by third persons during the pendency of an appeal. Vide *Sukhdeo Prasad* v. *Jumna* (11), which was a case of attachment of immoveable property in execution of a simple decree, of a consequent claim under section 278, of a suit under section 283 which was dismissed and of an appeal which finally settled the parties' contentions. Again the plaint in the present suit, Original Suit No. 927 of 1903, was framed for obtaining a declaration under the Specific Relief Act that the attachment of the suit properties by the plaintiff was valid, and for costs. The Court was competent to pass a declaratory decree to such an effect as between the original parties to the suit. The 3rd defendant was joined at his own request for the purpose of safeguarding the rights subsisting as between him and others claiming generally in the same interest. He might have remained quiet and awaited proceedings being taken to dispossess him. In *Gurwayya Gouda* v. *Dattatraya Anant* (12) the Bombay High Court held that in such circumstances the determination by application of section 22 of the Limitation Act of the date of institution of the suit as regards such freshly joined parties does not ordinarily affect the right of the plaintiff to continue the suit and would not, therefore, attract the application of the general provisions of the Limitation Act. The freshly joined parties in that case were co-plaintiffs, but the same principle must

(11) 23 A. 69; A. W. N. (1900) 199.
(12) 28 B. 11; 5 Bom. L. R. 618.

be applied if additional defendants are added under such circumstances, and has been applied in *Aiyyam Chetti* v. *Poongavanam* (13) where real owners were added more than one year after a suit was brought against a person against whom an order under section 335 was passed who claimed to be a mere *benamidar*. The appeal, therefore, fails on this point.

The appellant has failed to make out his other pleas. I agree in thinking that this second appeal must be dismissed with costs.

Appeal dismissed.

(13) 18 M. L. J. 464.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL NO. 29 OF 1913.

February 3, 1914.

Present:—Mr. Lindsay, A. J. C.

Bhaiya MOTI SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

Bhaiya PRITHIPAL SINGH—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 69 (2) and 90—Sale adjourned for more than seven days—Fresh proclamation of sale, not issued—Irregularity.

The omission to issue a fresh sale-proclamation, as required by Order XXI, rule 69 (2), Civil Procedure Code, in case of the sale being adjourned for more than seven days, amounts merely to an irregularity; and accordingly, as provided by Order XXI, rule 90, Civil Procedure Code, the existence of this irregularity is no sufficient ground for setting the sale aside unless it is shown that the person applying therefor has sustained substantial injury.

Bagal Chunder Mukerjee v. *Rameshur Mundul*, 18 C. 496, referred to.

Appeal against the order of the District Judge, Gonda, dated 3rd May 1913.

Babu *Surendra Nath Ray*, for the Appellant.

Babu *Pattu Lal*, for the Respondent.

JUDGMENT.—This is an appeal in the Execution Department. The facts of the case are as follows: A mortgage-decree was obtained against the appellant here, Bhaiya Moti Singh, for the sale of a share of certain property of his. The area of the share amounts to some 9 odd acres. One application for execution fell through in the end as nobody could be induced to make a bid for the property. Execution proceedings were set going for a second time on the 16th August 1912. The first date fixed for sale was the 24th of October 1912. On the occasion no bidders were forthcoming. A second date was fixed, namely, the 20th of December.

On that date four bids were made ranging from Rs. 120 to Rs. 160. It may here be noted that the annual profits of this property as set out in the sale-proclamation and as confirmed by the *Patwari* amount only to Rs. 13-13-0 a year. At the rate of 20 years' purchase of the estimated profits the value of the property was put down in the sale-proclamation at Rs. 276-4-0. On the 20th of December the sale-officer postponed the sale on the ground that the highest bid of Rs. 160 did not appear to him to be sufficient. Eventually the sale took place a month later, that is to say, on the 20th of January 1913, and on that occasion the estimated value, namely, Rs. 276-4-0, was bid by an agent of the decree-holder who was allowed by the Court to make an offer for the property. The judgment-debtor comes up here in appeal and his principal ground of complaint is that no fresh proclamation of sale issued after the sale was adjourned on the 20th of December 1912. The learned Judge who heard this case in the Court below admitted that there was an irregularity in this respect. He was at the same time however, of opinion that no injury had resulted to the judgment-debtor. It has been held in *Bagal Chunder Mukerjee* v. *Rameshur Mundul* (1) that the omission to issue a fresh sale-proclamation such as is now required by Order XXI, rule 69, sub-rule (2), of the Code of Civil Procedure amounts merely to an irregularity, and accordingly under the provisions of Order XXI, rule 90, the existence of this irregularity is no sufficient ground for setting the sale aside unless it is made to appear that the judgment-debtor has sustained substantial injury.

There can, in my opinion, be no question of injury to the judgment-debtor in this case. It is true he got the *Patwari* into the witness-box and that the *Patwari* has ven-

(1) 18 C. 496; 4 A. L. J. 578; A. W. N (1907) 193.

tured to assess the value of his property at Rs. 800. The *Patwari*, however, had to state that the net income of the property for sale was Rs. 13-13-3 a year. I think it is difficult to believe that anybody in the possession of his senses would bid Rs. 800 for such a small piece of property bringing in a profit of something less than Rs. 14 a year. On the contrary it seems to me that the estimated value which had been set out in the sale-proclamation represents as much as the property is worth. There is no reason to suppose in the circumstances to which I have referred that anything more would ever have been offered for the property. On two occasions on which the property was put up for sale nobody appeared to bid and it has not been complained that on those occasions there was any irregularity in publishing or conducting the sale. The fact of the matter is that the judgment-debtor had been trying to stave off the evil day of sale by endeavouring to induce the Court to accept the fancy figure which he chooses to put upon the property which he has now lost. I can see no reason for interference in this case and I dismiss the appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 210 OF 1913.

June 25, 1914.

Present:—Mr. Justice Piggott and Mr. Justice Rafique.

Maulvi MOHAMAD MAQBUL-UL-RAHMAN—JUDGMENT-DEBTOR—APPELLANT

versus

SAIYED ALI KHAN AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Auction sale—Irregularity—Substantial injury—Proof.

In order to get a sale set aside on the ground of material irregularity, a party applying under Order XXI, rule 90, must prove that there was such irregularity in publishing or conducting the sale as resulted in substantial injury to him.

First appeal from the order of the District Judge of Moradabad, dated 6th September, 1913.

Mr. *Dillon* (with him Mr. *O'Conor* and the Hon'ble Mr. *Moti Lal Nehru*), for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Dr. *Suleman* and the Hon'ble Mr. *Gokul Prasad*), for the Respondents.

JUDGMENT.

PIGGOTT, J.—This is an appeal by a judgment-debtor against an order dismissing an application made by him under Order XXI, rule 90, of the Code of Civil Procedure to have the sale at auction of certain villages belonging to him set aside. The fourth paragraph of the memorandum of appeal to this Court gives succinctly the grounds upon which relief is sought. It is there pleaded that the evidence on the record proves that there was both material irregularity and fraud in publishing and conducting the sale, with the result that property worth at least eight lakhs of rupees was sold for less than one lakh.

The plea of "fraud", in so far as it can be said to rest on any evidence at all, seems to be based upon the allegation that the notice of the sale was not duly proclaimed by beat of drum, and by the affixing of a copy of the proclamation on a conspicuous part of the property to be sold, as required by Order XXI, rule 67, read with rule 54 of the Code of Civil Procedure. In order to make out a plea of "fraud" it would be necessary to point to some evidence from which the Court could reasonably be asked to infer that these omissions, if they in fact took place, were brought about by the decree-holders, or by some other persons, with intent to prevent intending purchasers from coming forward and thus securing the sale of the property at a low price. I find no such evidence on the record, nor was our attention drawn to any such evidence in the course of arguments. The plea of "fraud" seems to have been left in the memorandum of appeal as matter of prejudice merely. At any rate I feel no hesitation in finding that no fraud is proved.

It may be contended that these allegations as to the proclamation of the sale amount at any rate to allegations of material irregularities. In order to get a sale set aside on the ground of material irregularity, a party applying under Order XXI, rule 90, must prove, in the first place, that there was some such irregularity in publishing or conducting the sale. He must then show that the sale

resulted in substantial injury to him, and finally he must prove some facts from which the Court can reasonably infer that this substantial injury was incurred by reason of the irregularity shown to have been committed. The wording of Order XXI, rule 90, of the present Code of Civil Procedure is perhaps a little more favourable to the applicant than that of section 311 of the Code of 1882, but the above seems to represent correctly the state of the law as now amended.

As regards the publication of the sale the case for the appellants breaks down at the very outset. I have been through the evidence and I find no valid reason for holding that proclamation was not duly made according to law. I entirely concur in the criticism of the learned Subordinate Judge against the evidence produced by the judgment-debtor. I accept his finding that the notice of the sale was duly published as required by law. There is no material defect in the sale-proclamation itself; so there was no material irregularity as regards the publishing of the sale.

With reference to the conduct of the sale itself, two points were pressed upon us in argument. The auction-purchaser of one of the lots found that he had not money enough with him to deposit one-fourth of the price in full. He seems to have tried to make arrangements, but as it was getting late the sale officer allowed him to deposit Rs. 2,000, and reported to the Court that the balance would be paid in next day. It was in fact paid in at the earliest possible opportunity. The procedure adopted is not strictly in accordance with the provisions of Order XXI, rule 84, Civil Procedure Code, but assuming that there was an irregularity [vide *Ahmad Bakhsh* v. *Lalta Prasad* (1)]. I cannot say that it strikes me as a "material" one so far as the judgment-debtor is concerned. If any one had good cause for complaint it was the next highest bidder who was there with his 25 per cent. of the purchase-money ready in his hand. In any case I find no reason whatever for holding that it was an irregularity which resulted in injury to the judgment-debtor.

The other point taken deserves a little more consideration. The decree under execution was one for Rs. 27,678. The Court had divided the property to be sold into nine lots, and had passed an order that so many lots only should be sold as would suffice to pay off the decree. The first four lots put up for sale fetched Rs. 28,200; but the officer in charge of the sale continued until he had disposed of the whole nine. This was not a mere oversight; there was a substantial reason. The judgment-debtor was heavily involved and applications for rateable distribution had been pouring in right up to the date of the sale. The total of the claims thus put in comes to more than double the sum for which execution was originally taken out. It has not been made to appear to us that when these further claims are taken into consideration, the amount realized by the sale of the whole nine lots was more than sufficient to ensure the payment of the entire judgment-debt to the original decree-holders. Under these circumstances it cannot be said that the officer conducting the sale was without justification in proceeding with it until he had disposed of the whole nine lots. I must concede to the appellant that it is a peculiar and unfortunate feature of the case that we cannot find on the record any formal communication, from the Court executing the decree to the Collector or to the officer conducting the sale, of the fact that these applications for rateable distribution had come in. There was another decree under execution against the same judgment-debtor, on which certain other property of his had been attached and put up for sale; in connection with that decree an intimation of a number of applications for rateable distribution had been sent to the sale officer. It may be that the Court remained under a mistaken impression that it had sent such intimation in both cases, or that it merely overlooked the fact that the orders issued in the present case required modification in view of the fact that numerous applications for rateable distribution had come in. The sale officer may have misunderstood the intimation he had received in the other execution case as applying to this one also; or he may have acted upon knowledge of the judgment-debtor's circumstances acquired in some manner not apparent from this record. I find no room for any suggestion that he acted otherwise than in good faith. His position is in

(1) 28 A. 238; A. W. N. (1905) 263.

fact intelligible enough. He was under orders to sell as many lots as might be necessary in order to ensure that these particular decree-holders should receive the whole of the Rs. 27,678 due to them. He did not feel sure that this could be secured even by the sale of the whole nine lots. He accordingly put all of them successively up to sale: the Court executing the decree was not bound to confirm the sale of any one of them which it might find to be in excess of what was necessary. On these facts I am of opinion that there was an irregularity committed by the Court executing the decree in not sending formal intimation to the Collector, or to the sale officer, of the filing of the application for rateable distribution, and in not modifying accordingly its original orders directing the sale in nine lots. There was also an irregularity in the conduct of the sale-officer in not referring to the Court for orders instead of proceeding with the sale of the nine lots on his own authority. Such irregularities might in some sense be described as "material." The question, however, is whether in this particular case they resulted in substantial injury to the judgment-debtor appellant.

The first point to be considered under this head is whether the five lots sold after the sum of Rs. 28,200 had been realized did in fact sell for less than their market value. The evidence relating to any of the first four lots is immaterial in view of my finding that there was no material irregularity in publishing the sale, and none in conducting it, so far as these four lots were concerned. The learned Subordinate Judge says that almost all the villages sold for much more than the estimated value given in the sale-proclamation; that the report of the sale shows that there was very fair competition, and that on many of the villages there are incumbrances which will have to be paid off by the purchasers. He finds that the judgment-debtor's evidence fails to satisfy him that "the properties have been sold at a low price". I have been through the record to see what the objector's evidence really comes to. Chhote Lal *Patwari* gives certain figures for Bahlolpur (Lot No. 5) and Nover (Lot No. 7). Assuming twenty years' purchase to be a fair price, the figures given by this witness would make Bahlolpur worth something over Rs. 10,000 and Nover worth over Rs. 22,000. The witness also says that there are palm and *dhak* trees on the waste land in both villages, especially in Bahlolpur. A witness named Bansidhar says he once offered Rs. 75,000 for village Chaubara (Lot No. 6) and would be ready to pay the same even now. He admits he has never seen the place, and could give no reason for the valuation he puts upon the village. A witness named Ram Sarup deposed that he thought village Chakkanwala (Lot No. 9) worth Rs. 80,000, and would pay Rs. 70,000 for it even now. He knew the land revenue was close on Rs. 1,000 a year, and for the rest relied on certain papers shown him by Intizam Ali, a servant of the judgment-debtor. A witness named Abdul Qayyum gave certain evidence not relevant for present purposes as relating to villages which formed lots Nos. 2 and 3; he also deposed to an attempt to purchase lot No. 8 for Rs. 30,000. He did not profess to have wanted to buy on his own account, or to have made any reasonable inquiries; he seems to me, in fact, to have conclusively broken down under cross-examination. A witness named Abdul Majid says he was ready to buy lot No. 7 for Rs. 30,000 and lot No. 5 (Bahlolpur) for Rs. 39,000. He could give no sensible reasons for believing these villages to offer a remunerative investment of these prices, and made no attempt to explain why he did not turn up and bid at the auction. Wahid-ul-haq *Patwari* deposed in general terms that the value of lot No. 9 must be about one lakh of rupees. Finally there is the report of a Commissioner who made an attempt, on his own showing a very rough one, to estimate the value of the standing timber in the villages in question. He says there is standing timber in Bahlolpur worth Rs. 37,000, in Nover worth close on Rs. 6,000 and in Chakkanwala worth close on Rs. 16,000. A great deal of this evidence is worthless on the face of it. The report of the Commissioner looks at first sight a fairly substantial piece of evidence, but it quite fails to impress me. We have this judgment-debtor heavily indebted, pressed by his creditors and submitting to the attachment and sale of hi

landed property; yet we are asked to believe that over sixty thousand rupees were lying to the man's hand, to be had for the asking. In the course of my work under the Bundelkhand Encumbered Estates Act, I constantly came across similar allegations as to the extraordinary value of forest timber standing on estates the proprietors of which had practically gone bankrupt without attempting to avail themselves of the alleged assets. The truth I take to be that these estimates of the value of such timber, even when prepared in good faith, are always delusive. To cut quantities of such timber and convey it to the nearest available market, either in the form of fire-wood or of building timber, is a pure speculation, as likely to result in loss as in gain. The sale of huge quantities (such as is postulated by these estimates) is practically impossible, because of the danger of glutting the market and bringing the price down below the cost of felling and cartage. I am unable to place any reliance on this part of the appellant's case.

As a matter of fact the five lots with which I am now concerned sold for Rs. 71,650 in all. Their estimated value, according to the rough estimate prepared in the Collector's office, comes to only Rs. 45,000, and there are heavy encumbrances, especially on village Chakkanwala. The total land revenue on the five villages comes to only Rs. 2,525. It is true that two of these, Chaubara and Chauharpur, are revenue-free villages; but the nominal assessment which is prepared for the purpose of calculating cesses, etc., is given in the sale-proclamation and is included in the above total. If it be assumed that the two revenue-free villages would bring in an income equal to twice their nominal assessment and the remaining three villages one equivalent to their assessment, the annual income would come to Rs. 3,725. On this basis the five lots appear to have sold for first over nineteen years' purchase; and this is at a forced sale, and without taking into account the encumbrances.

The amount of these encumbrances cannot be estimated with certainty, because we are not in a position to make up the interest account; but the principal of the debts due on villages Chaubara, Chauharpur and Chakkanwala alone comes to Rs. 35,846 while there are Rs. 24,000 more secured on mortgages which affect Chakkanwala jointly with Koli, the latter being lot No. 1 at the auction-sale, and, therefore, outside the scope of the present inquiry. It is quite possible that the assessment is a somewhat light one; but I should require very strong evidence before I could consent to increase the rough estimate of Rs. 3,725 (arrived at upon a consideration of the assessment figures) by more than Rs. 50 per cent., seeing that these villages are in the Moradabad District, recently under Settlement. If the annual income could be taken as high as Rs. 5,600 the price at twenty years' purchase would be Rs. 1,12,000; and the sale price *plus* the encumbrances comes to Rs. 1,07,496 without counting possible accumulations of interest, or the Rs. 24,000 secured on Koli and Chakkanwala jointly. In the arguments addressed to us on this point we were in effect invited to concentrate our attention on the single village of Bahlolpur: that is not a fair way of dealing with the issue. The question of the alleged substantial injury must be considered with reference to the auction-sale as a whole. After thus considering the evidence I concur with the learned Subordinate Judge in holding that the judgment-debtor has not proved substantial injury in connection with the sale of the five villages which constituted lots Nos. 5 to 9 inclusive at the auction-sale.

Still less has been proved that substantial injury resulted from the irregularities in the conduct of the sale which I have found to exist. In order to connect the two things the appellant should be able to point some facts from which the Court could reasonably infer that there were intending, or possible, purchasers who after studying the sale-proclamation came to the conclusion that the decree was certain to be satisfied by the sale of the first three or four lots and so remained absent, whereas they would have attended the sale if they had thought that lots Nos. 5 to 9 would be put up to sale. I am quite unable to draw any such inference from the facts on the record. I do not believe that anything of the kind occurred.

The appellant has, therefore, entirely failed to make out any case for relief under the provisions of Order XXI, rule 90, of the Civil Procedure Code. An attempt was made on

his behalf to get the case outside the limits of that rule. The contention if I rightly appreciate it, was that the officer conducting the sale had no authority from the Civil Court to put up any lot for sale when once the first four lots had realized more than the amount of the decree. His subsequent proceedings, we were asked to hold, amounted to something more than a mere irregularity: they were "without jurisdiction"—it was even suggested that the sale of lots Nos. 5 to 9 was a mere nullity and passed no title to the purchasers.

Now, in the first place, I take it to be settled law, it is certainly settled law so far as this Court is concerned that no such line of argument as this is open to an applicant for an order to set aside a sale under Order XXI, rule 90, of the Civil Procedure Code. Put aside for a moment the question of fraud, which has no real bearing on the present case, and consider the position. An applicant asks to have a sale set aside, alleging material irregularity in publishing or conducting the same. It is pointed out to him that the rule requires him to prove that he has suffered substantial injury by reason of the alleged irregularity. He replies, in effect, that the irregularity alleged by him is so serious that it must vitiate the sale, apart from any question of resulting injury. The obvious answer is that he cannot both apply to the Court under Order XXI, rule 90, and seek to evade its provisions in this fashion. This was the view of the law taken by this Court in *Shirin Begam* v. *Agha Ali Khan* (2) and in *Harbans Lal* v. *Kundan Lal* (3).

Personally I find no force in the contention from any point of view. I have set forth in detail the circumstances of the sale and have shown that the proceedings were irregular; but the sale took place under the orders of a competent Court, which had properly taken all the villages in question in execution and had jurisdiction to sell them and has duly confirmed the sale. The order issued to the sale officer, reasonably interpreted, was an order to sell as many lots as he might find necessary in order to secure to these particular decree-holders the sum of Rs. 27,768. It is not shown that he actually sold a single lot more than was really necessary for this purpose. I think the learned Subordinate Judge was quite right in confirming the sale.

For these reasons I would dismiss this appeal with costs, including fees on the higher scale.

RAFIQUE, J.—I concur.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs, including fees on the higher scale.

Appeal dismissed.

(2) 18 A. 141; A. W. N. (1896) 9.
(3) 21 A. 140; A. W. N. (1898) 212

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 61 OF 1913.

April 3, 1914.

Present:—Sir Charles Arnold White, KT., Chief Justice, and Mr. Justice Oldfield.

M. KULLAPPA CHETTY—APPELLANT

versus

P. V. SUBBARAYA CHETTY—RESPONDENT.

Contract Act (IX of 1872), s. 253—Partnership, dissolution of—Retirement of one partner—Date on which dissolution takes effect—Statement in pleadings—Admission.

A partnership-at-will is dissolved from the date on which one of the partners retires; it is not necessary that the retiring partner should send a notice of his intention to retire; it is enough if the partnership did not do any business with the outside public from the date of his retirement.

A statement in a plaint or written statement cannot be construed as an admission to dispense with further proof. It is only a statement of the case upon which the parties intend to rely and prove at the trial.

Appeal from the judgment of the Hon'ble Mr. Justice Wallis, dated the 7th of August 1913, and made in the exercise of the Ordinary Original Civil Jurisdiction of this Court in Civil Suit No. 377 of 1910.

Mr. *V. V. Srinivasa Aiyangar* (with him Mr. *P. Sambanda Mudaliar*), for the Appellant.

Mr. *T. Ethiraja Mudaliar*, for the Respondent.

JUDGMENT.

WHITE, C. J.—I agree with the learned Judge that the plaintiff failed to prove the agreement with reference to commission on which he relied, but I find myself unable

to agree with him with reference to the date on which the partnership must be deemed to have come to an end. The plaintiff's case is that the partnership came to an end in September 1908. The defendant's case is that it continued till May 1909. The learned Judge held that the partnership continued until May 1909 and directed that the partnership accounts should be taken up to that date. The partnership was admittedly a partnership-at-will and consequently section 253 of the Indian Contract Act, which provides that any partner may retire from such a partnership at any time, is applicable. The Judge found that the defendant decided to retire from the partnership in September 1908. His finding is in these words: "he"—that is the plaintiff—"has given evidence—uncontradicted evidence—which does point, no doubt, to the defendant having decided to retire from the partnership at the date which the plaintiff gives." "He"—that is the plaintiff—"showed that a certain firm, dealing with the partnership after that, dealt with him"—that is the defendant—"personally and he"—that is the plaintiff—"has given the evidence also of one of the working partners that the partnership accounts were all made up to that date"—this, I take it, means that the partnership accounts were closed on that date, that date being September 1908. The learned Judge goes on: "The book in which they were made up is not itself translated; still it seems to me that on the evidence as it stands he"—that is the plaintiff—"has failed, having regard to his own admission, to prove any dissolution of partnership at that date owing to the absence of notice". The finding of the learned Judge is that by reason of the plaintiff having admitted that he did not receive notice of the defendant's intention to retire, he (the plaintiff) had failed to prove dissolution of partnership as from the earlier date. The learned Judge goes on: "But the defendant's written statement says that the partnership was dissolved at a slightly later date and I think that must be taken as an admission and the dissolution must be taken to have taken place at the date mentioned in the written statement". I do not quite understand how the statement in the written statement can be treated as an admission. It is a statement in his pleading by the defendant of the case on which he relies, namely, that, notwithstanding the fact that he had, as found, intended to retire in September 1908, the dissolution did not in fact take place until the later date. It seems to me that the plaintiff might well have relied on the non-receipt of any notice from the defendant for the purpose of enabling him to say: "You sent me no notice of your retirement in September 1908, therefore, I will not accept that date as the date of your retirement". But I do not understand how the fact that the plaintiff did not receive notice of the defendant's retirement precludes him from setting up the case that the partnership came to an end when the defendant, as found by the Judge, intended to retire. In other words, it seems to me that although the plaintiff would have been entitled to rely on the absence of notice he is not precluded from waiving notice and saying: "Though I did not know at the time you intended to retire from the partnership, I know it now and I elect to treat the partnership as at an end from the time when you purported to determine it." It was contended on behalf of the defendant that there was evidence that the partnership business was in fact carried on after September 1908. There is no evidence of any dealings by the firm with third parties. Certain post cards, however, written by the plaintiff, were relied on as showing that the partnership business was in fact carried on after September 1908. One of these post cards is dated January 1909 and would seem to have been written by the plaintiff from Madras to the firm at Vellore on the assumption that the firm was still carrying on the partnership business. The plaintiff in his evidence, however, explained that when he sent this post card he did not know that the partnership business had been stopped in September. I do not think there is any evidence that the business was carried on as a partnership business after September 1908. Accordingly I think the decree of the learned Judge should be amended by directing that the partnership do stand dissolved as from September 3rd, 1908, and not as from May 1909. I would make no order as to the costs of this appeal.

OLDFIELD, J.—I concur.

Decree amended

WASAWA RAM *v.* BAHADUR CHAND.

PUNJAB CHEIF COURT.

CIVIL REVISION PETITION No. 1710 OF 1907.

July 27, 1908.

Present:—Mr. Justice Kensington and Mr. Justice Chevis.

WASAWA RAM—PLAINTIFF—PETITIONER *versus* BAHADUR CHAND—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VII, r. 11 —Valuation of suit—Jurisdiction—Court-fee —Suit for possession of colony land—Custom—Alienation by father —Market-value of land determines valuation of suit—Suit improperly valued—Procedure.

The plaintiff sued for possession of some colony land, alleging that a sale by the plaintiff's father was without necessity. The suit was instituted in the Court of a first Class Munsif and was stamped at Rs. 1-2, calculated at five times the revenue. It was not clear what this revenue represented.

The Munsif held that the jurisdictional value of the suit was Rs. 2,598 under the Suits Valuation Act calculated at fifteen times the net profits and returned the plaint for presentation to a competent Court.

On appeal the Divisional Judge held that the valuation of colony lands should be based on the market-value and dismissed the appeal. The plaintiff applied for revision of the order of the Divisional Judge. Subsequently the plaint was rejected by the District Judge:

Held, that the Divisional Judge was right in holding that the valuation of the suit for purposes of both jurisdiction and Court-fees would be the market-value. But the Divisional Judge ought not to have dismissed the appeal. He should have determined the market-value of the land and allowed the plaintiff time to pay up the deficiency in the Court-fee and present his plaint to the proper Court after it was properly stamped.

Petition, under section 70 (*a*) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the order of the Divisional Judge, Shahpur Division, dated the 4th May 1907, confirming that of the Munsif, first Class, Lyallpur, dated the 31st October 1907, returning the petition of plaint for presentation in a competent Court.

Messrs, *Shelverton* and *Vishnu Singh*, for the Petitioner.

Lala *Sangam Lal*, for the Respondent.

ORDER OF REFERENCE TO A DIVISION BENCH.

KENSINGTON, J.– (*9th March* 1908.)—The question involved in this petition for revision is of importance, and I shoud like the opinion of another Judge.

The suit is for possession of some 334 *kanals* of colony land on the ground that a sale by the plaintiff's father was without necessity. The plaint was instituted in the Court of a first Class Munsif and was stamped at Rs. 1-2-0, calculated on five times a revenue of Rs. 1-2-6. It is not clear what this nominal revenue represents.

The Munsif held that the jurisdictional value of the suit was Rs. 2,598 under the Suits Valuation Act and returned the plaint for presentation to a competent Court. The Divisional Judge differed from the Munsif as to the method of calculation of value for jurisdiction purposes and held that the valuation for colony lands should be based on the market-value. The plaintiff seeks revision of this order of the Divisional Court.

The plaint subsequently came before the District Judge who appears to have rejected it on 1st October 1907. I cannot find that the plaintiff has ever been told what Additional Court-fee is demanded of him, or what sum is taken to be the market-value of the land.

There seems to be little doubt that the suit would be beyond the jurisdiction of a Munsif under any method of calculation, but it is a question whether the Divisional Judge was right in rejecting the appeal before him without definitely determining the value of the suit. I am, however, not clear as to the proper action (if any) to be taken by this Court on revision and accordingly refer the petition to a Division Bench.

Messrs. *Vishnu Singh* and *Gokal Chand*, for the Petitioner.

Lala *SangamLal*, for the Respondent.

JUDGMENT.—The circumstances of this case sufficiently appear from the order of reference to a Division Bench, dated 9th March 1908, which may be read as part of our order.

We consider that the Divisional Judge is right in holding that the valuation of the suit for purposes of both jurisdiction and Court-fees will be the market-value. The learned Judge was, however, wrong in thereon rejecting the appeal before him. The Munsif had erroneously decided that the valuation would be at fifteen times the net profits, and had on a very arbitrary calculation of the net profits directed the plaint to be returned for presentation in a Court of competent jurisdiction. It follows from the Divisional Judge's correct decision of the basis of calculation that the question of jurisdiction cannot be determined until the market-value has been ascertained. *Prima facie* it would appear sufficient to take the 1893 sale-price (apparently Rs. 400) as the market-value,

but possibly this may be contested. In any case the Divisional Court is bound to determine the point and it will then be in a position to say whether the Munsif has jurisdiction or not, and to pass such orders as may be proper, fixing the time within which the deficiency of Court-fee will be made up by the plaintiff and instructing him as to the Court before which he should present his plaint after it is properly stamped.

We accordingly accept the revision and set aside the lower Appellate Court's order of 4th May 1907, directing that Court to proceed with disposal of the appeal afresh in the manner prescribed above. It follows that the subsequent order of the District Judge, dated 1st October 1907, rejecting the plaint is also set aside as having been passed before the plaintiff was informed what additional Court-fee was required of him. The order in question was *ultra vires*.

Costs of this revision to be costs of the cause. Counsel's fee Rs. 16.

Revision allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 127 OF 1912.

July 20, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

AVANAMA *alias* KANHIYOOR MANA *alias* THEKKINI YEDATH KIRANGOT MANAKKAL NARAYANA NAMBUDRIPAD'S SON NARAYANA NAMBUDRIPAD —PLAINTIFF—APPELLANT

versus

NARAYANA NAMBUDRIPAD AND OTHERS —DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 13, O. II, r. 7—Misjoinder of causes of action and parties—Suits Valuation Act (VII of 1887), s. 11—Jurisdiction, objection as to.

Objections as to misjoinder of causes of action and parties and as to want of jurisdiction (owing to under-valuation) when not raised before the Court of first instance are no ground for reversing a decree when they do not affect the decision of the case on its merits.

Lala Rup Narain v. *Gopal Devi*, 3 Ind. Cas. 382; 36 C. 780; 6 A. L. J. 567; 18 C. L. J. 58; 13 C. W. N. 920; 5 M. L. T. 423; 11 Bom. L. R. 833; 93 P. R. 1909; 19 M. L. J. 548; 36 I. A. 103 (P. C.); *Raghava Aiyar* v. *Murugesa Mudali*, 17 Ind. Cas. 97, *Tej Mal Sowcar* v. *Jagappilla Papayamma*, 13 Ind. Cas. 788; 22 M. L. J. 225; 11 M. L. T. 25; (1912) M. W. N 50, *Vencatamuniappa Chetty* v. *Goddam Chandappa*, 4 Ind. Cas. 106; 7 M. L. T. 78 and *In re Krishnaswami Pathan*, 8 Ind. Cas. 885; 9 M. L. T. 173, followed.

Second appeal against the decree of the District Court of South Malabar, in Appeal Suits Nos. 638, 639, 640 and 654 of 1908, preferred against that of the Court of the District Munsif of Manjeri, in Original Suit No. 161 of 1907.

FACTS.—This suit was to redeem a mortgage. The defendants are the various alienees in possession of the properties comprised in the mortgage suit sold to them on different dates and the value of the properties exceeded the pecuniary jurisdiction of the Court of the District Munsif. The first Court decreed the suit, but on appeal the District Judge reversed the decision on the ground that the suit was bad for misjoinder of causes of action and for want of jurisdiction owing to under-valuation. The present appeal is against the decree in the suit.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.

Mr. *J. L. Rosario*, for the Respondents.

JUDGMENT.—Following *Lala Rup Narain* v. *Gopal Devi* (1), [see also *Raghava Aiyar* v. *Murugesa Mudali* (2), *Tej Mal Sowcar* v. *Jagappilla Papayamma* (3), *Vencatamuniappa Chetty* v. *Goddam Chandappa* (4), *Sivasankaram Pillai* v. *Perumal Nayakar* (5) and *In re Krishnaswami Pathan* (6)] we must hold that the question of misjoinder cannot be made a ground for reversing the decision of the Munsif as there is no evidence and there was no contention even that such misjoinder (assuming that it existed) affected the merits.

Nor was the District Judge justified in reversing the Munsif's decision on the ground that the value of the suit was beyond the jurisdiction of the Munsif, there being again no allegation or proof that the disposal of the suit by the Munsif

(1) 3 Ind. Cas. 382; 36 C. 780; 6 A. L. J. 567; 10 C. L. J. 58; 13 C. W. N. 920; 5 M. L. T. 423; 11 Bom. L. R. 833; 93 P. R. 1909; 19 M. L. J. 548; 36 I. A. 103 (P. C.).

(2) 17 Ind. Cas. 97.

(3) 13 Ind. Cas. 788; 22 M. L. J. 225; 11 M. L. T. 25; (1912) M. W. N. 50.

(4) 5 Ind. Cas. 466; 7 M. L. T. 364.

(5) 4 Ind. Cas. 106; 7 M. L. T. 78.

(6) 8 Ind. Cas. 885; 9 M. L. T. 173.

affected the merits [see section 11, clause (*b*), of the Suits Valuation Act], the objection as to jurisdiction on the ground of the alleged under-valuation not having been taken before the Munsif [section 11, clause (*a*).]

We reverse the lower Appellate Court's decision and remand the case to that Court for decision of the appeal before it on the merits. The respondents will pay the appellant's costs in second appeal.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 60 OF 1913.

March 23, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C.

DALJIT—PLAINTIFF—APPELLANT

versus

RAM RATAN—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 5—Extension of period—Appeal, sufficient cause for not preferring in time—Copying office, issuing wrong copies of judgment and decree, effect of—Contributory delay on appellant's part in showing mistake, effect of.

Where an appeal could not be filed in time owing to the mistake of the office in not preparing correct copies of the judgment and decree appealed from:

Held, that the appellant was entitled, under section 5 of the Limitation Act, to an extension of time and that the appeal ought to be admitted, even if there was a contributory delay on his part.

Appeal against the order of the District Judge, Hardoi, dated 11th July, 1913, upholding that of the Assistant Collector, Hardoi, dated 12th March 1913.

Babu *Lachman Das*, for the Appellant.

JUDGMENT.—The appeal in this case was dismissed by the Court below on the ground that it was barred by limitation. The decree which was the subject of appeal was passed by the Court of first instance on the 12th March 1913. The application for copies of the judgment and decree was made on the 5th April, 1913. A note made on the copies states that they were ready on the 9th April 1913 and were delivered on 22nd April 1913. This note further says that five days were spent in preparing the copies and making them ready for delivery. The lower Appellate Court, however, finds that wrong copies had been made out and that on the appellant pointing out on the 18th April 1913 that those copies were wrong, fresh copies were made out and given to the appellant on the 22nd April 1913. It is obvious, therefore, that the copies which were ready for delivery on the 9th April 1913 were wrong copies and that the correct copies were not made out and delivered till the 22nd April 1913. The case was, therefore, one in which the delay was caused largely by the mistake of the office in preparing correct copies in the first instance, and even if there was a contributory delay on the part of the appellant it was excused by the circumstances of the case. The Court might well have granted an extension of time under section 5 of the Indian Limitation Act and admitted the appeal. There was sufficient cause for the appellant for not preferring the appeal earlier because the right copies were not ready.

The appeal is, therefore, allowed and the case remanded to the lower Appellate Court with a direction to re-admit the appeal under its original number and to dispose of it in accordance with law. The costs will abide the result.

Appeal allowed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 274 OF 1913.

January 26, 1914.

Present:—Mr. Justice Scott-Smith.

PIR BAKHSH AND OTHERS—DEFENDANTS—PETITIONERS

versus

HIRA LAL—PLAINTIFF—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), s. 25—Revision—Small Cause Court assuming facts without evidence and not receiving written pleas—Landlord and tenant—House fallen in earthquake—Non-liability of tenant for rent.

The judgment of a Court of Small Causes is liable to be set aside on revision under section 25 of Act IX of 1887, if it

(1) assumes the existence of some facts;

(2) refuses to receive and consider the pleas of the defendants;

(3) omits to decide all material points in dispute.

PUTHI *v.* NAND KISHORE.

A tenant cannot be made liable for the rent of the house let to him if it falls on account of earthquake and rain, *i.e.*, through no fault of his.

Petition, under section 25 of Act IX of 1887, for revision of the decree of the Judge, Small Cause Court, Lahore, dated the 14th February, 1913, decreeing the claim.

Mr. *Badr-ud-Din Qurashi*, for the Petitioners.

Mr. *Morrison*, for the Respondent.

JUDGMENT.—It is clear to me that the lower Court has based its decision, in part at least, upon assumptions which it was not warranted to make. At the very beginning of its judgment it says that two decrees about this very house have already been given by the Registrar of the Court. This may be so, but defendants never admitted it.

On 21st November 1912, defendants asked that plaintiff should make it clear what the house was for which he claimed rent. Plaintiff then filed a plan, and defendants' Counsel produces written pleas which he says his clients wanted to put in, but were not allowed to. On 14th February 1913, Pir Bakhsh, defendant, was orally examined and said he was never lessee of the house shown in the plan. He was not asked whether it was for the rent of this house that decrees had been passed against him.

Another plea of defendants was that the house had fallen down on account of earthquake and rain. If it fell through no fault of defendants how are they, therefore, liable for rent?

The parties should be fully examined and it should be decided what points are in dispute between them, and it will be very necessary to decide whether plaintiff claims rent of the house for which rent decrees were previously passed against defendants.

I accept the revision, and seting aside the decree of the Small Cause Court order a re-trial on the merits.

Revision allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1211 OF 1913.

June 26, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

PUTHI—DEFENDANT—APPELLANT

versus

NAND KISHORE—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), ss. 91, 92—Vendor and purchaser—Estoppel—Sale—Consideration, receipt of, acknowledged—Non-receipt, whether can be proved.

After acknowledging the receipt of consideration in the deed of sale a vendor is not estopped from showing that he had not actually received the consideration stated in the deed.

Sah Lall Chand v. *Indarjit*, 22 A. 317; 4 C. W. N. 485; 2 Bom. L. R. 553; 27 I. A. 93; 7 Sar. P. C. J. 702; (P.C.), referred to.

Second appeal from the decision of the District Judge of Agra, dated 2nd Augsust 1913.

Mr. *S. K. Dar*, for the Appellant.

Mr. *Baldeo Ram*, for the Respondent.

JUDGMENT.—This is a second appeal preferred by the defendant in a suit brought by the plaintiff-respondent for possession of immoveable property with mesne profits. On the 15th of November 1911, the defendant by a sale-deed transferred the property in suit to the plaintiff-respondent for the sum of Rs. 1,400. In the body of the deed the vendor recited that he had received payment of Rs. 1,400 by credit to a debt due from him on a mortgage-deed of the 28th of November 1900. After the execution of the deed the plaintiff applied for mutation of names, but the defendant objected. He pleaded that, as a matter of fact, he had not received payment of the consideration in full. The application for mutation was rejected, whereupon the plaintiff brought the present suit for possession. The defendant's case was that, as a matter of fact, Rs. 1,400 was not due from him to the plaintiff on the mortgage-deed, that the parties had agreed that an account should be taken because the plaintiff had, as a matter of fact, paid certain sums towards that debt, and it was agreed that any balance which was found between the sum actually due on the mortgage and the Rs. 1,400 was to be paid to the defendant. The Court of first instance found that the sum of Rs. 400 was due to the defendant from the plaintiff and gave the latter a decree for possession conditional on his paying that sum.

The plaintiff appealed and the lower

Appellate Court allowed the appeal and decreed the claim in full on the ground that sections 91 and 92 of the Indian Evidence Act constituted a bar to the plea raised by the defendant. As a matter of fact the plea raised by the defendant was that the acknowledgment of receipt of consideration as entered in the sale-deed was false, that the sum of Rs. 1,400 had not been paid as that sum was not actually due to the knowledge of the parties on the mortgage-debt.

The point is really covered by decision of their Lordships of the Privy Council in *Sah Lal Chand* v. *Indarjit* (1). In our opinion it was open to the defendants to show that, as a matter of fact, the Rs. 1,400 had not been taken as stated in the sale-deed. In this view we allow the appeal, set aside the decree of the Court below, and as the appeal was dismissed by that Court on a preliminary point we remand the case to the lower Appellate Court with directions to re-admit the appeal upon its original number and proceed to hear and determine the same according to law. Costs will be costs in the cause. Costs in this Court will include fees on the higher scale.

Appeal allowed.

(1) 22 A. 370 (P. C.); 4 C. W. N. 485; 2 Bom. L. R. 553; 27 I. A. 93; 7 Sar. P. C. J. 702.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1082 OF 1911.

July 14, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

AVUDAI AMMAL—DEFENDANT—APPELLANT

versus

GANAPATHI AIYAR AND ANOTHER—PLAINTIFF AND 1st DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 1—Limitation Act (IX of 1908), s. 12 (2)—Appeal presented out of time without copy of judgment—Copy of judgment produced in connected appeal—Delay, when to be excused.

A memorandum of appeal should always be accompanied by a copy of the judgment unless its production is dispensed with by the Court. An appellant is not entitled to a deduction of the time taken in obtaining copies of judgments to be filed in another connected appeal where a judgment is available to the Court at the hearing of the appeal, even if it may have been filed in another appeal. The Court may overlook delay in presentation if there are any merits in the case. Rules of procedure are to subserve the administration of justice and are not to be taken to furnish a means for dealing with the claims of suitors by the application of mechanical tests as a speedy and convenient substitute for adjudication upon merits.

Second appeal against the decree of the District Court of Tinnevelly, in Appeal Suit No. 402 of 1910, preferred against that of the Additional District Munsif of Tinnevelly, in Original Suit No. 343 of 1907.

Mr. *T. R. Ramachandra Aiyar*, for the Appellant.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The learned District Judge dismissed the appeal preferred by the 2nd defendant's legal representative in his Court as barred by limitation. Hence this second appeal by the 2nd defendant's legal representative.

We think that the learned District Judge was right in his view. Order XLI, rule 1, Civil Procedure Code, requires the appeal memorandum to be accompanied by a copy of the judgment "unless the Appellate Court dispenses therewith." No such dispensation was given and hence there was an irregular presentment of the appeal on 27th July 1910 to the District Court. Assuming, however, that the presentation of the copy of the judgment was dispensed with by the Appellate Court the appeal was presented long out of time. The appellant could not claim the deduction of any period as required for obtaining a copy of the judgment, as no time could be required or could have been spent in obtaining copy of the judgment when such copy was dispensed with.

The time spent in obtaining a copy of the same judgment for purposes of filing a different appeal in another suit (though it was a connected suit disposed of with the present suit by a single judgment) cannot legally be excluded in computing the period of limitation for filing this appeal.

An Appellate Court would ordinarily, no doubt, do well to exercise the discretion vested in it by law to excuse the delay in the presentation of an appeal, if copies

of the lower Court's judgment were made available somehow for the use of the Court and of the respondent at a reasonable time before the date fixed for the hearing of the appeal, though no copy was filed with the appeal memorandum, provided that a connected appeal had been filed in time.

But, in this case, the 2nd defendant and his legal representative have no merits in their case in the light of the findings of fact which we have come to in deciding the second appeal heard by us in the connected suit and we are not inclined to assist the 2nd defendants' legal representative in her attempt to non-suit wholly or partially the plaintiff (who has got merits on his side) on the strength of a mere technical defence which she would be entitled to argue if the delay in the presentation of her appeal to the lower Appellate Court be excused.

We dismiss the second appeal with plaintiff's costs.

TYABJI, J.—I agree. The memorandum of appeal to the District Court was presented on the 27th July 1910. It was not accompanied by a copy of the judgment under appeal. Admittedly the District Court did not under Order XLI, rule 1, of the Civil Procedure Code, formally dispense with the necessity for filing a copy of the judgment.

It was argued that the circumstances of this case were not merely such that the copy should have been dispensed with, but that the District Judge should have proceeded on the basis that without any leave having been obtained from him under Order XLI, rule 1, it was necessary to file a copy of the judgment. For there were two suits heard together; there was a common judgment in the two suits; there were appeals in both suits to the same Court; the appeals were numbered consecutively and would in the natural course be heard together. In one of the appeals a copy of the judgment was filed, as required by law. The omission to obtain leave for not filing a second copy of the same judgment in the other appeal may, therefore, be considered so excusable that had the appeal been dismissed on the ground of this omission alone. I should have been very reluctant if inspite of the difficulty and inadvisability of our interfering in such matters lightly the dismissal could not have been set aside by us.

Technical objections, especially in regard to forms of procedure, cannot be utilised for effecting a denial of justice: rules of procedure, as I conceive it, are to subserve the administration of justice and are not to be taken to furnish a means for dealing with the claims of suitors by the application of mechanical tests as a speedy and convenient substitute for adjudication upon merits.

But in this case even if the omission to file a copy of the judgment or to apply that the Court may dispense with the necessity of filing it be condoned, still the memorandum of appeal was itself presented quite out of time, unless all the time that was taken for obtaining a copy of the judgment for being filed in the other appeal be deducted in computing the period of limitation. It may be that if the defence of the appellant to the respondent's suit had been less technical, and if in that case I had had to decide the question for myself I should not have dismissed the appeal on the technical grounds above referred to. But this is a case where the well-recognised principle of a technicality defeating technicality may properly be brought into play. [See per Jessel, M. R., in *Gainsford* v. *Dunn* (1).]

I find, therefore, that like my learned brother I should have come to the same conclusion as the District Judge.

For these reasons, I agree that this appeal should be dismissed with the plaintiff's costs.

Appeal dismissed.

(1) (1874) 17 Eq. 405 at p. 409; 43 L. J. Ch. 403; 30 L. T. 283; 22 W. R. 499.

DEWAN *v.* BUDDHU.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 751 OF 1913.

June 23, 1914.

Present:—Mr. Justice Sundar Lal.

DEWAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BUDDHU AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (*IX of* 1908), *s.* 5—*Appeal filed beyond time—Delay unexplained—Extension of period for filing appeal.*

An appeal was filed before a District Judge beyond time and the only explanation given of the delay was that the papers were made over to a Counsel who returned them after the time for filing the appeal had expired. The Judge admitted the appeal without subjecting the explanation to any scrutiny:

Held, on second appeal, that as the lower Appellate Court did not exercise its discretion upon proper materials the High Court was competent to exercise its discretion and that the explanation given of the delay was not sufficient within the meaning of section 5 of the Limitation Act.

Second appeal from the decision of the District Judge of Meerut, dated 29th March 1913.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Appellants.

Mr. *Nihal Chand*, for the Respondents.

JUDGMENT.—This is an appeal arising out of a suit for damages for malicious prosecution in respect of a charge made by defendant No. 1 against the plaintiffs under section 347, Indian Penal Code. The other defendants are said to be the instigators and abettors of the charge. The claim was laid at Rs. 1,142. The Court of first instance found that the charge was false and groundless and made maliciously and without reasonable and probable cause. It decreed the claim for Rs. 305 on account of damages.

The learned Judge in appeal reversed the decree of the learned Subordinate Judge and has dismissed the suit.

The plaintiffs have appealed to this Court. The first ground raised in the appeal is that the appeal filed by the defendants in the Court below was filed long after the expiration of the period of limitation prescribed by law for the institution of appeals and that no explanation was given for the delay in the institution thereof which in law could be regarded as sufficient and adequate under section 5 of the Limitation Act of 1908. Now the facts of the case, so far as they bear on this point are as follows: The learned Subordinate Judge pronounced his judgment in the case on 2nd December 1912 and a decree bearing that date was prepared in accordance with law.

Applications for copies of the judgment and the decree in the case were made on 9th December 1912, and the copies were ready for delivery and posted on the notice board on 10th December 1912. Mr. Weston had appeared as Counsel for the defence in the Court of the Subordinate Judge, and it appears from the affidavit filed by the Rev. H. T. Thomas, that the defendants instructed Mr. Weston to file an appeal against the said decree. The papers were delivered to him and a sum of Rs. 40 was paid to him on 20th December 1912. It is not stated whether this amount was paid on account of the costs of the appeal or on account of Counsel's fee or both. The time for filing the appeal expired on 3rd January 1913, but no appeal was actually filed before that date. There is no explanation whatever given as to why the appeal was not filed by Mr. Weston, nor has it been stated whether the appellants took any steps to ascertain whether their appeal had been filed before the end of January. It appears from the affidavit of the Rev. Mr. Thomas that at about the end of January an inquiry was made of Mr. Weston as to the date fixed for the hearing of the appeal, and in reply a letter which was said to bear date 1st January 1913, but was really written on 1st February 1913 was sent intimating that the appeal had not been filed, and that the sum of Rs. 40 paid was being refunded by money order. The money order was received on the 3rd February 1913. The letter of Mr. Weston has not been produced. It is stated in the affidavit that one Lal Mohammad was sent to Mr. Weston to ascertain from him in detail the circumstances under which Mr. Weston had not filed the appeal. Whether Lal Mohammad saw Mr. Weston or not and whether the latter gave any and what explanation for his act, we do not know. Neither Mr. Weston nor Lal Mohammad filed any affidavit, nor even the appellants themselves on the point. There is no statement on their behalf as to whether they themselves took any interest in their proposed appeal. From 3rd to 12th February 1913 efforts were made to secure the service of some Counsel or Pleader to file the time

barred appeal, which was ultimately filed 37 days beyond time with the affidavit of Rev. Mr. Thomas to which I have already referred. The learned Judge made an *ex parte* order admitting the appeal under section 5 of the Limitation Act which he affirmed at the hearing of the appeal. No reasons are given in the said orders for excusing this long delay in the institution of the appeal. The time prescribed for filing an appeal to the District Judge from the decree of the Subordinate Judge is 30 days. Giving the defendants the benefit of two days more spent in obtaining copies of the decree and the judgment appealed against, they had time up to 3rd January 1913. The mystery remains unexplained as to why the appeal was not filed. It may be, as Dr. Tej Bahadur Sapru suggests, that Mr. Weston had not much faith in the appeal, as it appears from a statement made in the judgment of the Court of first instance that "Defendants' learned Counsel (Mr. Weston) frankly admitted that there was absolutely no proof on the record to rebut the evidence adduced by the plaintiff as regards issue No. 1" (whether the complaint filed by defendant No. 1 was false and malicious and without reasonable and probable cause). It is not stated what Mr. Weston's instructions were, whether he was to file the appeal only if he thought there was a fair chance of success, or to file it regardless of the possible result. I cannot understand a member of the Bar of Mr. Weston's position not filing the appeal, unless his instructions justified him in not filing in the circumstances of this case. It is not suggested that there was any misapprehension on the part of Mr. Weston as to the time within which the appeal ought to have been lodged, or that the defendants were misled by anything done by the plaintiffs-appellants. Quoting Lord Davey from another case, Collins, M. R., made the following observations in *In re Coles and Ravenshear* (1): "Upon the question whether time ought to be extended, speaking for myself I am inclined to adopt the view of the late James, L. J., that a party has a vested right in an order of the Court in his favour, and ought not to be deprived of an advantage given to him by the rules, 'unless there has been on his part some conduct raising an equity against him', or in a case of 'inevitable accident.'" As observed by Chief Justice Jenkins in *Karsondas Dharamsey* v. *Bai Gungabai* (2): "When the time for appealing is once passed a very valuable right is secured to the successful litigant, and the Court must, therefore, be fully satisfied of the justice of the grounds on which it is sought to obtain an extension of the time for attacking the decree, and thus perhaps depriving the successful litigant of the advantages which he has obtained." It was, therefore, for the defendants to make out very cogent grounds for excusing this long delay. It might be perhaps suggested that they had done all they had to do on their part in handing over the papers to Mr. Weston and supplying him with the necessary costs for filing the appeal, and that it was due to the accident of Mr. Weston either carelessly or deliberately not filing the appeal. But it has not been stated what Mr. Weston's instructions were. I cannot impute any negligence, or carelessness on the part of Mr. Weston, on the materials now on the record.

The learned Judge of the Court below did not apparently subject the explanation of the delay to any scrutiny. It appears that on 7th December 1912, he had held in a complaint filed by one Bishambher Sahai against Budhu under section 211, Indian Penal Code, which had resulted in a conviction of the latter, that there were no grounds for such conviction. He had held that Budhu was not able to prove his criminal charge against the present defendants and Bishambher Sahai and reversed the conviction of Budhu in appeal. He was already pre-disposed to consider Budhu's case favourably, and he admitted the appeal without much scrutiny and on the appeal coming on for hearing he admitted a copy of his judgment in the criminal appeal, as he says, "*to save a remand*". That judgment was no evidence against the present appellants, either of the facts found in that case or of the conclusions at which the Judge had finally arrived. The case of *Collector of Gorakhpur* v. *Palakhdhari Singh* (3) points out the limits within which a judgment not *inter partes* might be used. He took it in only to save a remand (I presume for the purpose of supplying evidence in justification of the

(1) (1907) 1 K. B. 1; 76 L. J. K. B. 27; 95 L. T. 750; 23 T. L. R. 32.

(2) 30 B. 329 at p. 330; 7 Bom. L. R. 965.

(3) 12 A. 1.

charge, which did not exist on the record). I have no hesitation in holding that the explanation given of the delay in filing the appeal was utterly inadequate.

The only question which has pressed itself on my attention is, whether I should now in appeal set aside the order of the learned Judge admitting the appeal and excusing the delay.

If the learned Judge had really exercised a discretion upon proper materials, I should not have re-considered the matter at all. It is evident from what I have already said that the learned Judge had not really applied his mind to consider the explanation of the delay in presenting the appeal after 3rd January 1913. No explanation was given to him as to why Mr. Weston had not filed the appeal within time. He had, therefore, no opportunity of considering the sufficiency or otherwise of the reasons for that fact. They were as unexplained to him as they are to me. In the absence of any explanation of this fact, I think, that he was, as I am, bound to reject the appeal as time-barred.

I, therefore, set aside the decree of the lower Appellate Court and reject the appeal to that Court as time-barred. I restore the decree of the Court of first instance with costs in all Courts which in this Court will include Counsel's fee on the higher scale.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 864 OF 1913.

June 17, 1914.

Present:—Mr. Justice Piggott.

GANESH TEWARI AND OTHERS—DEFENDANTS—APPELLANTS

versus

SALIK PANDE—PLAINTIFF—RESPONDENT.

U. P. Land Revenue Act (III of 1901), s. 233 (k)—Partition—No objection as to proprietary title—Jurisdiction of Civil Court.

A co-sharer in a certain *mahal* brought a suit in the Civil Court for joint possession of a plot of land against his co-sharers. Before the institution of his suit, another co-sharer had made an application for partition. Notice was issued to co-sharers including the plaintiff to raise objections. The plaintiff did not raise any objection:

Held, that his suit in the Civil Court became barred by section 233 (*k*) of the Land Revenue Act.

Second appeal from the decision of the District Judge of Ghazipore, dated the 16th April 1913.

FACTS.—On the 24th of September 1912 the plaintiffs sued for a declaration that they were in joint possession of certain occupancy holdings and of the site of a house. In the alternative they prayed for joint possession. It appears that prior to this suit, the defendant No. 1 had put in an application for partition on 20th March 1912. Both the Courts below decreed the suit.

Mr. *Peare Lal Banerji* (with him Mr. *M. L. Agarwala*), for the Defendants-Appellants.—Section 233 (*k*) of the Land Revenue Act (III of 1901) bars the present suit and the Civil Court is not competent to entertain it, inasmuch as partition proceedings in respect of the property in dispute are going on in the Revenue Court. If the present suit is successful, it will materially interfere with the decision of the Revenue Court and will thus frustrate the object of partition. Under section 117 of the Land Revenue Act, it is open to the Revenue Court to distribute the land as seems convenient to it.

He relied on *Nathi Mal* v. *Tej Singh* (1).

Mr. *Surendra Nath Sen*, for the Respondents, contended that in the present case section 233 (*k*) was inapplicable, inasmuch as the proprietary title was never denied. The jurisdiction of the Revenue Court can in no way be ousted because the Civil Court's decision cannot affect the partition. There is no provision in the Land Revenue Act which precludes the Civil Court from entertaining a suit for joint possession. So long as the civil suit does not affect the partition, it is maintainable even though partition proceedings are in progress.

Mr. *P. L. Banerji* was not heard in reply.

JUDGMENT.—The suit out of which this appeal arises was one in which a single co-sharer in a *mahal* sued the remaining co-sharers in order to enforce certain alleged rights. It appears that there was in the *mahal* in question an occupancy holding belonging to one *Musammat* Samundra Kuar

(1) 29 A. 634; 4 A. L. J. 573; A. W. N. (1907) 193.

who also occupied as an appurtenance to her holding a house situated in the same *mahal*. This *Musammat* Samundra Kuar appears to have entered into a bargain with one of the co-sharers, namely, the 1st defendant in this suit, and executed in his favour what purports to be a sale-deed of her occupancy holding and of her house. Apparently the remaining co-sharers are related to defendant No. 1 and are acting with him in this matter, for the plaintiff says that they refused to join in the present suit. The plaintiff comes into Court claiming either a declaration that he is jointly in possession with all the defendants of the plots of land which formed the occupancy holding of *Musammat* Samundra Kuar and the site of her house, or in the alternative a decree for joint possession of the same. He has got a decree for joint possession. Defendant No. 1 and some other defendants have appealed to this Court. The present suit was instituted on September the 24th, 1912. On March the 20th, 1912, an application for a partition of this *mahal* had been filed in a Revenue Court by Ganesh Tewari, defendant No. 1, and notices had been issued to the other co-sharers to appear and present objections in the usual manner. No objection had been filed by the plaintiff in the Revenue Court and, as a matter of fact, no question of proprietary title really arises in the present suit. The plaintiff's case in this suit is that certain co-sharers have secured possession in severalty of certain land which ought to be held jointly by all the co-sharers in the *mahal*. I am clearly of opinion that the present suit was barred after Ganesh Tewari's application for partition had been presented and notices issued accordingly. The plaintiff's object in the matter is sufficiently clear. In making this partition the Assistant Collector, acting under section 117 of the Land Revenue Act, must necessarily begin by ascertaining what lands in the *mahal* are held in severalty by different co-sharers. The lands in suit in this case are apparently held in severalty by some or all of the defendants. This is apparent because plaintiff has been given a decree for recovery of joint possession and not a simple declaration. The partition would then have to proceed in accordance with the actual possession of the defendants, subject only to the provisions of section 125 of the Land Revenue Act. The whole object of the present suit is to prevent this. The plaintiff's desire is, if possible, by executing this decree to get back into joint possession with all the other co-sharers of the lands referred to in the plaint, so that they may not be treated during the partition as held in severalty by some co-sharer or co-sharers other than himself. He is, therefore, in my opinion, bringing a suit in respect of the partition of a *mahal* within the meaning of section 233, clause (*k*), of the Land Revenue Act. A wide interpretation has been placed upon these words by this Court in several rulings, as for instance in *Nathi Mal* v. *Tej Singh* (1). The present case seems to me a stronger one against the plaintiff than the case above referred to. The effect of the execution of this present decree for joint possession, while the partition proceedings are going on, might be of the most undesirable nature and might lead directly to a serious conflict of jurisdiction. Once an application for partition had been instituted before a Revenue Court the apportionment of the various lands of the *mahal* amongst different co-sharers became a matter peculiarly within the jurisdiction of that Court under the provisions of the Land Revenue Act and the Civil Court is, in my opinion, precluded from interfering. For these reasons I accept this appeal, and setting aside the decrees of both the Courts below, I dismiss this suit with costs throughout including in this Court fees on the higher scale.

Appeal allowed.

(1) 29 A. 604; 4 A. L. J. 578; A. W. N. (1907) 190.

MAHADEO SINGH *v.* JAGMOHAN SINGH.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 459 OF 1911.

December 19, 1913.

Present:—Mr. Stuart, A. J. C.

MAHADEO SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JAGMOHAN SINGH—PLAINTIFF—RESPONDENT.

Mutation proceedings, nature of—Compromise in mutation proceedings—Registration—Statement—Evidence—Admissibility—Claim withdrawn in mutation proceedings—Estoppel—Declaratory suit.

The Revenue Courts refused to enter in the *khewat* the name of the plaintiff's predecessor-in-interest, first in 1891 and then in 1897, not on the ground of his title to a share in the property being denied but because the extent of the share could not be ascertained. A similar entry in favour of the plaintiff was refused in 1906, but in 1910 there was a compromise arrived at between the plaintiff and the defendants by which the former's name was entered in respect of half of the share that he claimed. Subsequently in 1911 the plaintiff brought a suit in the Civil Court for a declaration that he was also entitled to the remaining half share. The defendants pleaded that the suit was barred by limitation:

Held, that the suit was within time.

An *unregistered* compromise presented before a Revenue Court conducting proceedings in mutation of names and correction of *khewat*, is not admissible in evidence, because the Court does not in that capacity exercise judicial, but executive, functions. The statement made by a party in such proceedings is, however, so admissible.

A party withdrawing a portion, and accepting only the rest, of his claim in mutation proceedings is not estopped from subsequently suing for a declaration that he is entitled to the portion thus withdrawn, if the opposite party has, in no way, been thereby prejudiced, inasmuch as the withdrawal was not made in judicial proceedings.

Appeal against an order of the District Judge, Fyzabad, dated 6th September 1911, upholding that of the Officiating Sub-Judge, Fyzabad, dated 6th June 1911.

Babus *Surendro Nath Roy* and *Rudra Dat Sinha*, for the Appellants.

Babu *Hari Kishun Dhaon* and *Pandit Gokaran Nath Misra*, for the Respondent.

JUDGMENT.—The appellants and the plaintiff-respondent are members of a family, which is descended from a certain Ugra Sen to whom were born seven sons. Four of these sons died without issue. The remaining three sons, whose names were Prem Chand, Sujan Singh and Bhagwant Singh, founded three distinct branches of the family. The Prem Chand line was sub-divided into two branches, one founded by a certain Durjan and the other by Damodar. The branch founded by Damodar was sub-divided again into two branches one found by Ram Dingur and the other founded by Govind. The respondent belongs to the Ram Dingur branch and the appellants belong to the Govind branch. At the Summary Settlement of 1856 a certain share was entered in the name of Sukhnandan Singh of the Ram Dingur branch, who was respondent's grandfather's brother. But in 1874 Kripal of the Govind branch obtained at the time of the Regular Settlement a decree for the entry of his name with regard to the whole property of the family. The respondent's assertion is that this decree, although given nominally to Kripal alone, was given to him actually on behalf of all members of the family, and that first the respondent's predecessors-in-interest and then he himself remained in possession of the share which was entered in the name of Sukhnandan Singh in 1856, although until recently they were unable to obtain an entry in the regular revenue papers, showing their possession over any portion of the share. His suit was for a declaration of ownership over the aforesaid share. The learned Subordinate Judge decreed his claim for declaration, and the learned District Judge has upheld this decree in first appeal.

The appeal has been argued on four points only. The remaining points raised in the grounds of appeal were withdrawn. These four points are:—

1. That the suit is barred by limitation.
2. That the decree obtained by Kripal was for his sole benefit and not for the benefit of the other members of the family.
3. That on the pedigree set up by the plaintiff-respondent his suit fails.
4. That the plaintiff-respondent is estopped by his own action from making his claim.

On the first point I find that there has been no entry in the revenue papers in the names of the respondent's predecessors-in-interest or his name till the year 1910. On the 19th January 1889 Raghubar Singh, the son of Sukhnandan Singh, applied for an alteration in the revenue papers and for the entry of his name. His application was

finally rejected by the Revenue Courts on the 14th December 1891. In 1897 the appellants applied for entry of their names in the place of the name of their deceased uncle Lakhpati Singh. Raghubar Singh objected. His objection was finally dismissed on the 19th August 1897. It is to be noted that in these proceedings before the Revenue Court the title of Raghubar Singh to a share in the property was not denied. The Revenue Courts refused to enter his name because they were unable to find the extent of his share. On the 28th August 1905 the plaintiff-respondent applied for correction of the *khewat* and entry of his name. His application was finally dismissed by the Revenue Courts on the 28th July 1906; but even if this dismissal were considered to give him a cause of action for institution of the present suit, the present suit would be within time. Subsequently in February, 1910, he again applied to the Revenue Courts for amendment of the *khewat*. The appellants then agreed to the entry of his name with regard to one-half of the share which he now claims. His name was accordingly entered with respect to this one-half. Not being satisfied with the entry of his name with respect to one-half he instituted the present suit. My finding is that the suit is not barred by limitation. I decide that the proceedings instituted by the plaintiff-respondent similarly cannot place his case beyond limitation. On the second point I find that it is clearly proved that the decree which was obtained by Kripal was not a decree for his personal benefit but for his benefit as representative of the family. The appeal fails, therefore, on the second point. On the third point it is sufficient to note that the plaintiff-respondent is proved to be the sole heir of Sukhnandan Singh and as the claim is for the share that originally stood in the name of Sukhnandan Singh the plaintiff-respondent must succeed as against the appellants upon this point. The last question to be decided is that of estoppel. I agree with the learned Subordinate Judge that the actual compromise of 1910 which was presented not before a Court exercising judicial functions but before a Revenue Officer exercising executive functions, is not admissible in evidence owing to the fact that it has not been registered. The statement of the plaintiff-respondent made in those proceedings is admissible in evidence. It is to the effect that, although his share in the disputed property was correctly entered in his application for mutation, he was ready nevertheless to withdraw a portion of his claim and to accept the entry of his name with regard to half that share only. I do not consider that this withdrawal can be held to estop him from claiming a declaration as to his ownership over the remainder. The withdrawal was not made in judicial proceedings. It was made with respect to an application to a Revenue Officer exercising non-judicial functions. I am unable to find that the appellants were in any way prejudiced by the action of the plaintiff-respondent in this matter. In no way can the plaintiff-respondent be considred to be estopped in consequence. These are the points which have been urged during the hearing of this appeal; all others have been abandoned. As the appeal fails on these points, I direct that it must be dismissed and that the appellants pay their own costs and those of the plaintiff-respondent.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 1100 OF 1911.

July 16, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Scott-Smith.

BAHADUR CHAND—DEFENDANT—APPELLANT

versus

NAINA MAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Mitakshara—*Alienation by father—Suit by son for possession—Limitation to run from possession by vendee—Possession, how taken.*

In a suit under the *Mitakshara* Law for possession of land by annulment of illegal sales by his father, the son's only cause of action is the taking of possession by the vendee of what was the son's joint share of the family property, and his suit ought to be brought within 12 years of such adverse possession.

It is not necessary in order to obtain possession that the purchaser should step on to the land at all. The physical possibility of the buyer dealing with the thing exclusively as his own is all that is necessary.

First appeal from the decree of the District Judge, Lyallpur, dated the 21st August 1911, decreeing plaintiffs' claim.

The Hon'ble Mr. *Muhammad Shafi*, K. B., and Rai Bahadur Pandit *Sheo Narain* and Lala *Sangam Lal*, for the Appellant.

BAHADUR CHAND *v.* NAINA MAL.

Mr. *Oertel*, for the Respondents

JUDGMENT.—This was a suit by the plaintiffs-respondents for possession of certain land sold by their father, Jhanda Mal, to Bahadur Chand, defendant-appellant, by a registered deed on the 3rd of August 1893. The deed recites that the full consideration, Rs. 400, has been paid and that possession has been given to the vendee. A number of issues were framed by the first Court, but the important ones dealt with the questions of limitation and necessity for the sale. The finding of the Court was that the suit was within time having been brought within 12 years from the time when the vendee obtained possession of the land sold. The Court further found that necessity for the sale was not proved and gave the plaintiffs a decree for possession.

The defendant has appealed and the only point argued before us is whether the suit is barred by limitation. It is admitted now that the parties are governed by Hindu Law and that the land sold was the ancestral property of the plaintiffs' father. The first question which we have to decide is, when did the vendee obtain possession of the land sold? The sale, as already stated, took place on the 3rd of August 1893. On the 13th of August 1893 an entry was made in the mutation register to the effect that Jhanda had sold the land to Bahadur Chand. At first mutation was refused on the ground that the land was unculturable and the vendee had not taken *physical* possession of it. Subsequently, however, on the 1st of May 1894, mutation was sanctioned on the ground that the vendor had admitted the transfer of possession and the sale had been completed. No cultivation of the land took place until the year 1904 and the lower Court is of opinion that possession of it was not taken until then. Mr. Shafi argues that, as the land was waste, the execution of the deed and the admission therein that possession had been given to the vendee were quite sufficient to transfer possession, and that it was not necessary for the vendee to do anything further. He urges that in the case of waste land possession goes with the title and in support of his contention he has referred us to the following rulings: *Muhammad Yar* v. *Ghulam* (1), *Ramzan Ali* v. *Basharat Ali* (2) and *Shahabal Shah* v. *Ganesh Das* (3). These rulings, however, do not help him very much. They were cases in which it was held that a mere failure to cultivate waste land did not of itself constitute abandonment. Similarly *Chokkalinga Naicken* v. *Muthusami Naicken* (4), quoted by him, does not appear to be in point.

Mr. Oertel for the respondents urges that it was necessary for the vendee to go to the village where the land is situated and to signify in some way, which he does not clearly specify, that he had taken possession of the land. He does not, however, refer us to any authority and we can see no good reason for holding that in the case of waste land it is necessary for the vendee to go to the place where the land is situated. No doubt in order to take *physical* possession of the land it is necessary for a transferee to do something more than to merely obtain a deed in his favour, but we have only to consider when the purchaser took possession, not *physical* possession, of the land. In Markby's Elements of Law, sixth Edition, in Article 354, we find the following: "Corporal contact, therefore, is not the physical element which is involved in the conception of possession. It is rather the possibility of dealing with a thing as we like, and of excluding others." Again in Article 356 we find the following: "It is not necessary in order to obtain possession that the purchaser should step on to the land at all. The physical possibility of the buyer dealing with the thing exclusively as his own is all that is necessary." Hassan *Lamberdar*, a witness for the defendant, stated that he realised the *kharif* revenue for 1893 from Bahadur Chand (see page 65 of the paper-book). We see no reason to doubt this, and applying the principles set forth above we hold that the vendee took possession of the property sold on the date of the sale.

The next question is, what Article of the Limitation Act applies to this suit? Mr. Shafi argues that Article 126 of the first Schedule applies. That Article deals with suits by a Hindu governed by the law of the *Mitakshara* to set aside his father's alienation of ancestral property, and the limitation prescribed is 12 years from the date when the alienee takes possession of the property. Mr. Oertel, on the other hand, urges that Article 140 or Article 144 applies. Now we

(1) 49 P. R. 1884.
(2) 105 P. R. 1901.
(3) 53 P. R. 1907; 39 P. L. R. 1907.
(4) 21 M. 53.

may say at once that Article 140 does not apply, for the plaintiffs in this case do not come within the meaning of the words "a remainderman or a reversioner." Being members with their father of a joint Hindu family they were co-parceners in the property sold. Article 126 does not in terms apply, because the present suit is not one to set aside an alienation but is one for possession of the property alienated. We do not think it necessary to decide definitely whether Article 126 applies or not, for, in our opinion, even if Article 144 applies, the plaintiffs' claim is barred by time. We have already held that Bahadur Chand obtained possession of the land sold on the 3rd of August 1893. This possession was undoubtedly adverse to the vendor. In *Radhabai* v. *Anantrav Bhagvant* (5) it was held that in the ordinary case of property, whether self-acquired or ancestral, held by a Hindu father as ostensible owner, adverse possession against the father bars also the son. In *Musammat Poonheet Koer* v. *Bibee Kishen Kishore Narain Singh* (6) it was held that in a suit under the *Mitakshara* Law for possession of land by annulment of illegal sales by his father the plaintiff's only cause of action is the taking possession by the defendant of what was the son's joint share of the family property, and his suit ought to be brought within 12 years of such adverse possession.

Mr. Oertel referred us to *Roda* v. *Hirnam* (7), wherein it was held that the plaintiff's suit for recovery of ancestral land alienated by the last male owner was within time, inasmuch as it was brought within 12 years of the date when the defendant's possession became adverse to the plaintiff, such date being the date of the death of the last owner and no earlier. In that case, however, the parties were governed by Customary Law and the authority, therefore, is of no use to the present plaintiffs. We, therefore, hold that the plaintiff's claim is time-barred having been brought more than 12 years after the date on which the defendant obtained possession of the land sold, such possession having been obtained on the date of the sale and having been since then adverse to them.

(5) 9 B. 198 at p. 224.
(6) 23 W. R. 419.
(7) 18 P. R. 1895 (F. B.).

We accept the appeal and setting aside the order of the lower Court, dismiss the plaintiffs' claim with costs in both the Courts.

Appeal accepted.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 110 OF 1912.

January 27, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

KISHORBHAI REVADAS—PLAINTIFF—APPELLANT

versus

RANCHHODIA DHULIA AND OTHERS—DEFENDANTS—RESPONDENTS.

Probate—Revocation—Fraud and collusion—Revocation not allowed—Evidence Act (I of 1872), s. 44—Party applying for revocation barred in subsequent suit for recovery of property of deceased—Locus standi of debtor of deceased to challenge probate—Power of Subordinate Judge to decide questions of probate.

Where the application for revocation of probate on the ground of fraud and collusion has been dismissed by the District Court, the party applying will be barred by the decision in the revocation matter from raising again the same question in a suit by the executor to recover the estate to which the probate relates.

Where demand is made by the executor claiming title under an unrevoked probate, a debtor to the estate has no answer, unless possibly he is sued in a Court having jurisdiction to revoke the probate.

A Subordinate Judge's Court has no jurisdiction to deal with the question of probate.

Quære.—Whether a debtor of the deceased and one who holds property admittedly forming part of the estate would have any *locus standi* in applying to the District Court for revocation of the probate?

Second appeal from the decision of the Small Cause Court Judge with appellate powers, in Appeal No. 214 of 1909, confirming the decree passed by the Subordinate Judge at Umreth, in Civil Suit No. 491 of 1907.

Mr. *Jayakar* (with him Mr. *B. F. Dastur*), for the Appellant.

Mr. *V. J. Patel* (with him Mr. *M. K. Mehta*), for the Respondent.

JUDGMENT.—This suit was instituted by Kishorbhai Revadas, the executor, who had obtained probate of the Will of Jijibhai Kasandas, to recover from the first defendant Rs. 144 as rent of certain fields occupied by him as yearly tenant and possession of those fields.

The defence of the first defendant was the

the deceased Jijibhai had asked him to pay the rent to his nephew Jivabhai, who was the second defendant in the case, and the second defendant Jivabhai contended that the deceased made no Will and that the Will proved was fabrication.

The second defendant prior to the institution of this suit on the 2nd of March 1905 made an application to the District Court for revocation of the probate granted to the plaintiff upon the ground that the Will was a forgery, and that he (the second defendant) had been prepared to prove it in the probate proceedings, but at the last moment the plaintiff had bought him off, and that a mutual arrangement had been effected whereby the second defendant agreed not to cross-examine the plaintiff's witnesses and to call evidence and thus facilitated the grant of probate to the plaintiff who would otherwise have been prosecuted for forgery on the strength of the Mamlatdar's report, and in consideration of the withdrawal of his opposition the plaintiff agreed to restore the property of the deceased to him (the second defendant), or to pay the equivalent in cash directly the probate had been granted, but after the order had been passed the plaintiff declined to carry out his part of the arrangement and thus committed a fraud on the one hand upon the Court and on the other on him (the 2nd defendant) and that, therefore, the probate should be revoked. The application for revocation was disposed of by the District Court on the ground that the second defendant on his own showing was a party to a fraud upon the Court, that he had not come with clean hands and was not, therefore, entitled to the relief sought.

The first defendant, as I have stated, claims to be entitled to pay rent for the property to the second defendant. He, therefore, claims under him since the death of the testator.

The second defendant in this suit has taken advantage of the first defendant claiming under him to put forward the same grounds as he put forward in the application for revocation, and the Subordinate Judge who tried the case in the first instance, and the Subordinate Judge, with appellate powers, who tried the case in appeal, having gone into the questions of fraud, which the District Court declined to entertain upon the revocation application, have found that the Will was a forgery, and that the probate granted by the District Court is of no avail to enable the plaintiff to recover from the first defendant the property of the deceased.

This investigation was permitted in the lower Courts upon the strength of section 44 of the Evidence Act which states that "Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under sections 40, 41 or 42 and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

Now the party who seeks to prove the fraud and collusion vitiating the decree of the Probate Court, under which probate was granted to the plaintiff, is the second defendant, and the second defendant has already raised that question in the only Court which was competent to decide it, namely, the District Court, for the Subordinate Judges who tried the present case have no jurisdiction in probate matters, and the Court competent to decide it dismissed the application, for the reasons which I have already stated. It was an application in the nature of a suit, as all contested probate proceedings are, and the decision could have been appealed from by the second defendant, and if the learned District Judge was held to be wrong in rejecting the application upon the grounds upon which he had rejected it, the result would have been that those allegations of fraud would have been investigated by a Court competent to give effect to its findings. The second defendant, therefore, is, we think, barred by the decision of the District Court in the revocation matter from raising again the same question in the Court of the Subordinate Judge.

As regards the first defendant, he does not raise these questions by his pleading, although he has made common cause with the second defendant in his defence. As regards him, it is not disputed that he is in possession of property forming part of the estate of the deceased, and the plaintiff seeks to recover possession of that property for the estate as its representative. The defendant does not dispute that he is liable to pay rent for his occupation at a rate which is not exceeded in the demand in this suit.

Now, where the demand is made by the executor claiming title under an unrevoked probate, a debtor to the estate has no answer,

unless possibly he is sued in a Court having jurisdiction to revoke the probate. What would have been the result of this common defence if it had been put forward in the District Court is a question which is not free from difficulty and which we have not to decide in the present case. But we think it is clear that in the Subordinate Judge's Court, which has no jurisdiction to deal with the question of probate, the title of the plaintiff was conclusively proved by the production of the probate, and it was no valid defence on the part of the first defendant to join in the allegation of the second defendant that the Will was a forgery and that the probate had been obtained by fraud and deception.

Section 59 of the Probate Act says that "Probate shall be conclusive as to the representative title against all debtors of the deceased and all persons holding property which belongs to him, and shall afford full indemnity to all debtors paying their debts and all persons delivering up such property to the person to whom such Probate or Letters of Administration shall have been granted." Therefore, the first defendant in complying with the demands of the plaintiff would have been fully indemnified as against all persons entitled to share in the estate of the deceased.

The English cases afford illustrations of the rule stated in section 59 of the Probate Act. *Allen* v. *Dundas* (1) decides that "Payment of money to an executor who has obtained probate of a forged Will, is a discharge to the debtor of the intestate, notwithstanding the probate be afterwards declared null and administration be granted to the intestate's next of kin. A probate, as long as it remains unrepealed, cannot be impeached in the temporal Courts."

In *Attorney-General* v. *Partington* (2) Mr. Justice Willes says:—"It is only necessary to bear in mind the nature of such a grant as the act of a Court of sole jurisdiction pronouncing as to personal property to the exclusion of all other Courts,.....upon the question of testacy and intestacy, and upon the right to receive and distribute the effects of the deceased in the event of intestacy, whether total or partial. Without the *constat* of such a Court no other Court can take notice of the rights of representations to personal property; and when such Court has by the grant of Probate or Letters o Administration established the right, no other Court can permit it to be gainsayed." The last words of that quotation seem to us to be applicable to the case of a grant of probate by the District Court, which it is attempted to challenge in the Court of a Subordinate Judge. In *In re Ivory*; *Hankin* v. *Turner* (3) Letters of Administration of the estate of an intestate were granted *ex parte* to the defendant, as "his natural and lawful brother of the half blood." The plaintiff, who was an uncle of the intestate, then commenced an action in the Chancery Division for the administration of the estate, alleging that the defendant was illegitimate, and that he himself was next of kin; and moved for a Receiver and an injunction. It was held by Lush, J., "that the application must be refused, for that as long as the Letters of Administration remained in force they were conclusive evidence that the defendant was one of the next of kin, and that the plaintiff's proper course of procedure was to apply in the Probate Division to have them recalled."

Whether a debtor of the deceased and one who holds property admittedly forming part of the estate would have any *locus standi* in applying to the District Court for revocation of the probate we need not decide. As regards the second defendant, although he had a *locus standi* to make an application, his right is now at an end by reason of the unsuccessful result of his application for revocation. That being so, it appears to us that the first defendant has no defence to this suit. He will be completely indemnified by paying and delivering over the property to the plaintiff, and it is a pity that under the circumstances he should have thought fit to make common cause with the second defendant.

We reverse the decree of the lower Court and pass a decree for the sum claimed and for possession of the property in suit against the first defendant, with costs throughout payable by both defendants.

Decree reversed.

(1) (1789) 3 T. R. 125; 1 R. R. 666; 100 E. R. 490.

(2) (1864) 3 H. & C. 193 at p. 204; 33 L. J. Ex. 281; 10 Jur. (N. S.) 825; 10 L. T. (N. S.) 751; 13 W. R. 54; 140 R. R. 389.

(3) (1878) 10 Ch. D. 372; 39 L. T. 611; 27 W. R. 20.

SRI RAM v. MUHAMMAD-UD-DIN.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 830 OF 1913.
June 17, 1914.
Present:—Mr. Justice Piggott.
SRI RAM *alias* SIRYA—DEFENDANT—APPELLANT
versus
MUHAMMAD-UD-DIN—PLAINTIFF—RESPONDENT.

Landlord and tenant—Acquisition of proprietary rights by tenant—Status of tenant not changed qua holding.

A purchase by a tenant of land or of a fractional share in a village does not convert him into a proprietor of that land or abolish the proprietary right therein of the other co-sharers.

Mah bir Singh v. *Ashan Ullah*, A. W. N. (1901) 53, followed.

Second appeal from the decision of the Additional Judge of Moradabad, dated 24th April 1913.

Mr. *Hamilton*, for the Appellant.

Mr. *A. Haider*, for the Respondent.

JUDGMENT.—In this case the father of the plaintiff gave a lease of certain specified plots of land to two persons, Behari and Baldeo. It does not appear to have been denied in this litigation, and in any case is proved by the statement of the *Patwari*, a witness strongly hostile to the plaintiff, that the plaintiff's father and the plaintiff after him was solely entitled to collect the rents of these plots of land and could, therefore, give a lease of the same. When the period of lease had expired the tenants gave no relinquishment and have been found by the lower Appellate Court to have continued to hold on. Baldeo has died leaving two sons who are impleaded in this suit as having succeeded to Baldeo in the tenancy. Behari has a son Sri Ram, *alias* Sirya, who has been impleaded under peculiar circumstances. The plaintiff's case is that the said Sirya has acquired by purchase a share in the *milk* to which the plots of land in suit appertain, that he has been let into possession of these plots by collusion with his father Behari, and that the *Patwari* has been induced to record these plots as the *khudkasht* holding of Sirya. The plaintiff accordingly sues to eject Sirya along with the other tenants. Sirya alone has contested the case. He says in his written statement that he has purchased the proprietary rights in the plots in suit by a registered sale-deed, and that this purchase was taken under such circumstances that the plaintiff is estopped from denying the same. This plea entirely broke down. Not only has Sirya not produced the sale-deed on which he relies, but the evidence of the *Patwari* is sufficient to show that what Sirya has purchased is a share in the *zemindari* rights of this *milk* which does not cover the plots of land in suit. According to the *Patwari* the land in suit appertains to a *milk*, which ordinarily means a number of plots of land owned individually as such by particular co-sharers outside of any regular *patti* or *mahal*. It would have been interesting to know whether the appellant's sale-deed purported to convey to him proprietary rights in specified plots, or in a specified area, or some fractional share in the proprietary rights of the *milk*. Owing to the appellant's failure to put the document in evidence the matter cannot be determined with certainty. The appellant's plea that he had acquired proprietary rights to the plots in suit has broken down. The main point taken in appeal, as it was in the Court below, is that Sirya is in any case not in possession as a tenant of the plaintiff. The finding appears to be that he is in fact in possession along with his father, one of the original tenants, and that he has been let into such possession as he enjoys collusively by his father in order to prejudice the rights of the plaintiff. Under these circumstances the Courts below have, in my opinion, rightly ordered the ejectment of Sri Ram along with the original tenants. The land in suit is obviously not his *khudkasht*, as the *patwari* has recorded it, and his possession does not, in my opinion, rise to the dignity of that of a trespasser. He seems to me to have been let into such possession as he enjoys as a sub-tenant, or a licensee of his father. The general principle that a purchase by a tenant of land in a village or of a fractional share in the same village does not convert him into a proprietor of that land or abolish the proprietary rights therein of the other co-sharers, was laid down by this Court in *Mahabir Singh* v. *Ashan Ullah* (1). I have not disposed of this case solely on the strength of that ruling, because the Courts below have recorded no finding in respect to the plaintiff's allegation that, as regards this purchase of a share in the *milk*, the

(1) A. W. N. (1901) 53.

appellant Sirya is only a *benamidar* for his father Behari. Apart from this point, I think the reasons given are sufficient to warrant the dismissal of this appeal. It is hereby dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 489 OF 1911.

December 5, 1913.

Present:—Mr. Justice Oldfield.

MR. J. SEIBER AND ANOTHER—DEFENDANTS—PETITIONERS

versus

DANIEL VARKI—PLAINTIFF—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 18—Suit for pension by school master—Suit relating to trust—Jurisdiction of Civil Court.

Where a school master who was subscribing to the school masters' pension fund sued after his removal for his pension in a Small Cause Court:

Held, that the cognizance of the suit by the Small Cause Court was barred by Article 18 of Schedule II of the Small Cause Courts Act.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Additional District Munsif of Calicut in Small Cause Suit No. 371 of 1911.

FACTS.—The plaintiff was a school master in the service of the B. G. E. Mission under the management of the defendant and had put in over 18 years' service. He was improperly thrown out of employ under the orders of the Inspector of Mission Schools. He had been a subscriber to the school masters' pension fund and had paid up the subscriptions to the fund regularly and he was entitled to get by way of pension monthly an amount equal to 40 per cent. of the salary which he was drawing, *viz.*, Rs. 19-8.

He sued for the recovery of a sum of Rs. 49-11-8 being the amount of pension and interest due to him for 6½ months.

The defendant contended that the suit was one relating to a trust and as such fell under clause 18 of the Schedule II of the Provincial Small Cause Courts Act, and was, therefore, not cognizable by the Small Cause Court. The lower Court did not allow the contention and decreed the suit. The defendant applied in revision.

Mr. *A. S. Cowdell* (with him Mr. *John Mathai*), for the Petitioners.

Mr. *C. Madhavan Nair*, for the Respondent.

JUDGMENT.—The first objection to the lower Court's decision and the only one which it is necessary to consider, is that a Small Cause Court had no jurisdiction, because the suit relates to a trust. *Prima facie* it certainly is so, since the refund of subscriptions to a subscriber, who is dismissed or has resigned, is not one of the objects of the trust as stated in rule 1 of Exhibit I.

The plaintiff-respondent has attempted to show that it is covered by rule 9. But I cannot import into that rule by implication what his argument requires. His claim, therefore, involves the Court sanctioning an extension of the objects of the trust or an ascertainment of the *cestui que trust* under it. The case must be distinguished on this ground from *Sri Venkatachellapathy Subyya Vyavasaya* v. *Kanakasabapathi Pillai Dharmam*(1). *Subramania Ayyar* v. *Pandi Doraisami Tavar* (2) is more directly in point and is against the respondent. The civil revision petition must be allowed on the question of jurisdiction. The lower Court's decision is set aside and the plaint should be returned by the lower Court for representation in the proper Court. Costs up to date will be costs in the case.

Petition allowed.

(1) 5 Ind. Cas. 912; 8 M. L. T. 67; 33 M. 494; 20 M. L. J. 146.

(2) 26 M. 368.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 2 OF 1914.

April 14, 1914.

Present:—Mr. Lindsay, J. C.

KISHAN—APPLICANT—APPELLANT

versus

RAJ BAHADUR AND OTHERS—CREDITORS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 6 (2)—Jurisdiction of Court—Applicant working as domestic servant in one district and having agricultural holding in another.

NARAGAM KRISTAYA v. PENUMUDI BHADRAYYA.

A Court is competent to entertain the insolvency petition of a person working as a domestic servant within its jurisdiction although he has got an agricultural holding beyond its jurisdiction which he has not relinquished.

Appeal against an order of the District Judge, Lucknow, dated 19th November 1913.

Babu *Jiban Krishna Banerjee*, for the Appellant.

JUDGMENT.—This is an appeal against an order of the District Judge of Lucknow in the insolvency jurisdiction. A petition was presented by a person named Kishan asking that he might be declared an insolvent. The learned Judge has dismissed the application on the ground that he had no jurisdiction to entertain it. It appears that the applicant has been employed for some time as a personal servant in Lucknow. It was also stated that he had some cultivation in the Gonda District. The learned Judge in his order dismissing the application states that he thinks that in an agricultural country the permanent residence of a man must be taken to be where his agricultural holding is situated—a holding which he has not relinquished. A reference, however, to the language of section 6, sub-section (2), of the Provincial Insolvency Act shows that a petition under the Act may be presented to a Court having jurisdiction in any local area in which the debtor ordinarily resides or carries on business or personally works for gain. The question of ordinary residence does not, therefore, arise in connection with this case, for if it be a fact that the applicant here personally works for gain in Lucknow then under sub-section (2) of section 6, he is entitled to present his petition in the Lucknow Courts. The learned Judge does not seem to have noticed that the petitioner is not under any obligation to present his petition in the area in which he ordinarily resides. There seems to be no reason for doubting that the applicant does actually work for gain in Lucknow as a domestic servant, and this being so, I must hold that the order of the learned Judge refusing to entertain his petition was wrong.

I allow the appeal. The case will go back to the District Judge with directions to entertain the application and dispose of it according to law. I make no order as to costs.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2619 OF 1912.

December 28, 1913.

Present:—Mr. Justice Ayling and Mr. Justice Oldfield.

NARAGAM KRISTAYA—PLAINTIFF—APPELLANT

versus

PENUMUDI BHADRAYYA—DEFENDANT—RESPONDENT.

Madras Abkari Act (I of 1886), s. 22—Toddy-vendor—License, assignment of, whether valid—Presumption.

The terms of the license issued to a vendor of toddy determine his previliges and where one of the terms is that he should not assign the license without consent of the Collector, no other person except the licensee can carry on the business. Once a license is issued, it will be presumed that its terms were inserted with the approval and sanction of the Governor-in-Council.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Musulipatam, in Appeal Suit No. 741 of 1911, preferred against that of the Court of the District Munsif of Gudivada, in Original Suit No. 183 of 1910.

FACTS.—Plaintiff obtained a license to sell toddy, and a license was issued in his name. He appointed the defendant to manage the toddy shop on his behalf and assigned those rights to him. The plaintiff brought a suit to recover from the defendant sums due to his account of the dealings. It was objected that the assignment is void and will not give rise to any right of suit. The lower Appellate Court upheld the objection and dismissed the suit. Hence this second appeal.

Mr. *T. Ramachandra Rao*, for the Appellant.

Mr. *V. Ramadoss*, for the Respondent.

JUDGMENT.—The privileges enjoyed by the plaintiff are limited by the terms of the license issued to him: and it is admitte l that one clause of this license prohibited the assignment of those privileges without the previous consent of the Collector. We can find no basis for the contention that this condition is *ultra vires*, whether on the ground that it was not inserted under the orders of the Governor-in-Council or in exercise of powers delegated by the Governor-in-Council or for any other reason. Under section 114, illustration (*e*), of the Indian Evidence Act, it may be presumed that the license issued by the Collector was

validly issued: and this presumption has not been rebutted. We may also refer to the statutory provisions of section 22 of the Madras Abkari Act of 1886 which specifically forbid the exercise by an assignee of any rights without receipt of a license in his own name.

The second appeal is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL NO. 614 OF 1913.
June 9, 1914.
Present:—Mr. Justice Chamier.
JADUNATH LAL AND ANOTHER—DEFENDANTS—APPELLANTS
versus
BACHHU LAL—PLAINTIFF—RESPONDENT.

Joint land—Separate use of joint land by co-sharer—Right of such co-sharer to build permanent structure on land without consent of other co-sharers.

The fact that one of the co-sharers in a village has been in separate use and occupation of a land does not entitle him to erect permanent structures on it against the wishes of other co-sharers.

Second appeal from the decision of the District Judge of Gorakhpur, dated February 28th, 1913.

Mr. *Bajpai*, for the Appellant.

Mr. *Haribans Sahai*, for the Respondent.

JUDGMENT.—On the pleadings it is admitted that the land on which the defendants propose to build is the joint land of the parties. The defendants did not set up a title to the land by adverse possession. The issue fixed did not suggest adverse possession and there was no finding that the defendants have held adversely to their co-sharers. All that is found is that the defendants have been in separate occupation or have had made separate use of the land. This does not entitle them to erect permanent structures on it against the wishes of their co-sharers. The appeal is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL NO. 612 OF 1912.
November 27, 1912.
Present:—Mr. Justice Chevis.
Musammat JAINAN—DEFENDANT—APPELLANT
versus
RULIA—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Restitution of conjugal rights—Nikah—Iddat—*Difference between widow and divorced woman—Want of consent of divorced woman, whether invalidates marriage.*

Iddat must be kept if the first marriage is terminated by death of the husband, but for a divorced woman whose marriage has never been consummated, *iddat* is not necessary.

Where a woman is a virgin or represents herself as virgin, the consent of the father, uncle or brother is sufficient to validate the marriage and her silence is tantamount to consent. But in case of her not being virgin her consent must be expressed in person. A divorced woman whose marriage has not been consummated is a virgin for the purposes of such consent.

Bibi v. *Empress*, 43 P. R. 1882 Cr., referred to.

Second appeal from the order of the Divisional Judge, Jullundur Division, dated the 11th March 1912, reversing that of the District Judge, Jullundur, dated the 12th July 1911, dismissing the plaintiff's claim.

Pandit *Rambhaj Datta*, for the Appellant.

Mr. *Ahsan-ul-Haq*, for the Respondent.

JUDGMENT.—This is a suit for restitution of conjugal rights. The Divisional Judge has given plaintiff a decree, holding the marriage proved. As questions of fact cannot be raised in second appeal Counsel for *Musammat* Jainan cannot contest the factum of the *nikah*. He has confined his argument to two points (1) that the *nikah* is invalid because it was celebrated during the period of *iddat*, and (2) that it is invalid for want of consent.

As to (1) Counsel refers me to Tagore Law Lectures, paragraph 464, and *Bibi* v. *Empress* (1) and urges that *iddat* must be kept whether the marriage has been consummated or not. This is correct in the case of the former marriage having been terminated by death. But here we are dealing with the case of a woman whose marriage, never having been consummated, was terminated by divorce

(1) 43 P. R. 1882 Cr.

and from such woman no *iddat* is required, see Wilson's Digest of Muhammadan Law, 3rd Edition, page 153, and Baillie's Digest, page 351. On page 350 of the latter book *iddat* is defined as the waiting for a definite period which is incumbent on a woman after the dissolution of a rightful or semblable marriage that has been confirmed by consummation or by death. Here the marriage had not been confirmed either by consummation or by death, and so no *iddat* was required. Appellant's Counsel suggests that appellant's statement that her former marriage was never consummated is incorrect, but she clearly stated in the first Court that she had never gone to her husband's bed or even to his house, and the contrary has not been stated in her grounds of appeal to this Court. I cannot, therefore, listen to this suggestion.

The only other question argued is that appellant's consent was not obtained. But the evidence is that her brother was present, acting as her *vakil*, and gave consent on her behalf and that she kept silence. No doubt the authorities lay down that in the case of a woman who is not a virgin consent must be expressed by her in person and that silence cannot be taken to signify assent. But according to her own showing the appellant was a virgin, the former marriage never having been consummated, and the authorities lay down that in the case of a virgin if consent is given by a father, uncle or brother silence is tantamount to consent. See Ameer Ali's Muhammadan Law, Volume II, page 344.

On both points argued the authorities are all against the appellant.

The appeal fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 39 OF 1913.

February 11, 1914.

Present:—Mr Justice Seshagiri Aiyar.

SOORIYAN MUTHIRIAN—DEFENDANT—PETITIONER

versus

NATESAM PILLAI *alias* MARUDAI PILLAI—PLAINTIFF—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35 (i)—Contract to allow plaintiff to drain plaintiff's land—Breach of contract—Damages—Jurisdiction.

Defendant agreed with plaintiff for consideration that he may drain the water from his field into defendant's land. On the defendant going back upon his contract the plaintiff sued for damages.

Held, that the case was triable by a Court of Small Causes as Article 35 (*i*) of Schedule II of the Small Cause Courts Act was inapplicable to such cases.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Srirangam, in Small Cause No. 1399 of 1912.

Mr. *K. Bhashyam Aiyangar*, for the Appellant.

Mr. *N. Rajagopalachariar*, for the Respondent.

JUDGMENT.—The defendant's case is that this suit is not maintainable on the Small Cause side. The suit is on a contract between the plaintiff and the defendant. The defendant agreed to allow the plaintiff to drain the water from his field into defendant's land, and received Rs. 3 as consideration for the permission and the defendant broke the contract and refused to allow the water of the plaintiff to be taken into defendant's lands. Article 35 (*i*) has no application to such a case. This is not a case of easement nor is it a case of diverting the water-course. It is a pure case of contract which has been broken by the action of the defendant and he is bound to pay damages. The petitioner's Vakil does not question the quantum of damages awarded in this case. I dismiss the petition with costs.

Petition dismissed.

NARAIN SINGH v. SHIAM KALI KUNWAR.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 25 OF 1912.

March 24, 1914.

Present:—Mr. Stuart, A. J. C., and Mr. Kanhaiya Lal, A. J. C.

NARAIN SINGH—PLAINTIFF—APPELLANT

versus

Musammat SHIAM KALI KUNWAR—DEFENDANT—RESPONDENT.

Hindu Law—Adoption of Brahmin *boy by person of lower caste, whether valid.*

A *Brahmn* boy cannot be adopted by a person of lower caste.

Bhagwan Singh v. *Bhagwan Singh*, 21 A. 412 (P.C.); 3 C. W. N. 454; 26 I. A. 153; 1 Bom. L. R. 311; 7 Sar. P. C. J. 474, referred to.

Kusum Kumari Roy v. *Satya Ranjan Das*, 30 C. 999; 7 C. W. N. 784, distinguished from.

Appeal against an order of the Subordinate Judge, Tahsil Biswan, dated 29th January 1912.

Mr. *Muhammad Arabi*, for the Appellant.

Mirza *Sami-ullah Beg*, for the Respondent.

JUDGMENT.—The dispute in these cases relates to certain property which belonged to Sheoratan Singh, who died on the 20th November 1909 leaving a widow *Musammat* Shiam Kali Kuar.

It is stated by *Musammat* Shiam Kali Kuar that Sheoratan Singh bequeathed his entire property to her as an absolute and transferable estate by an unregistered Will executed three days before his death. The genuineness of that Will is contested by the plaintiff-appellant who claims to be the adopted son of Baldeo Bakhsh Singh, the brother of Sheoratan Singh. It is not disputed that Baldeo Bakhsh Singh died in the life-time of Sheoratan Singh and that Sheoratan Singh and Baldeo Bakhsh Singh were living separately. They were *Thakurs* of the *Raghubansi* clan. The plaintiff-appellant is a *Brahmin* by caste. His father Ram Adhar is a *karinda* in the service of *Musammat* Gulab Kuar. The adoption is alleged to have been made by *Musammat* Gulab Kuar, the widow of Baldeo Bakhsh Singh, sometime in *Baisakh* 1955 *Sambat*. Sheoratan Singh held a decree for arrears of rent against *Musammat* Gulab Kuar in execution of which *Musammat* Shiam Kali Kuar as his legal representative attached certain property inherited by *Musammat* Gulab Kuar from her husband. The plaintiff-appellant claims in these suits to have the Will said to have been made by Sheoratan Singh in favour of *Musammat* Shiam Kali Kuar set aside, and the property attached by *Musammat* Shiam Kali Kuar, in execution of the aforesaid decree against *Musammat* Gulab Kuar, exempted from the sale on the ground that the Will is not genuine and that the decree aforesaid is not binding on the estate of Baldeo Bakhsh Singh or on his legal representative, the plaintiff.

Musammaat Shiam Kali Kuar denies that the plaintiff was adopted by *Musammat* Gulab Kuar and states that *Musammat* Gulab Kuar had no power to make an adoption, and that the adoption was invalid under the Hindu Law. She further pleads that the plaintiff has not been in possession of the disputed property and a declaratory suit is not, therefore, maintainable.

The learned Subordinate Judge found that the alleged adoption was not established and that the adoption, if made, was void and conferred no right. The reasons given by him for discrediting the evidence adduced by the plaintiff appear to us to be valid and pertinent.

The allegation of the plaintiff was that *Musammat* Gulab Kuar executed a formal deed of adoption on the 28th May 1902. But neither the original nor a certified copy thereof was filed. Most of the witnesses, who professed to have been present at the time of the alleged adoption, were residents of other villages and gave no satisfactory explanation for having been asked to attend the adoption. Of the rest Bisheshar, a resident of the village, admitted that he made a complaint to the Deputy Commissioner against *Musammat* Shiam Kali Kuar, alleging that she was forcibly collecting rents from him, showing thereby that he was not on good terms with the defendant-respondent, whom he would have liked to see ousted from the disputed property. Kalka, another resident of the village, stated that he saw the plaintiff for the first time when he was four or five years old, and that the adoption took place four or five years after that. But he was contradicted by Ganga Prasad, another witness for the plaintiff, who stated that the plaintiff was adopted at the age of five or six years. The only other resident of the village adduced was Sita Ram, a goldsmith who appears to be a man of no position. He admits that he was sent for to do some house hold work. It is admitted that no *Raghubansi Thakurs* or men

of the tribe and caste to which Baldeo Bakhsh Singh and his widow, *Musammat* Gulab Kuar, belonged were present at the time of the adoption. The priest, who is alleged to have officiated at the ceremony of adoption, was not produced. There is nothing to show that after the alleged adoption any steps were taken to have the name of the plaintiff entered in the revenue papers in regard to the property in dispute in the place of, or in addition to, that of *Musammat* Gulab Kuar.

An adoption of a *Brahman* boy by a man of a lower caste is not, moreover, authorized by the Hindu Law. The principle of the Hindu Law, as recognised by their Lordships of the Privy Council in *Bhagwan Singh* v. *Bhagwan Singh* (1), is that the boy should be one whose natural mother, when a virgin, could have been married by the adoptive father. Manu forbids the marriage of a person of one caste with a woman of a higher caste, and further declares that only a boy of an equal caste can be taken in adoption (Manu, Chapter III, Verse 13, and Chapter IX, Verses 85 and 168). The word used in the text of Manu is "*sadrisham*", meaning similar or alike, and has been interpreted by Medhatithi, one of the earliest commentators of Manu, as meaning a person of an appropriate family and character. Medhatithi proceeds to illustrate his meaning by saying that a *Brahman* could adopt a *Kshatriya* boy. But this interpretation has not been accepted by the other commentators, including Kulluka, Raghavanand, and Nandan, who hold the expression to mean a person of an equal caste. Yajnyavalkya, whose text forms the subject of the commentary called the *Mitakshara*, after describing the different classes of son, states (Bk. II, Verse 133) that each class is entitled to inherit in the order named in the absence of the preceding class, but the rule is only applicable to sons equal by caste (*sajatiyeshu tanayeshu*). The author of the *Mitakshara* in commenting on the text of Yajnyavalkya above referred to says:—"He who is given by his mother with her husband's consent while her husband is absent, or after her husband's decease, or who is given by his father or by both, being of the same class (*savarnaya*) with the person to whom he is given, becomes his adopted son." (Colebrooke's *Mitakshara*, Chapter I, Section II, Para. 9). The authors of the Dattaka Mimansa and Dattaka Chandrika adopt the same view and insist that an adopted boy must be of the same primary class as the adpotive father, to give him a right of inheritance. (Dattaka Mimansa, section 2, paragraphs 22 to 25, and Dattaka Chandrika, section 1, paragraphs 12 to 16). Shaunaka lays down a similar rule (Mandlik's Hindu Law, page 498).

Dealing with the above question, West and Buhler observe: "The adopted son according to Manu's rule must be *sadrisham* (adequate, alike). This, Medhatithi in his commentary explained, as meaning of appropriate family and character. But Yajnyavalkya says the adopted or other subsidiary son must be of equal class with the father, and resting on this, Nilkantha adopts Kulluka's interpretation of Manu to the same effect. It was a natural process, as marriage of a wife of lower caste became unlawful, that adoption should be similarly restricted. It was part of the imitation of nature which has influenced the whole institution that when a *Kshatriya* son of a *Brahman* became impossible or one of intermediate caste, the adoption of such a son should become impossible also." (West and Buhler's Hindu Law, Volume II, page 928).

"It appears," says Ghose, "that so late as the time of Medhatithi, sons from castes other than that of the adoptive father could be adopted, but as the rules of caste became more rigorous that was prohibited" (Ghose's Hindu Law, second Edition, page 568). The adoption of a boy belonging to a caste different from that of the adopter is, according to Golap Chandra Sarkar, "not forbidden by the Smritis. There is, however, a passage in the alleged work of Shaunaka, already referred to, recommending adoption within the caste, and providing that an adopted son belonging to a different caste is entitled to food and raiment only and not to a share of the property, as he cannot serve the spiritual purpose. The caste exclusiveness has become so rigid now, that an adoption of a son known to belong to a different caste is imposible at the present day (Golap Chandra Sarkar's Hindu Law, 4th Edition, page 158).

(1) 21 A. 412; 3 C. W. N. 454; 26 I. A. 153; 1 Bom. L. R. 311; 7 Sar. P. C. J. 474.

"In the time of Manu," says Mayne, "a man might have married wives of different classes and the sons of all such wives would have been legitimate, and would have inherited together, though in different proportions. Each of such sons must have been competent to perform his father's obsequies, though perhaps with varying merit. It would have been remarkable, therefore, if a man could not have adopted the son of a woman whom he might have married. Baudhayana makes no reference to caste, and Vasistha merely says, 'the class ought to be known,' which is natural enough, as determining a preference. The other authors (Katyayana, Shaunaka, Yajnyavalkya and Yaska) admit that such adoptions do take place, and are effectual as prolonging the line, though not for purposes of oblations. They, therefore, declare that a son if adopted is entitled to receive maintenance" (Mayne's Hindu Law, 7th Edition, page 178).

He then goes on to say: "It is probable, therefore, that as long as mixed marriages were lawful the adoption of sons of inferior castes was also lawful; when the former ceased, the latter also ceased. At present I imagine that the adoption of a *Kshatriya* by a *Brahman* would be a mere nullity, and would neither take the boy out of his natural family, nor give him any claim upon the family of the adopter." (*Ibid*, page 178, see also Shyama Charan's Vyavastha Chandrika, Vol. II, page 66, and Trevelyan's Hindu Law, page 132).

In *Kusum Kumari Roy* v. *Satya Ranjan Das* (2) it was held that an orthodox Hindu might adopt the son of a member of the Sadharan Brahmo Samaj. But the report of that case does not show whether the adopted son was a person of a different caste. On the other hand it was there found that he was recognised and treated throughout as a member of an orthodox Hindu family. There is nothing in the *Wajib-ul-arz* which affects to disregard differences of tribe or clan (*qaum*) as bars to adoption to establish a custom authorizing the adoption of a boy from a different caste. For the purposes of inheritance each primary caste (*Varna*) must adopt from within its own limits. The plaintiff-appellant has, therefore, no *locus standi* to bring these suits.

The appeals, therefore, fail and are dismissed with costs.

Appeals dismissed.

(2) 30 C. 999; 7 C. W. N. 784.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 129 OF 1914.

July 27, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.

MALAMAL VITTIL KRISHNAN NAIR—PETITIONER—APPELLANT

versus

KAVALAPPARA MOOPPIL NAIR AVERGAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XLI, r. 5—Order of Appellate Court refusing stay of execution of decree, appeal from.

No appeal lies to the High Court against an order of the lower Appellate Court refusing to stay execution of a decree against which an appeal is pending before that Court. A Court hearing an appeal is "not a Court executing a decree" within the meaning of section 47 of the Civil Procedure Code.

Ramchandra v. *Balmukund*, 29 B. 71; 6 Bom. L. R. 780, followed.

Appeal against the order of the District Court of South Malabar, in Civil Miscellaneous Petition No. 127 of 1914 in Appeal Suit No. 34 of 1914, preferred against that of the Temporary Subordinate Judge of Palghat, in Original Suit No. 17 of 1911.

Mr. *T. R. Ramachandra Aiyar*, for the Appellant.

Mr. *J. L. Rosario*, for the Respondent.

JUDGMENT.—The District Judge passed an order under Order XLI, rule 5, refusing to stay the execution of a decree passed by the Subordinate Judge against which an appeal is pending before himself. This is an appeal against his order.

A preliminary objection is taken that no appeal lies. We think the objection is well-founded. Mr. Ramachandra Aiyar contends that the order falls within the purview of section 47 and is, therefore, appealable. But that section only applies to orders passed by the Court executing the decree. In this case the District Court is not the Court executing the decree. See *Ramchandra* v. *Balmukund* (1).

We, therefore, uphold the preliminary objection and dismiss the appeal with costs.

Appeal dismissed.

(1) 29 B. 71; 6 Bom. L. R. 780.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 8 OF 1914.

June 1, 1914.

Present:—Mr. Justice Twomey and Mr. Juctice Ormond.

MA E ME AND ANOTHER—APPELLANTS

versus

MA E—RESPONDENT.

Probate and Administration Act (V of 1881), *ss.* 69, 90 (4)—*"Person interested in the property", meaning of—Creditor's interest in property of deceased debtor—Charge—Creditor's* locus standi *to object to Probate or Letters—Fraud—Succession Act (X of* 1865), *s.* 250.

Section 90 of the Probate and Administration Act refers to immoveable property only.

A creditor has no interest in the immoveable property of his deceased debtor unless he has a charge on that property under section 69 of the Probate and Administration Act or section 250 of the Succession Act.

As a creditor of the estate of a deceased debtor is not merely as such "interested in the property" within the meaning of section 90 (4), he has no *locus standi* to come in and object to the grant of Probate or Letters of Administration unless he objects to the grant on the ground that the Will is set up in fraud of the creditors.

Mr. *Agabeg*, for the Appellants.

Mr. *Ba Dun*, for the Respondent.

JUDGMENT.—Ma E Me as administratrix to the estate of her deceased husband had incurred costs in litigation with Ma E. Ma E attached certain immoveable property as being part of the estate of the deceased; but Ma Thi obtaining the removal of that attachment on the ground that she had purchased the property from the administratrix, Ma E Me. Ma E then applied to set aside the sale by Ma E Me to Ma Thi as having been made by the administratrix without the leave of the Court. The District Judge granted the application and set aside the sale and he held that by setting aside the sale, the order removing the attachment was *ipso facto* set aside.

Ma E Me and Ma Thi now appeal. The first question is whether Ma E as creditor of the estate is a person "interested in the property" within the meaning of section 90, subsection 4, of the Probate and Administration Act. That provision relates to the alienation of immoveable property and, therefore, the words "interested in the property" must be "interested in the immoveable property" disposed of. Now a creditor has no interest in the immoveable property of his deceased debtor unless he has a charge on that property under the provisions of section 69 of the Probate and Administration Act and section 250 of the Succession Act, under which the District Judge may issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of Probate or Letters of Administration. A creditor has no *locus standi* to come in and object to a grant of Probate or Letters of Administration unless he objects to the grant on the ground that the Will is set up in fraud of the creditors. In this case the creditor does not allege that the sale was made in fraud of the creditors.

We think the creditor Ma E had no *locus standi* to have the sale set aside under section 90. Even if the sale by the administratrix had been properly set aside by the Court under section 90, the Court had no power to set aside the order of the Township Court removing Ma Thi's attachment. The sale by the administratrix to Ma Thi would be good until it was set aside and it was, therefore, good when the Township Court ordered the removal of Ma E's attachment. If the order of the District Court setting aside the sale under section 90 had been correct, it would still have been necessary for the creditor to make a fresh application for the attachment of the property.

We allow the appeal and set aside the order of the District Court with costs, three gold *mohurs*.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 225 OF 1912.

February 25, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

SECRETARY OF STATE FOR INDIA—DEFENDANT—APPELLANT

versus

JWAHIR LAL—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), *O. XXII, rr.* 4, 9—*Application for substitution of name filed beyond six months—Abatement—Limitation Act (IX of* 1908), *s.* 5—*Extension of time.*

An appeal abates where no application is made in the case to bring on the record the legal repre-

SECRETARY OF STATE v. JAWAHIR LAL.

presentatives of the deceased respondent within the six months prescribed by the Limitation Act. Section 5 of the Limitation Act does not apply to such an application.

Under Order XXII, rule 9, of the Civil Procedure Code the remedy of the appellant after such abatement is to apply to have the order of abatement set aside on the ground that he was prevented by any sufficient cause from continuing the suit or the appeal, as the case may be, and this rule clearly makes section 5 of the Limitation Act applicable to it.

First appeal from a decree of the Subordinate Judge of Shahjahanpur, dated the 4th April 1912.

FACTS appear fully from the following

ORDER OF REFERENCE.

PIGGOTT, J.—This is an application in First Appeal No. 225 of 1912, in which the Secretary of State for India is appellant and one Hakim Jawahir Lal was impleaded as sole respondent. I am informed that the suit itself is of considerable value, and the appeal one which must necessarily come before a Bench of two Judges. The application before me is one under Order XXII, rule 4, of the Civil Procedure Code. According to the affidavit by which it is supported, Hakim Jawahir Lal died on the 18th of April 1913, and it was not until the 12th of December 1913 that application was made to this Court on behalf of the appellant to bring the legal representatives of the deceased respondent on the record. *Prima facie*, therefore, the application is beyond time and is barred by Article 177 of Schedule 1 of the Indian Limitation Act, IX of 1908. In the affidavit before me certain reasons are put forward on behalf of the appellant which are said to be sufficient cause for the application in question not having been preferred within the prescribed period of limitation. I am not at present considering the sufficiency of these reasons. The point taken before me on behalf of the legal representative of the deceased respondent, to whom notice was issued of this application, is that I have no jurisdiction to consider at this stage the sufficiency of the reasons put forward on behalf of the appellant, and that I have no option but to reject this application as one barred by time. The question is whether section 5 of the Indian Limitation Act, IX of 1908, applies to the present application. That section itself, so far as it relates to applications, refers only to applications for review of judgment or for leave to appeal or any other application to which this section may be made applicable by any enactment or rule for the time being in force. Under section 372 A of the former Code of Civil Procedure (Act XIV of 1882) the corresponding section of the Indian Limitation Act of 1877 was made applicable to applications under section 368A of that Code, corresponding to Order XXII, rule 4, of the present Code of Civil Procedure. This section 372A of Act XIV of 1882 has been replaced in the present Code of Civil Procedure by Order XXII, rule 9. But there is an important difference of language. By the third sub-rule of Order XXII, rule 9, the provisions of section 5 of the Indian Limitation Act are directed to apply to applications under sub-rule 2 of the same rule, but are not directed to apply to any other rule in Order XXII, as for instance, to rule 4 of Order XXII. Moreover the words "the plaintiff or" at the beginning of sub-rule (2) of rule 9 are new, and suggest a change of policy on the part of the Legislature. The effect of these alterations, as I understand them, is as follows: The sufficiency of the reasons alleged in the affidavit now before me for not making an application under Order XXII, rule 4, within the prescribed period of limitation cannot be considered at this stage. The present application ought to be dismissed as time-barred. The appeal in question, First Appeal No. 225 of 1912, would then come up for disposal before two Judges and would be declared to abate under the provisions of Order XXII, rule 4, sub-rule (3). It would then be open to the appellant to come to Court with an application under Order XXII, rule 9, sub-rule (2), showing cause under the provisions of section 5 of the Indian Limitation Act for his having neglected to continue the suit, that is to say, to make the necessary application under Order XXII, rule 4, of the Code of Civil Procedure within the prescribed period. It would then be open to this Court to consider the sufficiency of the reasons put forward and to pass such orders as it might consider proper. According to this view of the law, the proper order for me to pass to-day would be one dismissing the application now before me. On behalf of the appellant, however, I have been asked to pass some order which would have the effect of bringing the whole matter before the Bench which must deal with the appeal itself. If my view of the law is correct, it would certainly be expedient that an appli-

cation like the one now before me should be dealt with by a Bench capable of finally disposing of the appeal. An order for the abatement of the appeal would certainly follow automatically upon an order rejecting the present application; and though I feel no doubt in my own mind regarding the question of law raised, it being a question which was fully threshed out before me in the Judicial Commissioner's Court, Oudh, I think it expedient that this application should be dealt with by a Bench capable of disposing of the appeal itself. My order, therefore, is that this application along with the file in First Appeal No. 225 of 1912 be laid on an early convenient date before a Bench of two Judges.

Mr. *W. Wallach*, for the Appellant.

Messrs. *Benode Behari* and *S. K. Dar*, for the Respondent.

JUDGMENT.—This is an application under Order XXII, rule 4, of the Code of Civil Procedure to bring on the record the legal representatives of the deceased respondent. The application was made after the expiry of the period of limitation prescribed for such an application. A learned Judge of this Court has referred the application to us for disposal, he being of opinion that under Order XXII, rule 4, no application can be entertained unless it is filed within the period of limitation allowed by the Limitation Act, that is to say, within six months from the date of the decease of the respondent. We agree with the view taken by our learned colleague. The law seems to have been altered in this respect in the present Code of Civil Procedure. By section 5 of the Limitation Act, that section can apply only to cases to which, besides the cases mentioned in the section itself, it is made applicable by any other provision of law. The section is not made applicable to an application under rule 4 of Order XXII. The rule distinctly provides in sub-rule (3) that where within the time limited by law no application is made under sub rule (1), the suit shall abate as against the deceased defendant. In the case of an appeal the word "appeal" should be read for "suit" and "respondent" for "defendant." Therefore, as the law now stands, since no application was made under sub-rule (1) within the time allowed by law, the appeal must abate. The remedy of the person who could not make his application within the time allowed by the law of limitation is that provided by rule 9 of the Order. He may after the order of abatement has been passed apply to have it set aside on the ground that he was prevented by any sufficient cause from continuing the suit or appeal, as the case may be, and this rule clearly makes section 5 of the Limitation Act applicable to it. We are of opinion that the application to bring the heirs of the respondent on the record cannot be entertained, having been made beyond the period of limitation prescribed for such an application. We accordingly reject it with costs.

Their Lordships after disposing of the application, proceeded with the appeal:

BANERJI, J.—As no application was made in this case to bring on the record the legal representatives of the deceased respondent within the six months prescribed by the Limitation Act this appeal has abated. We accordingly declare that the appeal has abated. This order is made without prejudice to any application which the appellant may be advised to make under Order XXII, rule 9, of the Code.

Appeal abated.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 17 OF 1910.

February 11, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

CHERUVALATH KUNHANARI VALAKKATHALA EREEHAN *alias* KUTTAPPA AND OTHERS—PETITIONERS—APPELLANTS

versus

THEYYATATH KORAN—COUNTER-PETITIONER—RESPONDENT.

Civil Procedure Code Act (V of 1908), O. XXXIV, rr. 4, 6—Transfer of Property Act (IV of 1882), s. 88—Decree directing payment of money within fixed time and in default sale of mortgaged property—Money-decree—Further order under rule 6, unnecessary.

Where a decree directs payment of the amount decreed within a fixed time and orders sale of mort-

gaged property in default, the decree is not merely a mortgage-decree but also a money-decree and no further order under rule 6, Order XXXIV, is necessary.

Appeal against the order of the District Court of South Malabar, in Appeal Suit No. 580 of 1909, preferred against that of the Court of the Additional District Munsif of Calicut in Execution Petition No. 695 of 1909 in Original Suit No. 636 of 1906.

Mr. *C. Madhavan Nair*, for the Appellants.

Mr. *K. P. M. Menon*, for the Respondent.

JUDGMENT.—We overrule the preliminary objection that no second appeal lies.

On the merits we are bound by a uniform course of decisions of this Court to hold that where a decree directs the defendants to pay money to the plaintiff within a certain time and sale of mortgaged property in default, the decree is not only an ordinary mortgage-decree under section 88 of the Transfer of Property Act (Order XXXIV, rule 4, of the Code of Civil Procedure), but is also a decree for money which may be executed against the other properties of the defendant. Any further order or decree under Order XXXIV, rule 6, of the Code of Civil Procedure is unnecessary. The decree now in question may, therefore, be executed as a money-decree. On this ground we set aside the orders of the Courts below and direct the District Munsif to restore the petition to his file and dispose of it according to law.

Costs hitherto incurred will abide the result.

Appeal allowed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 2516 OF 1911.

August 6, 1913.

Present:—Mr. Justice Kensington.

MIRAJ DIN—JUDGMENT-DEBTOR—DEFENDANT—PETITIONER

versus

DILBAGH RAI SON OF POHLO MAL—DECREE-HOLDER—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 90, 92—Auction sale, insufficient notice of—Loss.

Where several improper orders are passed relating to the sale of a minor judgment-debtor's property and the decree-holder does not comply with the instructions given by the executing Court and the judgment-debtor suffers substantial loss thereby, the proper course is to set aside the sale and not to direct the judgment-debtor to resort to the cumbrous remedy by fresh suit against his guardian and the decree-holder.

Where on account of insufficient notice of sale the property of a judgment-debtor has been knocked down for an inadequate price, the sale is liable to be set aside as irregular.

Civil revision from an order of the Divisional Judge, Lahore Division, dated 10th April 1911, confirming that of the Munsif, Lahore, dated 1st June 1910, rejecting the judgment-debtor's application to set aside auction sale of his property, and petition under section 70 (*a*) and (*b*) of Act XVIII of 1884 for revision of the order of the Divisional Judge, Lahore Division, dated 17th June 1907, upholding the order of the Munsif, 1st Class, Lahore, dated 7th December 1906, rejecting the application to set aside the sale in execution of a decree.

Mr. *Badr-ud-Din Qureshi*, for the Petitioner.

Messrs. *Asquith* and *Dhanpat Rai*, for the Respondent.

JUDGMENT.—The lower Courts appear to me to have gone wrong in this case through misunderstanding of the previous Chief Court order of 16th November 1907, on Civil Revision No. 1493 of 1907.*

The house property in question was sold by auction by Messrs. Jamsetjee and Co. on the 20th June 1906 for Rs. 400, that being the sale bid and made by the decree-holder's son Hira Lal. The auctioneer reported that the sale was unfair.

On the 25th June a fresh sale was ordered for 25th June, 1906. This time there was some small show of rival bidding between the decree-holder and his son (no other bids being mentioned) and the house was knocked down to the decree-holder for Rs. 465.

An objection pleading insufficient notice of sale was lodged on behalf of the minor judgment-debtor in July 1906, and a further objection on the 26th October 1906 urging among other things (paragraph 4) that the sale had not been properly advertised.

These objections have never been properly disposed of and the lower Courts have wandered off into unnecessary

*This judgment is printed at the end of this case.—*Ed.*

technicalities which have nothing to do with the real point in dispute. The mere fact that the sale has been since confirmed has nothing to do with the matter, and I cannot conceive why the Munsif on the 1st June 1910 thought himself precluded from re-opening the question of sale, though professing anxiety to do so in the ends of justice. The short answer to his arguments is that the previous Chief Court order gave him the necessary authority.

It has unfortunately taken over three years to bring the dispute for the second time to a hearing in the Chief Court, but the auction-purchaser has no right to benefit by the delay at the judgment-debtor's expense.

The executing Court's order of 25th June 1906 was manifestly unfair as requiring a fresh sale of property of considerable value at two days' notice without advertisement. No amount of legal sophistry can get round this glaring defect in the sale proceedings of 27th July 1906, or the result that the decree-holder has thereby obtained the judgment-debtor's property at what is believed by the executing Court to be much below its value.

This revision is allowed. The sale proceedings of 1906 are set aside *in toto*, the subsequent orders of both the lower Courts being also set aside. The executing Court should now proceed to put the property up for sale again in a reasonable manner, giving suitable publicity to the sale and sufficient notice to secure a genuine sale by auction instead of a family party arrangement between the decree-holder and his son. Or if the judgment-debtor so prefers he should be given an opportunity of paying up the balance due on the decree, whatever the amount may be, and so recovering the house.

The judgment-debtor-petitioner is allowed his costs against the decree-holder-respondent Dilbagh Rai in respect of the Munsif's proceedings of 1st June 1910, the appeal decided in the lower Appellate Court on 10th April 1911 and of this Court.

Revision allowed.

PETITION No. 1493 OF 1907.

KENSINGTON, J.—(*16th November* 1907.) —The Divisional Court's order of 17th June 1907 does not strike me as well considered. On the facts as stated by the Court it was clear that there was a misunderstanding of some sort in the Munsif's Court which could be remedied at once by directing the Munsif to give the petitioner a further hearing on his objections to certain sale proceedings. There was no necessity for referring him to the cumbrous remedy by fresh suit against his guardian and the decree-holder.

Moreover, there is little to be surpised at in the misunderstanding looking to the confused nature of the Munsif's orders from 8th August 1906 to 21st November 1906, inclusive. On the date last mentioned certain instructions were given to the decree-holder which have admittedly not been carried out and the petitioner's guardian may very well have been misled into thinking that nothing more was required of him in the meanwhile.

As matters stand, the order of 7th December 1906 dismissing the petitioner's application cannot be upheld if it was intended to thereby dismiss the objection to the sale, especially when read with the previous order of 31st October to which it refers.

The simplest way to settle the matter is to set aside the order of 7th December 1906 and direct the executing Court to take the case up again at the stage reached on 21st November 1906.

The revision is so far allowed. No order as to costs in the Divisional Court or in this Court.

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT No. 1219 OF 1912.

February 27, 1914.

Present:—Mr. Justice Macleod.

BANSIDHAR LACHHMINARAYEN— PLAINTIFFS

versus

JWALAPRASAD GAYAPRASAD— DEFENDANTS.

Hundi—Shahjog hundi—*False, fraudulent, stolen or forged* hundi—*Responsibility of* Shah *to produce drawer or refund—Solvency of drawer not guaranteed but genuineness guaranteed—Person sending* hundi *for collection not person from whom* hundi *bought—Claim for refund to be made directly and without delay*

According to the custom among Shroffs relating to *shahjog hundis* the *Shah* who obtains payment of a *shahjog hundi* is, in the event of the *hundi* turning out to be a false, fraudulent, stolen or forged *one*, bound to refund the amount of the *hundi* with interest unless he produces the actual drawer or the person who committed the fraud.

According to the actual practice of Shroffs when dealing with *hundis*, whether *shahjog* or not, the *Shah* does not guarantee the solvency of the drawer, but guarantees the genuineness of the *hundi*. A drawee will not pay a *hundi* unless he has funds in his hands belonging to the drawer, or is willing to give him credit, and he will not pay on presentation of a *shahjog hundi* to a *Shah* unless he is satisfied as to the respectability of the *Shah*, as he looks to him in case of anything afterwards going wrong with the *hundi*. The respectability of the *Shah* is a matter only for the drawee to consider.

The person who sends a *hundi* for collection is not the person from whom the *hundi* is bought.

The claim to a refund against a *Shah* who has received payment of a *hundi* on the ground that the *hundi* is a forgery, must be made as soon as possible after the forgery has been discovered so as to enable the *Shah* to protect himself. Delay in making the claim over a month without any reasonable excuse will disentitle the claimant from recovering. The fact that the Police in their investigation regarding the forgery visited the shop of the *Shah* cannot be considered as a communication by the claimant to the *Shah* of the forgery, and certainly cannot be taken for a claim to a refund.

It is necessary that all notices involving responsibility on mercantile documents should be clearly, precisely and directly given.

Mr. *Strangman*, Advocate-General, (with him Messrs. *Inverarity* and *Setalvad*), for the Plaintiffs.

Messrs. *Raikes* and *Kanga*, for Defendant No. 1.

JUDGMENT.—The plaintiffs seek to recover from the defendants the sum of Rs. 3,000 with interest from the 10th June 1912 under the following circumstances :—

On the 10th June the 1st defendant received from the second defendant a *hundi* for Rs. 3,000 purporting to be drawn by one Ramlal Ramprasad in favour of the 2nd defendant on the plaintiffs payable at sight to a Shah.

The *hundi* is Exhibit C. Over an one anna stamp at the top is written: "*Hundi* is sent for collection by Manilal Gayaprasad (2nd defendant) to Bhai Jwalaprasad Gayaprasad (1st defendant)." There had been dealings to a considerable extent between 1st and 2nd defendants. The *hundi* was presented the same day to the plaintiffs but, as they had received no advice regarding it, payment was refused.

On the 11th June the plaintiffs received a letter, Exhibit A, purporting to be written from Harpalpur by one Ramlal Ramprasad enclosing a railway receipt for 300 bags of linseed which was to be sold at a profit. Notice was given that two *hundis* for Rs. 3,000 each had been drawn in favour of Manilal Gayaprasad on the plaintiffs payable at sight which plaintiffs were requested to accept and pay. The following address was given :—

Ramlal Ramprasad of Jhansi,
C/o Manilal Gayaprasad,
Harpalpur.

The railway receipt is Exhibit B written on a form used by the Great Indian Peninsula Railway Company marked A. G. 6513. It purports to be a receipt by the Station Master at Ranipur Road for 300 bags of linseed consigned by Ramlal Ramprasad to the plaintiffs in Bombay, and is numbered 64 out of book 1166.

The plaintiffs on the 11th June handed over this receipt in preformance of a contract to one Killachand Devchand, receiving Rs. 5,600.

Thereupon they paid Rs. 3,000 with one day's interest to the 1st defendant who endorsed the *hundi* as paid.

Killachand was unable to obtain delivery of the goods from the Railway Company and returned the railway receipt to the plaintiffs on the 6th August when he got back his money.

Meanwhile the Company instituted an inquiry regarding the railway receipt which was suspected of having been forged.

On the 4th August, Kashinath, senior clerk in the office of the Goods Superintendent, Wari Bunder, started for Govna as it had been ascertained that a book numbered 1166 had been issued to that station. On the 7th August he was at Jhansi where he was joined by Purshotam Raghowji, the plaintiff's *goomasta*. On the 10th August they were at Ranipur and went on the same day to Harpalpur. The result of this inquiry was as follows:—

The railway receipt for the 300 bags linseed had never been issued from Ranipur. The form had been stolen apparently out of a book numbered 1166 which had been despatched with a lot of other unused books of forms from Atara to Jhansi, and the details entered in it forged. The person

suspected was Kamlaprasad, the Station Master at Harpalpur. His father's name was Manilal and he had a son called Gayaprasad ; so that there was some reason for suspecting that the 2nd defendant's firm of Manilal Gayaprasad which had a *pehdi* at Harpalpur was owned by Kamlaprasad. No person of the name of Ramlal Ramprasad could be discovered at Harpalpur, Jhansi, or any of the neighbouring towns.

Soon after Kamlaprasad disappeared into Harpalpur territory, and it seems most probable that he was the author of the fraud practised on the plaintiffs and 1st defendant. The plaintiffs were unable to serve the summons on the 2nd defendants, so they were struck out.

The plaintiffs contend that according to the well-established custom among Shroffs relating to *shahjog hundis* the Shah who obtains payment of a *shah jog hundi* is, in the event of the *hundi*, turning out to be a false, fraudulent, stolen or forged *hundi*, bound to refund the amount of the *hundi* with interest unless he produces the actual drawer or the person who committed the fraud.

The plaintiffs have proved, so far as proof is possible in this case, that there was no such person as Ramlal Ramprasad of Jhansi, and that this *hundi* was, therefore, a forgery. If the custom set up is binding on the parties, the plaintiffs were entitled to call upon the 1st defendant to produce Ramlal or refund the Rs. 3,000 with interest.

But the first issue raised by the 1st defendant must be disposed of before this question can be discussed, namely, whether the *hundi* as such was paid on the responsibility of the 1st defendant as a Shah and in accordance with the custom alleged.

I think this issue was raised owing to a misunderstanding regarding the actual practice of Shroffs when dealing with *hundis*, whether *shahjog* or not. The Shah does not guarantee the solvency of the drawer, he guarantees the genuineness of the *hundi*. A drawee will not pay a *hundi* unless he has funds in his hands belonging to the drawer or is willing to give him credit, and he will not pay on presentation of a *shahjog hundi* to a Shah unless he is satisfied as to the respectability of the Shah as he looks to him in case of anything afterwards going wrong with the *hundi*: see remarks of Arnould, J., in *Davlatram Shriram* v. *Bulakidas Khemchand* (1). Therefore this issue is somewhat meaningless. The respectability of the Shah is a matter only for the drawee to consider, as it is difficult to conceive that a Shah would repudiate his liability to refund on the ground that he was not a respectable person.

The custom set up by the plaintiffs was held to be proved by Arnould, J., in *Davlatram's* case (1). The head-note runs as follows:—

"According to mercantile usage amongst Hindus where a *hundi*, drawn 'payable to holder' (*shahjogi*), is paid at maturity by the drawee to the Shah or holder of the *hundi*, and such *hundi* afterwards turns out to be forged, the Shah, though a *bona fide* holder for value, is bound to re-pay to the drawee the amount of such *hundi* with interest from the date of payment, provided the drawee has been guilty of no laches in discovering the forgery and communicating the fact of such forgery to the Shah.

"The Shah, however, relieves himself from such liability by producing the actual forger."

So far as I know this custom has never since been disputed. It was referred to with approval as well-established by Bayley, (Acting) C. J., and Farran, J., on a reference from the Small Cause Court in *Ganesdas Ramnarayan* v. *Lachminarayan* (2), and, therefore, I was of opinion that there was no necessity for the plaintiffs to call evidence to prove that the custom was still followed by Shroffs, though the 1st defendant was at liberty to call evidence to show that the custom was either no longer followed or had been altered by later usage. I find that this was the view taken by the Small Cause Court in the above case, where an attempt was made without success by the defendants to prove that the custom has been altered: see *Ganesdas'* case (2).

The plaintiffs, however, did prove that both the Marwari Panch Shroff Association and the Marwari Association, which number amongst their members most of the Marwari Shroffs in Bombay, have a rule to the effect that in the case of fraud the payee of a *hundi* who has received the amount as *shahjog* shall produce the drawer, and if he does

(1) 6 B. H. C. R. (O. C. J.) 24 at p. 29.
(2) 18 B. 570

not do so shall pay to the person from whom the amount of the *hundi* has been received, with interest from the date the money was paid.

It was contended for the 1st defendant that the Shah was duly bound to produce the person who sent the *hundi*, not the drawer, but apart from the finding in *Davlatram Shriram* v. *Bulakidas Khemchand* (1) to the effect that the Shah could only relieve himself from responsibility by producing the actual forger, the evidence of 1st defendant's witnesses, Parbhudayal Hurkissonlal and Pratab Rai Ranchidas, conclusively showed that the words "*manjal pohochana*" in rule 16 meant "trace the *hundi* to the drawer."

The rule had not been officially translated, but I was informed by the interpreter that the dictionary meaning of the words is, "arrive at the last stage."

It was suggested that these witnesses, after having told the 1st defendant's Solicitors that they would give evidence to the effect that the words meant 'trace out the person who sent the *hundi*,' had been got at by the plaintiffs, but whatever promises they may have made before they were called, I was satisfied that they gave to those words the interpretation which they thought was commonly accepted by the members of the two Associations.

Arnould, J., in *Davlatram* v. *Shriram Bulakidas Khemchand* (1) at pag 38 said: "The substantial requisite in case of a forged *hundi* is that the drawer of the forged *hundi*, or the person of whom the forged *hundi* has been bought, should be pointed out." For this he relied on the evidence of the *Moonim* of Shivlal Motilal that 'the Shah must point out the responsible person.'

But at page 30 he referred to the evidence of the same *Moonim*: 'The Shah, or the person to whom the money has been paid, must point out the responsible person (the drawer), and, if he do not, he is responsible himself.'

Therefore it is not quite clear how the learned Judge arrived at the conclusion that 'the responsible person' was either the drawer, or the person from whom the *hundi* was bought.

In any event the person who sends a *hundi* for collection is not the person from whom the *hundi* is bought.

But the evidence in this case is conclusive that it is the duty of the Shah in the case of a forged *hundi* to produce the drawer or refund the money. Even if the custom were as alleged by the 1st defendant, it cannot be said that they ever made the slightest attempt to produce Manilal Gayaprasad.

But, as stated by Arnould, J, at page 31, 'if the discovery or communication to the Shah of the fact of the forgery is delayed by the laches or negligence of the drawee...he can, in such case, claim a refund from the Shah.'

It is contended by the 1st defendant that the plaintiffs have been guilty of laches. Now it is clear that Purshotum Raghowji, the plaintiff's *Goomasta*, must have ascertained by the 10th or 11th August that the *hundi* was a forgery and yet no demand was made upon the 1st defendant until the 25th September. This was due to the absence of the plaintiff from Bombay from the 9th July until the 23rd September. He said he returned to Bombay in consequence of information. He was not asked when he received information: but in any event he ought to have been informed immediately by Raghowji that Ramlal could not be traced, and if Raghowji delayed in informing his master, his master must be held responsible for the consequences.

In my opinion the claim to a refund against a Shah who has received payment of a *hundi*, on the ground that the *hundi* was a forgery, must be made as soon as possible after the forgery has been discovered, so as to enable the Shah to protect himself, and the plaintiff in this case was guilty of such delay, namely, over a month, without any reasonable excuses as to disentitle him from recovering. It was suggested that the 1st defendant had notice in August that the Police were making inquiries as the Sub-Inspector visited their shop; but I do not think that that can be considered as a communication by the plaintiff to the 1st defendant of the forgery and there certainly was no claim to a refund. It is necessary that all notices involving responsibility on mercantile documents should be clearly, precisely and directly given.

The suit must be dismissed but without costs.

Suit dismissed.

Attorneys for the Plaintiffs: Messrs. *Malvi, Hiralal, Mody & Ranchhodas.*

Attorneys for the Defendants: Messrs *Ardeshir, Hormusji, Dinshaw & Co.*

AYYAGRI VEERASALINGAM v. KOVVURI BASIVIREDDI.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 541 OF 1912.

July 21, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

AYYAGARI VEERASALINGAM—DEFENDANT—APPELLANT

versus

KOVVURI BASIVIREDDI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 93, cl. 3), 104, cl. (2), O. XLIII, r. 1 (m)—Compromise petition filed—Objection by one party—Recording of compromise by Court—Decree—Appealability—Court's power to pass decree—Terms outside scope of suit, whether can be incorporated in decree—Consideration for compromise.

Where a Court of first instance passed a decree in accordance with the terms of a compromise agreement which it recorded and where on appeal against the said decree the District Judge confirmed the same:

Held, that a second appeal lay against the decree of the District Judge and that Order XLIII, rule 1 (*m*), and section 104 of the Civil Procedure Code of 1908 did not bar the same.

Where, in spite of the objection of one of the parties to a compromise, that he only consented to execute a sale-deed outside the Court in consideration of the plaintiff withdrawing the suit and did not consent to a decree being passed against him, the Court held that there was a consent of the parties to the terms of the compromise agreement which it recorded and passed a decree in accordance therewith:

Held, that an appeal lay against the said decree and that section 96, clause (3), of the Code of Civil Procedure of 1908 did not prohibit it.

All terms which form consideration for the adjustment of the matters in dispute in a suit, whether they form the subject-matter of the suit or not, become related to the suit and can be embodied in the decree.

Natesa Chetti v. *Vengu Nachiar*, 3 Ind. Cas. 701, 6 M. L. T. 313; 33 M. 102; 20 M. L. J. 20 and *Govinda Chandra Pal* v. *Dwarka Nath Pal*, 35 C. 837, 7 C. L. J. 492; 12 C. W. N. 849, followed.

Second appeal against the judgment and decree of the District Court of Kistna, in Appeal Suit No. 584 of 1910, preferred against those of the Court of the Subordinate Judge of Ellore, in Original Suit No. 52 of 1909.

FACTS.—Parties to a suit pending in the Court of the Subordinate Judge of Ellore, compromised their disputes and filed a petition embodying certain terms in Court. When the petition came up for orders the 1st defendant objected that he only consented to execute a sale-deed to the plaintiff outside the Court on the plaintiff withdrawing the suit and not to a decree being passed in the suit itself compelling him to execute a sale-deed. The Subordinate Judge, however, recorded the compromise and passed a decree in accordance therewith. Against this decree the 1st defendant preferred an appeal to the District Judge who confirmed the decree of the Court of first instance. The 1st defendant then preferred this second appeal to the High Court.

Mr. *P. Narayanamurthi* (with him Mr. *P. Somasundaram*), for the Respondent, raised two preliminary objections (1) that Order XLIII, rule 1 (*m*) and section 104, clause (2), Civil Procedure Code, barred the second appeal which was in effect against an order passed by the District Court, in appeal, confirming an order passed by the Subordinate Judge recording a compromise, and (2) that section 96, clause (3), prohibited an appeal from a decree passed by the Court by the consent of parties. Both these objections were overruled.

Mr. *Zynuldin* for Mr. *T. Prakasam*, for the Appellant.—The 1st defendant agreed only to execute a sale-deed outside the Court in case plaintiff withdrew his suit. He never consented to a decree being passed in the suit itself. As the plaintiff did not withdraw the suit the compromise was not binding on the 1st defendant and the decree passed on the footing that the compromise was valid and binding cannot be supported. Further the term as to the execution of a sale-deed did not relate to the suit and could not be embodied in the decree.

Mr. *P. Narayanamurthi*, for the Respondents:—The decree was correct. The fact that the 1st defendant did or did not agree to the passing of a decree compelling him to execute a sale-deed was not relevant. The only question that had to be considered by the Judge was whether there had been an adjustment of the suit and he held that there was. On that footing, it was quite competent to the Court to pass a decree. As regards the other point all terms which form the consideration for the compromise relate to the suit, whether they are within the scope of the suit or not and can be embodied in the decree. *Natesa Chetti* v. *Vengu Nachiar* (1) and *Gobinda Chandra Pal* v. *Dwarka Nath Pal* (2).

(1) 3 Ind. Cas. 701; 33 M. 102; 6 M. L. T. 313; 20 M. L. J. 20.

(2) 35 C. 837; 12 C.W. N. 843; 7 C. L. J. 492.

JUDGMENT.—There is a preliminary objection taken to the entertainment of the second appeal on two grounds. One ground is that it is practically a second appeal preferred against the order of the District Court which was passed in appeal from the order of the Subordinate Judge recording a compromise petition under Order XXIII, rule 3, and that such a second appeal is prohibited by Order XLIII, rule 1 (*m*), and section 104, clause (2). The short answer to this is that there was no appeal to the District Court against the order of the Subordinate Judge recording the compromise nor is the present second appeal against any order of the District Court passed in appeal against any such order of the Subordinate Judge. The appeal and second appeal are respectively from the decree of the Subordinate Judge passed in accordance with the compromise agreement after recording it and from the decree of the District Judge on appeal against the Subordinate Judge's decree.

The next contention is that section 96, clause (3), prohibits an appeal from a decree passed by the Court with the consent of parties. The answer to this objection is that the decree itself was not passed by the consent of parties, but the Court held that there was a consent of parties to the terms of a compromise agreement which was recorded and it passed a decree in accordance therewith notwithstanding the objection of one of the parties.

The preliminary objection fails.

Coming to the merits of the second appeal, the appellant's learned Counsel contended that under the compromise agreement the first defendant agreed only to execute a sale-deed to plaintiff outside the Court in consideration of the plaintiff's withdrawing the suit, and that he did not agree to a decree being passed compelling him (the 2nd defendant) to execute such a sale-deed. Whether he agreed to the Court's passing a decree or not, compelling him to execute a sale-deed, is not relevant. The real question is, whether the suit was adjusted by a compromise, one of the terms of which was that the 1st defendant should execute such a sale-deed and whether a decree can be passed in accordance with such a term. We think that it could be done.

Another contention put forward by the appellant's Counsel (Mr. Zynuddin who argued the case with ability and fairness) was that such a term does not "relate to the suit," and hence the decree cannot embody it. Though certain earlier decisions were inclined to the view that any terms which did not directly concern the subject-matter of the suit could not be embodied in the decree, we prefer to follow the later cases in *Natesan Chetty* v. *Vengu Nachiar* (1) and *Gobind Chandra Paul* v. *Dwarka Nath Paul* (2) which hold that all terms which form the consideration for the adjustment of the matters in dispute in the suit, whether they form part of the subject-matter of the suit or not, do become related to the suit and can be embodied in the decree. In the result, the second appeal fails and is dismissed with costs of the 1st respondent.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1344 OF 1911.

July 14, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Napier.

RAJA KAMADANA VENKATANARASIMHA RAMACHANDRA ROW BAHADUR ZAMINDAR GARU, ZAMINDAR OF GURUZA (DIED), AND OTHERS PLAINTIFFS—APPELLANTS

versus

KONDURI CHINNA VENKAYYA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Agreement to pay higher rate of rent executed before Madras Estates Land Act (I of 1908)—Without consideration—Void.

An agreement without consideration is not enforceable as a contract.

Therefore a landlord is not entitled to the enhanced rate of rent from a tenant on the basis of an agreement executed before the passing of the Estates Land Act to pay enhanced rate without any consideration.

DESIREDDI YELLAMANDER *v.* SEKHAKOLLI CHINNA PITCHAIAH.

Second appeal against the decree of the Court of the District Judge of Kistna, in Appeal Suit No. 132 of 1909, preferred against that of the Court of the Deputy Collector of Ellore, in Summary Suit No. 209 of 1908.

FACTS.—Prior to the enactment of the Madras Estates Land Act, certain tenants executed an agreement to their landlord whereby they agreed to dig a well upon the land, to make a garden and to pay a higher rate of rent. The landlord claimed the enhanced rent and the tenants disputed their liability to pay the same. The Deputy Collector of Ellore as well as the District Judge on appeal held in favour of the tenants. The landlord thereupon appealed to the High Court.

Mr. *V. Ramadoss*, for the Appellants —The tenants are bound by their agreement to pay the enhanced rent. The document in question was executed prior to the enactment of the Madras Estates Land Act I of 1908.

Mr. *P. Nagabhushanam*, for the Respondents.—The agreement is clearly unenforceable as it is not supported by consideration: *Arumugam Chetty* v. *Raja Jagaveera Rama Venkateswara Ettappa* (1).

JUDGMENT.—It is argued that the appellant is entitled to the rent claimed on the basis of an agreement (Exhibit A) executed prior to the enactment of the Madras Estates Land Act whereby the tenant, after digging a well and making a garden, undertook to pay a higher rate of rent. No consideration is alleged for this agreement and it is not enforceable as a contract. [Vide *Armugam Chetty* v. *Raja Jagaveera Rama Venkateswara Ettappa* (1)].

The appeal is dismissed with costs.

Appeal dismissed.

(1) 8 Ind. Cas. 330; 35 M. 134; 9 M. L. T. 76.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 77 OF 1913.

July 20, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Napier.

DESIREDDI YELLAMANDER—APPELLANT

versus

SEKHAKOLLI CHINNA PITCHAIAH—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182—"Step-in-aid of execution"—Application for continuance of sale.

An application by a decree-holder for continuance of an auction sale to secure the attendance of more bidders is a "step-in-aid of execution" within the meaning of Article 182 of Schedule I of the Limitation Act, 1908.

Troylokya Nath Bose v. *Jyoti Prokash Nandi*, 30 C 761; 8 C. W. N. 251, followed.

Appeal against the appellate order of the District Court of Guntur, in Appeal Suit No. 35 of 1913, preferred against that of the Court of the District Munsif of Narasaraupet, in Execution Petition No. 722 of 1912 (in Original Suit No. 314 of 1906).

FACTS.—On the morning of the day fixed for the sale of certain immoveable property in execution of a decree the decree-holder put in a petition praying that the sale might be kept going on for three consecutive days, so that proper attendance of bidders might be secured and that an adequate price might be obtained for the property advertised for sale. This petition was rejected and the sale was concluded that very day. This sale, however, was subsequently set aside on other grounds. Within three years of the date of the above application but more than three years from the date of the last execution petition, the decree-holder applied in execution for the realisation of the decree amount. The judgment-debtor opposed the application on the ground that it was barred by limitation under Article 182, Schedule I, of the Indian Limitation Act, 1908. Both the lower Courts held that the application of the decree-holder for securing a proper attendance of bidders was a step-in-aid of execution and consequently the present execution application was not barred. The judgment-debtor thereupon appealed to the High Court.

Mr. *P. M. Srinivasa Iyengar* for Mr. *P. Nagabhushanam*, for the Appellant.—The execution application is clearly barred. The petition of the decree-holder for keeping the sale open for three days to secure proper attendance of bidders is not a step-in-aid of execution, as it is only an application for adjournment. Vide *Abdul Kadir* v. *Krishna Malamal Nair* (1).

Mr. *N. S. Narasimhachari*, for Mr. *V. Ramesam*, for the Respondent.—The petition for keeping the sale open for three days is a step-in-aid of execution. Courts have always leaned favourably towards decree-holders and interpreted Article 182, Schedule I of the Limitation Act very widely: *Troylokya Nath Bose* v. *Jyoti Prokash Naudi* (2).

JUDGMENT.—Both Courts have found that the decree-holder applied for the continuance of the sale in order to secure the attendance of more bidders, and that his application was in aid of execution. Their decisions on this finding in respondent's favour are justified by *Troylokya Nath Bose* v. *Jyoti Prokash Naudi* (2). The Courts have always placed a wide construction on the words "step-in-aid of execution" in Article 182, Schedule I, of the Limitation Act and we are not prepared to dissent from this conclusion. The appeal against the appellate order is dismissed with costs.

Appeal dismissed.

(1) 23 Ind. Cas. 533; 1 L.W. 271; (1914) M.W.N. 563.
(2) 30 C. 761; 8 C. W. N. 251.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1008 OF 1913.

June 18, 1914.

Present:—Mr. Justice Sunder Lal.

CHATTERPAL—DEFENDANT—APPELLANT

versus

GAJADHAR UPADHYA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Plot in abadi—*Tenant's user for long time—Right of tenant to enclose and build upon it—Consent of* zemindar.

A tenant cannot enclose and construct a house upon a plot of open land in the *abadi* which has been in his use for a long time, without the consent of the landlord.

Second appeal from the decision of the District Judge of Gorakhpur, dated 2nd July 1913.

Mr. *S. D. Sinha*, for the Appellant.

Mr. *Iswar Saran*, for the Respondents.

JUDGMENT.—The plaintiffs in this case

are the *zemindars* of the village. The defendant is a tenant occupying a house in the *abadi*. Near his house is a plot of open land No. 17 which has been found by the Court below to have been in the use of the tenant for a considerable time. The tenant now proposes to enclose the plot and construct a house on it. To this the *zemindars* do not consent and they have brought a suit for possession and an injunction restraining the defendant from constructing on the land. The question is whether the tenant can, as of right, build on the said land. At most the tenant has a right to use the open land for various purposes.

There was either a license to use the land or an easement enjoyed by him, if such a position were legally possible. As a tenant he could not acquire an easement over his *zemindar's* land and a licensee is not entitled to impose any additional burden or construct a building upon the land used by him without his landlord's consent.

The Court below was perfectly right in restraining the defendant from building on the land. The authorities cited fully bear out the position and I think the decree of the Court below is correct. I dismiss the appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 474 OF 1913.

November 28, 1913.

Present:—Mr. Justice Rattigan.

Maulvi MUHAMMAD BAKHSH—DEFENDANT—APPELLANT

versus

CHHANGA AND OTHERS—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Vendor becoming owner by exchange of land before sale—Sanction given by Collector under Punjab Alienation of Land Act (XIII of 1900)*—Date of operation.*

A permanent alienation of land subject to the sanction of the Deputy Commissioner under the Punjab Alienation of Land Act, if eventually sanctioned by that officer, becomes effective from its original date. Consequently a suit for pre-emption on the ground of the vendee not being an owner in the sub-division in which the land in dispute is situate

must fail if before the sale of the land under pre-emption the vendee had become an owner therein by an exchange, although it was sanctioned during the pendency of the suit of pre-emption against him.

Saghar v. *Nur Ahmad*, 19 Ind. Cas. 239; 79 P. R. 1913; 59 P. W. R. 1913; 110 P. L. R. 1913 overruling *Said Khan* v. *Matwala*, 16 Ind. Cas. 775; 82 P. R. 1912; 219 P. W. R. 1912; 219 P. L. R. 1912, followed.

Second appeal from the decree of the Divisional Judge, Jullundur, dated the 6th February 1913, reversing that of the Subordinate Judge, 2nd Class, Jullundur, dated the 18th July 1912, dismissing plaintiff's claim.

Mirza *Jalal-ud-din*, for the Appellant.

Mr. *Nand Lal*, for Chhanga, and Mr. *Roshan Lal*, for Nizam Din, son of Gaman, Respondents.

JUDGMENT.—Before proceeding to discuss the present appeal upon its merits, I would refer to my judgment in Civil Appeal No. 640 of 1913. For reasons there given, I have so far varied the decree given by the Divisional Judge to Chhanga, respondent, as to make it a decree in favour of Chhanga jointly with his original co-plaintiffs, Nizam Din, (son of Gaman), Maula Bakhsh and Fattu. These three persons are already on the record as co-respondents and the only respect in which my judgment in the other case affects them is to make them co-decree-holders with Chhanga, instead of their being merely *pro forma* respondents, as they originally were, to this appeal. I have explained the situation to Mr. Roshan Lal, who appears on their behalf, and he informs me that he supports Mr. Nand Lal's argument, on behalf of Chhanga, respondent, and has nothing further to urge.

The four plaintiffs sued for pre-emption of certain land sold to defendant No. 1 and his relative, defendant No. 2, by a deed of sale, dated 5th of December 1909. Plaintiffs' claim to pre-empt was based on the ground that they were owners in the sub-division of the village in which the land is situate, whereas the vendees owned no land in that sub-division. In reply to this, defendants pleaded that they had become owners in the sub-division prior to the date of sale by means of an exchange of land which had taken place between them and Khan Sahib Mahbub Alam who owned land in that sub-division. It is admitted that this exchange was effected in order to frustrate all claims of pre-emptors, and both Courts are agreed that it took place in fact and at a date prior to the institution of this suit (*i. e.*, before the 3rd of December 1910). It appears, however, that the vendees are members of an agricultural tribe but that Khan Sahib Mahbub Alam is not, and, consequently, the alienation of land by the vendees in his favour required the sanction of the Collector. This sanction was duly accorded on the 9th January 1911, that is to say, after the date of the institution of the present case. It is contended that until such sanction was given by the Collector, the alienation to Khan Sahib Mahbub Alam was not complete, and that as a corollary, the alienation by that gentleman to the vendees was also incomplete and ineffective.

The Divisional Judge, upon the authority of *Said Khan* v. *Matwala* (1) and with reference to the provisions of section 3 (*ii*) of the Alienation of Land Act, has upheld this contention and decided that plaintiffs had a superior right when the suit was instituted, inasmuch as the exchange of land whereby the vendees acquired property in the sub-division did not take effect until the Collector's sanction had been obtained. There is undoubtedly considerable force in the contentions and I confess I should have had some difficulty in deciding the point were the matter *res integra*. As it is, however, I consider myself bound by the decision of a Division Bench of this Court reported as *Saghar* v. *Nur Ahmad* (2). This decision overrules the authority relied on by the Divisional Judge and is binding upon me. It is, I think, a clear authority for the proposition that a permanent alienation is nonetheless a permanent alienation merely because it may be unenforcible in consequence of the provisions of Land Alienation Act; and that if eventually sanctioned by the Deputy Commissioner, it becomes effective from its original date. To a somewhat similar effect is the decision of another Division Bench in *Abbo* v. *Rahman* (3), where it is remarked that an alienation which requires the sanction of the Deputy Commissioner cannot take effect until such sanction has been obtained, but when the sanction has been given, it cannot

(1) 16 Ind. Cas. 775; 82 P. R. 1912; 219 P. W. R. 1912; 219 P. L. R. 1912.

(2) 19 Ind. Cas. 239; 79 P. R. 1913; 59 P. W. R. 1913; 110 P. L. R. 1913.

(3) C. A. No. 647 of 1910, decided on 11th July 1912 by Shah Din and Beadon, JJ.

create a new alienation but makes valid the alienation which has already taken place.

Upon these authorities I hold that the vendees had become owners in the sub-division before the plaintiffs' suit for pre-emption had been instituted and that consequently their suit must fail. I accordingly accept this appeal and direct that plaintiffs' suit be dismissed with costs throughout.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 2388 TO 2392 OF 1912.

July 13, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

IN S. A. No. 2388 OF 1912.

VUNGARALA SESHAYYA AND ANOTHER—DEFENDANTS—APPELLANTS

IN S. A. No. 2389 OF 1912.

VUNGARALA SATTIRAZU—DEFENDANT—APPELLANT

IN S. A. No. 2390 OF 1912.

GANNI VEERAYYA—DEFENDANT—APPELLANT

IN S. A. No. 2391 OF 1912.

CHINTAPALLI SATTIRAZU AND ANOTHER—DEFENDANTS NOS. 2, 3—APPELLANTS

versus

TADAPALLI SUBBA RAO AND OTHERS—PLAINTIFFS—RESPONDENTS IN ALL.

IN S. A. No. 2392 OF 1912.

DAMISETTI VENKATASWAMY AND OTHERS—DEFENDANTS NOS. 1 TO 4—APPELLANTS

versus

ALLA NARAYANASAWMY AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 3 (2), cl. (d)—Resumed jagir, whether estate.

Once the Government resumes a *jagir* it is neither a "settled" nor an "unsettled *jagir*" and, therefore, is not an "estate" within the meaning of section 3 (2), clause (*d*), of the Estates Land Act.

Second appeal against the decrees of the Court of the Subordinate Judge of Cocanada in Appeal Suits Nos. 15, 16, 17, 18 and 149 of 1910 preferred against those of the Court of the District Munsif of Cocanada in Original Suits Nos. 460, 462, 463, 465 of 1908 and 280 of 1909.

Mr. *P. Narayanamurthi*, for the Appellants.

Mr. *B. Narasimha Rao* (with him Mr. *V. Ramesam*), for the Respondents.

JUDGMENT.—The *jagir* having been resumed by the Government, the property in question was neither a settled nor an unsettled *jagir* when the Estates Land Act came into force and hence the definition of an estate in that Act did not apply to it.

The Subordinate Judge rightly relied on the defendants' (appellants') own admissions in the *muchilikas* executed by them for his finding that they had no occupancy rights in their respective holdings and that finding of fact cannot be questioned in second appeal.

This and the connected second appeal are, therefore, dismisssd with costs.

Appeals dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEALS NO. 869 TO 877 OF 1913.

June 18, 1914.

Present:—Mr. Justice Piggott.

Chaudhri UMRAO SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

UMRAO SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Lambardar's *power to grant lease—Declaration—Jurisdiction of Civil Court—Agra Tenancy Act (II of 1901), s. 95.*

It is not in the power of a *lambardar* to grant a lease of co-parcenary land beyond such period as the circumstances of a particular year or particular season may require. But where he grants a lease which is beneficial to the general body of the co-sharers, it is not open to the latter to have it declared invalid, whatever be the period of lease.

Chattray v. Nawala, 29 A. 20; 3 A. L. J. 639; A. W. N. (1906) 257; and *Mukhta Prasad v. Kamta Singh*, A. W. N. (1906) 277; 3 A. L. J. 655, referred to.

A suit for a declaration that a Revenue Court's decree, whether based on a compromise or otherwise, is illegal or inoperative for want of jurisdiction or error of law, cannot be entertained by a Civil Court.

Second appeal from the decision of the Additional Judge of Moradabad, dated the 12th April 1913.

FACTS.—The question was whether a decree obtained by certain tenants against the *lambardar* on the basis of a compromise in the

Revenue Court could be set aside by a Civil Court at the instance of the other co-sharers. The plaintiffs appealed.

Dr. *S. N. Sen*, for the Appellants.—The appellants were no parties either to the decree or the compromise, which on the face of it is prejudicial to the interests of the plaintiffs and is clearly collusive. Consequently a Civil Court is competent to set it aside. Section 95 of Act II of 1901, under which the tenants had sued, has nothing to do with enhancement of rent.

I rely on *Chattray* v. *Nawala* (1) and on *Jagan Nath* v. *Hardyal* (2).

[PIGGOTT, J. referred to *Mukhta Prasad* v. *Kanta Singh* (3)].

Mr. *M. L. Agarwala*, (with him Mr. *Abdul Raoof* for whom Mr. *Agha Haidar*), for the Respondents.—The *lambardar* represented the co-sharers and the compromise incorporated in the decree was binding on the plaintiffs *Gulzari Lal* v. *Jai Ram* (4).

The leases could not be held to be illegal simply because they were for a period of more than seven years. The real thing to be seen is whether the rights of the co-sharers have been injuriously affected. The lower Appellate Court has found as a fact that the leases were beneficial to the co-sharers.

If the decree was a valid decree, a Civil Court cannot set it aside; if it is a nullity, no suit is maintainable for the purpose of obtaining a declaration on a question of law.

Dr. *S. N. Sen*, in reply.

JUDGMENT.—These are nine connected second appeals which may be disposed of together, as they have been by the lower Appellate Court, the essential facts being the same in each of the nine suits out of which they arise.

The plaintiffs, Chaudhri Umrao Singh, Risal Singh and *Musammat* Kisar, together with the first and principal defendant, Chaudhri Shibba Singh, are co-sharers in each of two *mahals*, one situated in a village called Bahadurpur and the other in a village called Abdullahpur. Of each of these *mahals* the defendant Shibba Singh is the *lambardar*. In the year 1908 Shibba Singh, in his capacity as *lambardar*, granted to a number of tenants in both these *mahals* registered leases for periods of seven years; perhaps this was not the precise period in each case; but the point is not material. Apparently these leases covered a great bulk of the culturable land in both *mahals* which was not already in the hands of occupancy tenants, or held by Shibba Singh himself as his *sir* or *khudkasht*. It is an important fact in the case that there was no action taken or objection raised by the plaintiffs in respect of these leases, until the connected suits now before me were instituted in the month of April 1912. In the meantime the relations between the plaintiffs and the defendant had become very much strained. In the latter part of the year 1911 the tenants who held the registered leases presented in the Revenue Court a series of applications under section 95 of the Agra Tenancy Act (Local Act II of 1901), asking for a declaration as to the various matters therein specified, and amongst other things as to the class to which the said tenants belonged and the rent payable in respect of their holdings. It will be convenient in order to explain the position exactly to take one case in detail as a sample of others, and I, therefore, turn to the actual facts of the case out of which Second Appeal No. 869 of 1913 arises. In this case the registered lease granted by Shibba Singh was in favour of a tenant called Umrao Singh. It was dated August the 24th, 1908, and it gave the said tenant the right to hold the fields therein specified for a period of seven years at a rent of Rs. 55 per annum. Umrao Singh's plaint in the Revenue Court was to the effect that there had been an agreement between himself and the *lambardar* Shibba Singh superseding the lease of 1908. He alleged that the terms of this agreement were that, from the commencement of the agricultural year 1319 *Fasli*, he should pay rent at Rs. 62 per annum instead of Rs. 55; but on the other hand that the term of his lease should be extended so as to run to the end of 1329 *Fasli*, that is to say, roughly to the month of September 1922 A. D. He admitted that he had no registered lease to this effect and pleaded that the *lambardar* was for some reason declining to have the correct facts regarding his tenancy entered in the village papers. On these grounds he sought

(1) 29 A. 20; 3 A. L. J. 639; A. W. N. (1906) 257.
(2) A. W. N. (1897) 207.
(3) A. W. N. (1906) 277; 8 A. L. J. 655.
(4) 24 Ind. Cas. 178; 12 A. L. J. 606 (F. B.).

declaration under section 95 of the Agra Tenancy Act as already explained. When this suit was set down for hearing it was terminated by a compromise filed by the parties, that is to say, by the tenant Umrao Singh and the *lambardar* Shibba Singh. This compromise is dated September the 9th, 1911. It is to the effect that Shibba Singh has agreed to give Umrao Singh a lease for 11 years from 1319 to 1329 *Fasli* inclusive and that on the other hand the tenant Umrao Singh has agreed to his rent being enhanced up to the sum of Rs. 69 per annum.

Now in view of the manner in which the case has been argued before me it is scarcely possible for me to avoid some sort of criticism or discussion of the action taken by the Revenue Court in this matter. It seems to me that the Assistant Collector, before proceeding to give a decree for a declaration in terms of compromise, might have stopped to consider whether the tenant Umrao Singh actually held a lease, "registered" within the meaning of the definition of that expression, given in the Tenancy Act itself, so as to give him a right to classify himself as a tenant holding under an eleven years' lease. It seems open to argument also whether under the provisions of section 47 of the Tenancy Act enhancement of rent had been duly applied for, and whether the Assistant Collector should not have considered this point before proceeding to dispose of the suit before him. As often happens, however, when a suit is compromised, the Court did not look beyond the terms of the compromise itself. It gave the tenant Umrao Singh a decree to the effect that he is the tenant of the lands specified in his application at a rent of Rs. 69 per annum for the period of 1319 to 1329 *Fasli* inclusive.

Similar proceedings took place in respect of all the tenants who had been given leases in 1908 A. D. Each of them obtained against the *lambardar* Shibba Singh a decree stating that he held the lands covered by his former lease at an enhanced rent and for a longer term, terminating with the year 1329 *Fasli*.

The nine suits now before me on appeal were filed by the remaining co-sharers in the two *mahals* in question with a view to contesting the validity of the arrangement come to between the *lambardar* and the various tenants. In each case the plaintiffs alleged that the arrangements come to and the decree obtained from the Revenue Court were fraudulent and collusive as between the *lambardar* and the tenants, and intended simply to cause injury to the remaining co-sharers. The relief sought in each case is a declaration that the lease entered into in the year 1908, which is described as having been subsequently amended under the compromise of September the 9th, 1911, may be cancelled so far as it affects the plaintiffs' rights. The Court of first instance has considered separately the validity of the contracts of lease embodied in the registered instruments of 1908 and those subsequently effected which are evidenced by the Revenue Court's decrees passed on the compromises of September 1911. The learned Munsif came to the conclusion that the plaintiffs were entitled to no relief in respect of the registered leases of 1908, and this for two reasons. He held that a suit for the cancellation of those leases was barred by limitation on the date on which those suits were instituted by reason of Article 91, Schedule I, of the Indian Limitation Act IX of 1908. He held further that the plaintiffs had acquiesced in those leases by the enjoyment of profits on the basis of the rents collected by the *lambardar* in accordance with the said leases, and for this reason also they were not entitled to obtain any decree invalidating the same. He was, however, of opinion that the plaintiffs had been wronged by the arrangements come to between the *lambardar* and the various tenants in the month of September 1911, and that the wrong was one for which relief could be given by a decree of his Court. He gave the plaintiffs in each case a declaration that the compromise dated September the 9th, 1911, is null and void as against them, and also that it is ineffectual in so far as it affects their interests. The defendants appealed to the Court of the District Judge and cross-objections were filed by the plaintiffs in respect of that portion of their claim which had been dismissed. The learned District Judge before whom the appeals came for decision has remarked that the cross-objections were not pressed before him, and in any case he can see no force in the pleas taken. On the

appeals of the defendants he discussed the various questions of law and of fact involved at considerable length. He doubted whether the plaintiffs could, in any case, obtain a decree which would have the effect of nullifying the decrees passed by the Revenue Court in a matter in which that Court had sole jurisdiction. But he did not come to any definite decision on this point. He went on to hold, however, that there was no reason to suppose that the compromises entered into in the Revenue Court were collusive as between the *lambardar* and the tenants, or were detrimental to the interests of the co-sharers. He has gone in fact somewhat further than this, for he has recorded a finding that "it is fairly shown that the compromise was for the benefit of the co-sharers."

The plaintiffs have filed a series of second appeals in this Court. There are two pleas in their memorandum of appeal which seem to be intended to challenge the finding of the Court of first instance, affirmed by the lower Appellate Court, with respect to the registered leases of 1908. Apart from the question of limitation, I do not think I can go behind the findings of both the Courts below that there has been acquiescence by the plaintiffs in the matter of these leases. It has not been suggested that the plaintiffs were not getting their share of the profits during the years 1908 to 1911 inclusive, or that they claimed profits on the basis of some calculation of a possible rental of the lands in suit over and above the divisible profits calculated on the basis of the rents set forth in the leases of 1908. It seems to me on a consideration of the case as a whole that the plaintiffs were not disposed to quarrel with the *lambardar's* management at the time when these leases of 1908 were executed, and that the real reason for the present suits is to be found in the subsequent disagreement of the parties, the intention of the plaintiffs to apply for the partition of the two *mahals* and their belief that the suits in the Revenue Courts and the compromises of September the 9th, 1911, represented some trick or device on the part of the *lambardar* to prejudice their position after the partition should have been effected. I find from the record that applications for the partition of the two *mahals* were actually made on the 3rd and 4th of January 1912 respectively. Some of the pleas taken in the memorandum of appeal before me, and some of the arguments addressed to me in support of these appeals, are not of a nature calculated to help the plaintiffs' case. I have already pointed out the sort of criticisms which have been applied to the compromise decrees passed by the Revenue Court. The argument before me goes to suggest that those decrees, in so far as they purport to lay down the period of the tenancy, are on the face of them illegal as dealing with matters outside the scope of section 95 of the Agra Tenancy Act. It is useless for the appellants to try to argue the appeals on such lines as these. If, as a matter of fact, these proceedings in the Revenue Court are void by reason of some inherent irregularity or illegality, that is a matter with which the Civil Courts have no concern. Obviously a suit for a declaration that an Assistant Collector sitting as a Court of Revenue has passed a decree, whether based on a compromise or otherwise, which is illegal or inoperative by reason of some want of jurisdiction or error of law, is not a suit which can be entertained by a Civil Court. It may be that the tenants who are defendants in these various suits may hereafter find themselves setting up the compromise decrees of September the 9th, 1911, as defences against some suit for their ejectment brought under section 58 of the Agra Tenancy Act, and that the Revenue Courts themselves may have to decide whether the tenants are in effect holding under an unexpired lease and can produce legal evidence that they are so holding. With these matters we are not concerned in the present suits. If, as a matter of fact, the *lambardar* and the tenants handled the business so clumsily that their proceedings in the Revenue Court failed to confer upon the tenants the status of tenants holding under valid leases, so much the better for the present plaintiffs; but it is not for the Civil Court in these present suits to give them a decree to that effect. If the plaintiffs are really entitled to any relief at all, they must start with the assumption, so far as these suits are concerned, that the *lambardar* Shibba Singh entered into contracts with these various tenants which would confer upon the said tenants a right to hold the lands in suit for a period of eleven years, unless it can be shown that the

lambardar, in entering into those contracts on behalf of the whole body of co-sharers, was exceeding his powers. This was substantially the relief which the plaintiffs were trying to get, although they do not seem to have put the point very happily in their plaint. What they really want is a declaration in each of these suits that the contract of lease entered into in the month of September 1911 by the defendant *lambardar* with the defendants-tenants in each case is a contract which is not binding upon the plaintiffs, in so far as it purports to confer upon the tenants the right to hold the lands in suit under a lease for a period of eleven years, or otherwise than as tenants from year to year. The mere fact that the contract of lease between the *lambardar* and the tenants had got itself embodied in a decree of rent Court, in a suit to which the plaintiffs-co-sharers were no parties, would not, in my opinion, be sufficient in itself to bar the plaintiffs from maintaining a suit for a declaration to the effect above stated. The real question, however, is whether on the findings recorded by the lower Appellate Court the plaintiffs have made out a good case for such a declaration. The question of the rights and powers of a *lambardar* in dealing with co-parcenary land has been considered by this Court in a series of rulings. I am content to refer to the case of *Chattray* v. *Nawala* (1) where it was laid down, in concurrence with a previous decision by another Bench of this Court, that a *lambardar* has not general power to grant any lease of co-parcenary land beyond such period as the circumstances of a particular year or particular season may require. The effect of this decision is understood to have been modified by the views expressed by another Bench of this Court in *Mukhta Prasad* v. *Kamta Singh* (3); but the weight of authority seems to me in favour of the ruling in *Chattray* v. *Nawala* (1). I should be disposed to presume against the validity of a lease for a long period of years granted by a *lambardar* of co-parcenary land in which he himself had only a small share; more particularly I should incline to presume against the validity of a series of leases granted under circumstances so peculiar as those with which I am now concerned, and at a time when it is presumable that the *lambardar* knew that his co-sharers were about to apply for partition. At the same time I am bound to admit that in the case of any and every lease granted by him, whatever be its period, it is open to the *lambardar* to plead and to prove by evidence that the grant of the lease was justified by the circumstances of the case and that it was beneficial to the co-parcenary body as a whole. In the present case I have before me the express findings of the Court below that there was nothing collusive about the proceedings in the Assistant Collector's Court, and that it is fairly shown that the compromises there entered into were for the benefit of the co-sharers. I cannot say that these findings rest upon no evidence at all. It is quite a peculiar feature of the case as it now stands that the registered leases of the year 1908, which were acquiesced in by the co-sharers, were in every case for an annual rental considerably lower than that secured by the contracts of lease entered into in 1911. It is difficult to say that the mere fact that the period covered by the leases was considerably extended in the contracts entred into in 1911 would in itself be prejudicial to the other co-shares. The tenants must either pay the enhanced rent contracted for by them, or they will have to submit to ejectment in default of payment of rent. I am not prepared to say that the lower Appellate Court was not entitled to arrive at the findings recorded by it, and it seems to me that I must treat them as decisive in regard to all these appeals. I hold then that the plaintiffs are not entitled to any decree declaring the invalidity of any contracts of lease which may have been entered into between the *lambardar*-defendant and the tenants-defendants in the month of September 1911, assuming that valid contracts of lease were entered into between these parties, because the *lambardar* has succeeded in proving affirmatively to the satisfaction of the lower Appellate Court that he entered into these contracts in good faith and that they were advantageous to the general body of the co-sharers. These appeals must, therefore, fail and I dismiss each of them with costs.

Appeals dismissed

BOMBAY HIGH COURT.

CIVIL REFERENCE No. 2 OF 1914.

April 7, 1914.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

SATYABHAMABAI JANARDAN KHARE —PLAINTIFF

versus

GOVIND JANKU BADE— DEFENDANT.

Limitation—Dekkhan Agriculturists' Relief Act (XVII of 1879), ss. 47, 48—Conciliation system abolished—Time between application to Conciliator and termination of system not allowed to be deducted—Extension of time allowed to give reasonable opportunity to file suit—Rule of law where party cannot conform to law of limitation without any fault on his part.

In a suit on a bond in which it was necessary to file a Conciliator's certificate under section 47 of the Dekkhan Agriculturists' Relief Act, where no certificate is granted in consequence of the termination of the conciliation system in the District, section 48 of the Dekkhan Agriculturists' Relief Act has no application, and the period of limitation applicable, therefore, would be the period prescribed under the Limitation Act.

The plaintiff would not be entitled to deduct the time between his application to the Conciliator and the termination of the conciliation system, but he would be entitled to such extension of time as would be necessary to secure him a reasonable opportunity to file the suit in time.

Where 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 would ordinarily excuse him.

Civil reference made by the Subordinate Judge of Dapoli, in Small Cause Suit No. 246 of 1913.

Mr. *S. S. Patkar*, Government Pleader, for the Plaintiff.

Mr. *G. S. Rao*, *amicus curiæ*, for the Defendant.

JUDGMENT.—The facts are stated in the reference. The question submitted for our opinion is whether the plaintiff is entitled to deduct the time between his application to the Conciliator and the termination of the conciliation system in the District (*i. e.*, from 28th March to 30th May 1913).

As no certificate is granted by the Conciliator, it is quite clear that section 48 of the Dekkhan Agriculturists' Relief Act has no application. There is no other statutory provision corresponding to section 48 to cover a case of this kind. The period of limitation applicable, therefore, would be the period prescribed under the Limitation Act, unless the plaintiff could claim to have an extension of the time in any other way.

It is clear that the plaintiff's suit would be in time if filed on the 31st May 1913. The Local Government cancelled the appointments of Conciliators in the District with effect from the 30th May 1913. The plaintiff had made his application to the Conciliator for a certificate which it was obligatory upon him to obtain at the time. Up to 30th May 1913, he could not have filed his suit without a certificate from a Conciliator. All of a sudden by the Government Notification he was called upon to file his suit on the 31st May, which it was practically impossible for him to do. Under these circumstances we think the plaintiff is clearly entitled to the benefit of the rule that where 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. But this rule is subject to the limitation that it will excuse him so far as it is necessary, and not beyond. The cases of *Mayer* v. *Harding* (1) and *Reg.* v. *Justices of Surrey* (2) are fair illustrations of the application of this principle under somewhat different circumstances. The plaintiff in this case would be entitled to such extension of time as would be necessary to secure him a reasonable opportunity to file the suit in time, which it became practically impossible for him to do in virtue of the Government Notification. It is not possible to lay down any general rule as to what period would be sufficient to constitute a reasonable opportunity. It must depend upon the circumstances of each particular case, which must be duly proved. Thus, though the plaintiff in this case is not entitled to deduct the time from 28th March to 30th May 1913, he is entitled to such extension of time as may be necessary to give him a reasonable opportunity to enable him to file the suit in time.

We are indebted to Mr. G. S. Rao for having argued the case on behalf of the defendant at our request.

(1) (1867) 2 Q. B. 410; 9 B. and S. 27*n*; 16 L. T. 429; 15 W. R. 816.

(2) (1880) 6 Q. B. D. 100; 50 L. J. M. C. 10; 43 L. T. 500; 29 W. R. 260; 45 J. P. 93.

MADRAS HIGH COURT.

APPEALS AGAINST APPELLATE ORDERS NOS. 108 AND 109 OF 1912.

July 17, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Napier.

NARAYANASWAMY TEVAN AND OTHERS —APPELLANTS

versus

IN NO. 108 OF 1912.

KRISHNASAMI PILLAI (DIED) AND ANOTHER—RESPONDENTS.

IN NO. 109 OF 1912.

SUBBAYA TEVAN AND OTHERS— RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XX, r. 7—Limitation Act (IX of 1908), s. 12 (2), Sch. I, Art. 152—Date of decree same as date of judgment.

Order XX, rule 7, of the Code of Civil Procedure read with Article 152, Schedule I, of the Limitation Act, IX of 1908, makes the "date of the decree" for calculating time for appeal to be the date on which the judgment was pronounced.

But where some time is taken in getting the decree drafted because the extra Court-fee is not paid and time is given for its payment, such time must be taken to be the time requisite for obtaining copies within the meaning of section 12 (2) of the Limitation Act, provided that an application for copy was put in before the preparation of the decree.

Appeals against the orders of the District Court of Tanjore, in I. A. Nos. 138 and 137 of 1912, in the matter of the appeals preferred against those of the Court of the District Munsif of Mannargudi in Miscellaneous Petitions Nos. 26 and 27 of 1911 (in Original Suits Nos. 322 and 321 of 1908), respectively.

Mr. *T. R. Venkatarama Sastri*, for the Appellants.

JUDGMENT.—We agree with the District Judge that the date of the decrees for the purpose of calculating appeal time must be taken to be 18th April 1911, when the judgments were pronounced. Order XX, rule 7, of the Code of Civil Procedure, 1908, read with Article 152 to Schedule I of the Indian Limitation Act, 1908, is conclusive on this point.

On the other hand we think appellants are entitled under section 12 (2) of the Indian Limitation Act to claim that the period between 18th April 1911 and 20th June 1911 should be excluded as time requisite for obtaining copy of decrees. They were allowed time by the Court up to 20th June 1911 for paying the extra Court-fee and were entitled to fully avail themselves of it. Until they did pay, it was impossible for any action to be taken towards preparing the decrees. In fact they applied for copies of judgments and decrees on 21st April 1911; but their applications were rejected on the ground that the decrees had not been drawn up.

The appeals were, in our opinion, presented in time. They should be admitted and disposed of according to law.

Costs will be costs in the cause.

Appeal accepted.

BOMBAY HIGH COURT.

CIVIL REFERENCE NO. 15 OF 1913.

April 7, 1914.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

RUP CHAND MAKANDAS— PLAINTIFF

versus

MUKUNDA MAHADEV—DEFENDANT.

Limitation—Dekkhan Agriculturists' Relief Act (XVII of 1879), ss. 47, 48—Conciliation system abolished after grant of certificate and during vacation—Suit instituted on day of re-opening of Court—Plaintiff entitled to deduct time spent in obtaining certificate—Rule as to excusing plaintiff in questions of limitation.

Where a Conciliator's certificate was obtained under the Dekkhan Agriculturist's Relief Act, and before the suit was filed, the Court was closed for the Summer Vacation, during which the conciliation system was abolished and the period of limitation expired·

Held, that the plaintiff was entitled to deduct the period between his application and the grant of certificate, and was within time in bringing his suit on the opening day after the vacation.

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.

Civil reference made by the Additional First Class Subordinate Judge at Dhulia, in Small Cause Suit No. 473 of 1913.

JUDGMENT.—On the facts stated in the reference, we are clearly of opinion that the suit is not time-barred.

The plaintiff applied for a certificate and obtained it at a time when the conciliation system was in existence and when under the provisions of the Dekkhan Agriculturists' Relief Act it was incumbent upon him to obtain such a certificate. He could have filed the suit in time and claimed the

benefit of section 48 of the Dekkhan Agriculturists' Relief Act, had it not been for the fact that the Court was closed for the Summer Vacation from the 28th April to 8th June 1913. He filed the suit on the opening day after the vacation. The accident of the Local Government having cancelled the appointments of the Conciliators on the 10th May with effect from the 30th May 1913 cannot make any difference in the plaintiff's position. The suit, though filed on the 9th June when the conciliation system was abolished, was substantially one to which the provisions of Chapter VI of the Dekkhan Agriculturists' Relief Act were applicable throughout the period of limitation which expired during the vacation. The plaintiff is accordingly entitled to deduct the period between his application and the grant of the certificate.

Assuming, however, that section 48 of the Dekkhan Agriculturists' Relief Act does not apply, as at the date of the suit there were no Conciliators in the District, it is clear that the plaintiff's claim is still in time on another ground. On the facts the position is clearly this that the plaintiff's suit would be strictly in time upto a certain date during the vacation, on which day he could not file it as the Court was closed. He could file it on the re-opening of the Court under section 4 of the Limitation Act. But by the Government Notification the whole position was changed, and it became impossible for the plaintiff to file his suit in time. It is clear that the law does not compel a man to do that which he cannot possibly perform. Under the circumstances, we think, the proper rule to apply is that 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. The facts in this case clearly entitle the plaintiff to be excused.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 328 OF 1911.

July 6, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Shah Din.

SHANKAR LAL—DEFENDANT—APPELLANT

versus

DALLU—PLAINTIFF AND ANOTHER—VENDOR—RESPONDENTS.

Punjab Pre-emption Act (II of 1905)—Punjab Alienation of Land Act (XIII of 1900) -Right to realize arrears of rent of agricultural land, not land—Objection as to omission of portion of property sold taken at late stage not entertainable—Amendment of plaint- -Estoppel.

The right to realize arrears of rent of agricultural land, is not agricultural land within the meaning of the Punjab Pre-emption Act (II of 1905), and the omission to include that right in a suit for pre-emption in respect of the land with which the said right is sold is not fatal to the suit.

'A right to receive rent', which is included in the definition of 'land' as given in the Alienation of Land Act, means a right to receive rent which would become payable in future. It does not mean a right to realize arrears of rent which have already accrued due and are recoverable as a liquidated sum.

An objection taken by the vendee as to the omission in a pre-emption suit of a portion of the property sold after the evidence of both parties has been recorded and on the date fixed for arguments in the case, is raised at too late a stage and should not be entertained by the Court. The Court, however, would be perfectly right in allowing amendment of the plaint, if it ever entertains the objection.

The Court will not draw vague general inferences as to estoppel by conduct against a pre-emptor from the mere fact that a large number of the residents of the village in which the land in dispute is situate attempted to purchase it but failed before the sale in dispute took place.

First appeal from the order of the District Judge of Hissar, dated the 25th of January 1911, decreeing plaintiff's claim.

Mr. *Pestonjee Dadabhai* and Mehta *Bahadur Chand*, for the Appellant.

Mr. *Lakhshmi Narain*, for the Respondents.

JUDGMENT.—By a registered deed, dated the 6th December 1908, Mr. Robert Hercules Skinner, a member of the well-known Skinner family of Hansi, sold to Babu Shankar Lal, a Pleader of Hissar, the entire agricultural estate comprised in village Dhansu, situate in Tahsil Hissar, together with certain arrears of rent said to be due to the vendor by his tenants in village

Dhansu, for Rs. 70,745. The consideration was made up as follows:—

		Rs.
No. 1.	Value of the entire village	70,380
No. 2.	Paid on account of arrears of rent due by defaulting tenants for the years 1905, 1906 and 1907 ...	365
	TOTAL ...	70,745

In the sale-deed the whole consideration is stated to have been received by the vendor as per detail below:—

		Rs.	A.
(*a*)	Received previously *as under* ...	852	8
	Received on 27th August 1903 ... 500 0		
	Received on 2nd December 1903 ... 352 8		
(*b*)	Received by cheque before the Sub-Registrar ...	69,892	8

On the 14th January 1909, the plaintiff-respondent, Dallu, an occupancy tenant in the village, brought a suit for pre-emption in respect of the entire village area sold, alleging that the price of the village as entered in the sale-deed, *i. e.*, Rs. 70,380, had not been fixed and paid in good faith; that the arrears of rent, though entered in the sale-deed as amounting to Rs. 365, really amounted to about Rs. 20,000; and that the market-value of the village was Rs. 50,000. Upon these allegations the plaintiff prayed for a decree for possession of the village by pre-emption on payment of Rs. 50,000 or such other sum as the Court might see fit to fix as the value of the property sold. On the 27th January 1909, the defendant-vendee, Shankar Lal, filed his written statement (page 22 of the paper-book) in which he pleaded, *inter alia*, that the plaintiff had not included the whole of the property sold in his claim and his suit must, therefore, be dismissed; that the plaintiff along with the other tenants of the village, having refused to purchase the village before the sale in dispute, his right of pre-emption, if any, had been extinguished; that the plaintiff was a *benami* pre-emptor, that is to say, that he had brought the suit at the instigation and for the benefit of other persons and not solely for himself, and that the price of the village Rs. 70,380 as entered in the sale-deed had been fixed in good faith and its market-value was not less than that sum. On the same date on which the written pleas were filed the vendee's Pleader made an oral statement in Court (page 24 of the paper-book) and in the course of it he said:—

".....The present suit cannot lie because the plaintiff has failed to include houses and residential site in the claim and to file the Court-fee on their value."

This part of the statement clearly refers to written plea No. (3) in which the vendee had urged that the plaintiff's suit must fail because he had not included the whole of the property sold in the claim; and we have noticed this circumstance here because, as we shall see later on, it bears materially upon one part of the vendee's defence to the plaintiff's claim. Proceeding further with the statement the vendee's Pleader said :—

"The value of *Mauza* Dhansu, *viz.*, Rs. 70,380, was fixed and paid in good faith. The market-value thereof is not less than that. The balance of rent was fixed separately and paid off. The balance of rent, *viz.*, Rs. 730, is very small. The consideration therefor *viz.*, Rs. 355, at annas 8 per rupee was paid in addition, as is shown in the sale-deed too. The plaintiff has no right of pre-emption."

On the same date the plaintiff's Pleader made a statement by way of replication, in the course of which he said:—

"He (plaintiff) has brought a suit for pre-emption in respect of the entire property sold to the defendant-vendee under a registered deed of sale dated the 22nd December 1908. In the sale-deed the values of houses, *abadi* or other rights are not shown separately. On the contrary, the entire village together with all rights and houses, *abadi*, etc., was sold. Hence there is no necessity to fix separately the value of any house or right and to file Court-fee therefor..... The market-value of the property is not more than Rs. 50,000. The balance of rent still due from the tenants is Rs. 20,000 nearly. The consideration in the sale-deed is shown as Rs. 70,380 for *Mauza* Dhansu and the right to receive the said balance of rent. By this calculation also the value of *Mauza* Dhansu is not more than Rs. 50,000.'

Upon the pleadings of the parties the District Judge framed eleven issues which, with slight verbal alterations, are reproduced in his judgment. Of these issues the following are material to this appeal:

". . . . . "

"(4) Was the suit not for the whole property sold? Had not full Court-fee been paid?"

". . . . . "

"(10) Was plaintiff estopped from bringing the pre-emption suit from his conduct, act, silence or waiver?"

"(11) Was the plaintiff unable to buy the property? Had he brought suit fictitiously for benefit of persons having no right. What was the effect of such a conduct on his part on the suit?"

The record shows that after the evidence of both parties had been recorded and the case closed on both sides, the 23rd January 1911 was fixed for hearing arguments. On that date it was argued on behalf of the defendant-vendee that the right to realize arrears of rent, which was transferred by the vendor to the vendee for Rs. 365 by the sale-deed of the 6th December 1903, was part of the property sold, and that since the plaintiff had not included in the suit the said right to realize arrears of rent, the suit must fail upon that ground alone. The District Judge recorded two orders on the 23rd January, in which he observes that the vendee's objection in his written pleas as to part of the property sold being excluded from the claim had been couched in ambiguous language, that the plaintiff was never given to understand that the right to realize arrears of rent was part of the property sold and should have been included in the claim, and that the plaintiff had all along stated that he had sued for pre-emption of the entire property that had been sold by the vendor to the vendee. In these circumstances, the District Judge thought that no amendment of the plaint was necessary to enable the plaintiff to pre-empt the entire village sold, but he allowed the plaintiff to amend it in order to remove all possibility of an objection in future on the ground of the right to realize arrears of rent being omitted from the claim. The plaintiff accordingly amended his plaint by including in his claim (*a*) the right to recover arrears of rent as entered in the sale-deed; (*b*) all houses, *abadi* land, etc., and all other accessory rights. Both reliefs (*a*) and (*b*) were valued for purposes of Court-fee at Rs. 1,365, and additional Court-fee was paid on the plaint accordingly. The plaintiff's Pleader further stated that his client was willing to pay to the vendee the whole amount mentioned in the sale-deed as consideration for the sale, *i.e.*, Rs. 70,745. The District Judge delivered judgment on the 25th January and gave the plaintiff a decree for possession of the whole village, together with all the rights set forth in the sale-deed on payment of the full price, Rs. 70,745.

From that decree the defendant-vendee has appealed to this Court. The questions which we have to decide in this appeal are comparatively simple, and these are (1) whether the plaintiff's suit must fail on the ground that he has omitted to include part of the property sold in his claim; (2) whether an offer of the village was made by the vendor to the plaintiff and refused by him before the sale was made in favour of the present vendee, and whether by reason of that refusal he has precluded from bringing the present suit; and (3) whether the plaintiff is a *benami* pre-emptor, he having brought the suit, not in good faith on his own behalf for his own benefit, but at the instigation and for the benefit of other persons who have no right of pre-emption, and whether the suit must fail on this ground.

Upon the first question the argument of the appellant's learned Counsel is this. Under sections 4 and 12 of the Punjab Pre-emption Act, II of 1905, the plaintiff-respondent had a right of pre-emption in respect of the whole of the agricultural land covered by the sale-deed of the 6th December 1903; under section 3 of the Pre-emption Act "agricultural land" for the purposes of the Act means "land as defined in section 2, sub-section (3), of the Punjab Alienation of Land Act, 1900"; "land" as defined in the last mentioned Act includes "a right to receive rent," and it follows that the right to receive arrears of rent, which was transferred by the vendor to the vendee under the sale-deed of the 6th December 1903, was "agricultural land" and as such subject to pre-emption. The plaintiff did not include in his original claim, as contained in the unamended plaint, the aforesaid right to receive arrears of rent; in other words, he deliberately omitted to claim part

of the property sold to which his right of pre-emption extended; and on the well-known principle that a pre-emptor is bound to include the whole bargain of sale in his claim, otherwise his suit must fail, the plaintiff's suit as originally laid must be dismissed.

The answer to this argument is two-fold. In the first place, in his written statement, dated the 27th January 1909, the vendee did not, as we have seen, specifically plead that the plaintiff had a right of pre-emption in respect of "the right to realize arrears of rent" which had been transferred to the vendee by the sale in dispute, such right being agricultural land for purposes of pre-emption, and that since the plaintiff had omitted to include this right in the claim his suit was liable to be dismissed. All that the vendee pleaded was that the plaintiff had not included the whole "property" sold in the claim; and his Pleader in his oral statement of the same date explained this plea by saying that the plaintiff had not included "houses and residential site" in the suit and had not paid the necessary Court-fee on their value. In answer to this the plaintiff's Pleader stated that the entire property sold, together with all the rights and the houses and *abadi*, etc., had been included in the suit; and it was not even remotely suggested to him that his client was bound to include in the claim the right to receive arrears of rent referred to in the sale-deed. It was not until the 23rd January 1911, when the case was argued by the vendee's Pleader, that he for the first time urged that the right to collect rent was "agricultural land" within the meaning of the Punjab Pre-emption Act, and that the plaintiff's omission to include in his claim the right to realize arrears of rent, which had been transferred to the vendee under the sale in dispute, was fatal to his claim. In our opinion, this objection by the vendee's Pleader was raised at too late a stage of the case and it should not have been entertained by the District Judge. But assuming that the objection could be raised at that stage of the proceedings by the vendee's Pleader, we think that the District Judge was perfectly right in allowing the amendment of the plaint so as to enable the plaintiff to include in his claim the right to collect arrears of rent mentioned in the deed of 8th December 1906. Upon this view of the matter, then, the plaintiff's suit was not liable to be dismissed on the ground urged by the vendee's Counsel.

But in the second place, assuming that the vendee had pleaded, and had intended to plead, at the very outset that the plaintiff's omission to include in his claim the right to realize arrears of rent was fatal to the suit, we are clearly of opinion that the kind of right transferred by the vendor to the vendee under the sale-deed of the 6th December 1908, does not fall within section 2, sub-section (3), clause (*d*), of the Alienation of Land Act, and is not agricultural land within the meaning of section 3 of the Pre-emption Act, as we understand the expression. "A right to receive rent," which is included in the definition of "land" as given in the Alienation of Land Act, means a right to receive rent which would become payable in future; it does not mean a right to realize arrears of rent which have already accrued due and are recoverable as a liquidated sum. The right to realize arrears of rent of agricultural land may well be transferred by sale to a person apart from and independently of the agricultural land concerned, and it would be repugnant to common sense and to all legal notions underlying the law of pre-emption to hold that a right of pre-emption arises and can be exercised in respect of the sale of such a right to realize the rent already fallen due which *ex hypothesi* would be unconnected with the land. We have no hesitation, therefore, in holding that the right to realize arrears of rent, which was sold by the vendor to the vendee in this case under the sale in dispute, was not agricultural land within the meaning of the Punjab Pre-emption Act; and it follows that the plaintiff's omission to include that right in his original claim as embodied in the unamended plaint was not fatal to the suit.

The second question which we have to decide and which has been set out above can be disposed of in a few words. The appellant's Counsel has referred to certain written applications made in the months of September and October 1908 by certain occupancy and non-occupancy tenants of village Dhansu and by certain outsiders to the Tahsildar requesting him to get Mr. R. H. Skinner to sell the village to them and not to the present appellant, Shankar

Lal. The object is to show that the intended sale of the village was known all over the village and that all the villagers and some outsiders were anxious and had made efforts to purchase it, but that the village was not sold to them because they were unable to raise the amount of money which Mr. Skinner wanted them to pay as the sale consideration. The plaintiff's name does not occur among the signatories to the applications referred to by Counsel, and we are not prepared to draw vague general inferences against the plaintiff from the mere fact that a large number of the other tenants and residents of this village had attempted to purchase it but had failed before the sale in dispute took place. Next, we have been referred to the evidence of Mr. Skinner's *Mukhtar*, Abdul Ghafur Khan (page 34), who says that he several times requested the plaintiff, as also the other tenants, to purchase the village in dispute and that the plaintiff replied that he could not afford to pay the money in a lump sum. Witness adds that Mr. Skinner also asked the plaintiff if he was prepared to purchase the village for Rs. 65,000 and to pay money by instalments, and that it was after the plaintiff and the other tenants had refused to make the purchase that Mr. Skinner sold the village to the present vendee. We find that Mr. Skinner himself was examined as a witness for the vendee, and yet no question was put to him on the subject of the alleged refusal of the plaintiff to purchase the village on the alleged offer made to him. We are, therefore, not prepared to beleive the evidence of Abdul Ghafur Khan on this point, and there being no other trustworthy evidence in support of this part of the vendee's case, we must hold, in agreement with the District Judge, that the plaintiff is not precluded by his conduct from enforcing his claim.

Lastly, there is a question of the alleged *benami* character of the plaintiff's claim. In this connection the appellant's Counsel has referred us to the registered bond for Rs. 3,000 dated the 20th January 1900, which was executed by Kirta and Kalu, residents of *Mauza* Dhansu, in favour of one Mir Amar Ali of Kharkhoda (page 15 of the paper book). This bond contains a recital by Kirta and Kalu that they have borrowed the sum of Rs. 3,000 in order to meet the expenses in connection with the pre-emption suit relating to *Mauza* Dhansu pending in the District Court, Hissar, between the inhabitants of the village and Shankar Lal, Pleader of Hissar. Kalu was examined as a witness both for the plaintiff and for the vendee (pages 76 and 63), and he repudiated the suggestion that he had financed the plaintiff with the money borrowed by him from Amar Ali. The evidence of a number of other witnesses, *e. g.*, Kanhaya, Jai Sukh, Kheta and Sukha, who were produced for the plaintiff, and of Maira, a witness produced by the defendant, has also been referred to by the appellant's Counsel in order to show that the plaintiff had agreed to share the village lands after he has obtained the decree for pre-emption with other tenants and residents of the place. The plaintiff's witnesses in no way support the appellant's contention, while the appellant's own evidence under this head is wholly worthless. Upon careful consideration of the evidence in the case we have no hesitation in holding that the appellant has failed to prove the *benami* character of the plaintiff's claim.

For the foregoing reasons we hold that all the contentions advanced by the appellant's Counsel are unsustainable and we dismiss the appeal.

Plaintiff has filed cross-objections under Order XLI, rule 22, Civil Procedure Code, to that part of the decree of the District Judge which directs the parties to bear their own costs. The District Judge says that the plaintiff has succeeded as regards the right of pre-emption but has failed on the question of price, and it is on that ground that the order as to each party paying its own costs is based. But the record says that the plaintiff, although he alleged at the outset that the village had been sold for Rs. 50,000 and that that amount also represented its market-value, did not afterwards very seriously dispute his liability to pay the whole price mentioned in the sale-deed, while, on the other hand, the defendant-vendee did all that he could in various ways to prolong the litigation evidently with the object of driving the plaintiff to despair

and thereby compelling him to give up his just claim. In these circumstances the most equitable order to pass as regards costs would be to direct the vendee to pay half the costs of the plaintiff in the lower Court and to pay his full costs in this Court and we order accordingly.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 566 OF 1913.

February 24, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

KASHINATH RAMCHANDRA—PLAINTIFF—APPELLANT

versus

NATHOO KESHAV—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. II, rr. 2, 4—Cause of action—Suit for possession and rent.

The 'cause of action' upon which the plaintiff may base various claims in one suit under Order II, rule 2, does not depend upon the character of the relief for which he prays. It refers to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour.

The words of Order II, rule 4 (*c*), do not imply that in all cases a suit for the recovery of immoveable property must necessarily be based upon a different cause of action to a suit for arrears of rent for the same land.

A lease for ten years provided that if the lessee failed to pay rent of any year, the lessor would be entitled to recover possession of the land. The lessee failed to pay rent for two years. A suit for recovery of possession was filed under the forfeiture clause. The plaintiff stated in the plaint that he would bring a separate suit for rent, but he did not obtain permission of the Court in that respect. A decree for possession was passed and possession obtained.

Subsequently, the plaintiff sued to recover the arrears of two years' rent from the defendant.

Held, that the suit was barred under Order II, rule 2, of the Code of Civil Procedure.

Second appeal from the decision of the First Class Subordinate Judge at Dhulia, in Appeal No. 399 of 1911, confirming the decree passed by the Second Class Subordinate Judge at Yaval, in Civil Suit No. 1523 of 1910.

Mr. *P. B. Shinjre*, for the Appellant.

Mr. *N. M. Samarth*, for the Respondent.

JUDGMENT.—The material facts are stated by the Appellate Judge as follows:—"The lease provided that on the defendants' failure to pay the rent the plaintiff should be entitled to take possession of the lands. Defendants having failed to pay the rent of the two years in question the plaintiff sued them in 1909 for possession and obtained a decree which directed that on the defendants' default to pay all the arrears of rent and costs within three months the plaintiff should take possession of the lands and recover his costs from them. See Exhibit 19. It is admitted that the defendants did not pay the rent and costs and that consequently the plaintiff took possession of the lands. In the said suit the plaintiff asked for permission to bring a separate suit for the rent of the two years in question, but none was given to him. The question, therefore, is whether the present suit is barred under Civil Procedure Code, Order II, rule 2. I think it is clearly barred."

In our opinion the decision of the lower Court is correct. The claim in the present suit for rent up to the date of the forfeiture arises upon the same contract of tenancy as did the landlord's right of forfeiture for non-payment of rent.

The 'cause of action' upon which the plaintiff may base various claims in one suit under Order II, rule 2, does not depend upon the character of the relief for which he prays. "It refers to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour" [*Musammat Chand Kour* v. *Partab Singh* (1)], "to every fact which it would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court:" *Read* v. *Brown* (2). If the evidence required to support two claims is different in any material respect the causes of action are different: see *Brunsden* v. *Humphrey* (3). The rule of the Supreme Court in England (adopted in Order II of the Civil Procedure Code) which prohibits with certain exceptions the union in one suit of other claims with a claim for the recovery of

(1) 15 I. A. 156; 16 C. 98; 5 Sar. P. C. J. 243; 12 Ind. Jur 331.

(2) (1888) 22 Q. B. D. 128; 58 L. J. Q. B. 120; 60 L. T. 250; 37 W. R. 131.

(3) (1884) 14 Q. B. D. 141; 53 L. J. Q. B. 476; 51 L. T. 529; 32 W. R. 944; 49 J. P. 4.

immoveable property is, as pointed out by Sir George Jessel, in *Gledhill* v. *Hunter* (4), a survival from the rule prevailing in ejectment actions modified by a limited application of the rule in Chancery that you might join in a suit to establish title to land any other cause of action so long as you did not make your bill open to objection on the ground of multifariousness. Up to the time of the Judicature Act of 1873 the Common Law Courts entertained actions for rent upon the covenant in the lease after ejectment on the ground of forfeiture for non-payment of rent [see *Hartshorne* v. *Watson*(5)]: but no necessity or reason exists for a separate suit for rent where there has been a forfeiture for non-payment, under the practice established by the Judicature Acts and the Civil Procedure Code. Both the claim for possession and the claim for rent may be enforced in one suit without any inconsistency. And since they may be enforced they ought to be enforced in one suit provided the cause of action is the same, unless the Court gives leave for the reservation of one of the remedies.

We agree with the criticism expressed by the Allahabad High Court in *Mewa Kuar* v. *Banarsi Prasad* (6) that the wording of sections 43 and 44 (now Order II, rules 2 and 4) "is not happy and suggests confusion," which confusion does not appear to us to be diminished by the addition of clause (c) in rule 4. We do not, however, think that the words of rule 4 imply that in all cases a suit for the recovery of immoveable property must necessarily be based upon a different cause of action to a suit for arrears of rent for the same land. There may be cases in which a suit for recovery of land will involve the production of different evidence to that necessary to support a suit for rent in respect of the same land: for example a suit for rent up to the date of a forfeiture for breach of covenant to repair would depend upon different evidence to that necessary to establish the breach of covenant and consequent right to possession. That, however, is not the case here.

(4) (1880) 14 Ch. D. 492; 49 L. J. Ch. 393; 42 L. T. 892; 28 W. R. 530.
(5) (1838) 4 Bing. (N. C.) 178; 5 Scott, 503; 6 D. P. C. 404; 7 L. J. C. P. 138; 2 Jur. 155; 1 Arn. 15; 44 R. R. 698; 132 E. R. 756.
(6) 17 A. 583; A. W. N. (1895) 121.

The plaintiff apparently recognized that his claim for rent and his claim for possession arose out of one and the same cause of action, but though in his plaint in the earlier suit he stated that he reserved his right to claim rent, he omitted to obtain the assent of the Court to the reservation. He is, therefore, barred by the express provisions of Order II, rule 2, from now suing for the relief so omitted. We affirm the decree of the lower Court and dismiss the appeal with costs.

Decree affirmed.

MADRAS HIGH COURT.

APPEALS NOS. 262 AND 269 OF 1909 AND 122 OF 1910.

March 26, 1914.

Present:—Mr. Justice Wallis and Mr. Justice Sadasiva Aiyar.

IN APPEAL NO. 262 OF 1909.

ANANTHANARAYANA AIYAR, MANAGER OF THE MEENATCHI SUNDARESWARAL DEVASTANAM, MADURA—APPELLANT

IN APPEALS NOS. 269 OF 1909 AND 122 OF 1910.

ABISHEKA SUNDARAM BATTER AND OTHERS—APPELLANTS

versus

ATHIMUTHU AIYAR *alias* ATHI MUNEESWARA AIYAR *alias* ATHI AIYAR AND ANOTHER—RESPONDENTS IN ALL.

Temple trusteeship—Hereditary right—Evidence—Descent from father to son conclusive when supported by corroborative evidence.

The descent of a temple trusteeship from father to son when supported by corroborative evidence establishes an hereditary right to the office.

Appeals against the preliminary decree and Appeal No. 122 of 1910 against the final decree of the District Court of Madura in O. S. No. 19 of 1909.

Mr. *T. Rangachariar*, for the Appellants.

Messr. *T. R. Ramachandra Aiyar* and *S. Sreenivasa Iyengar*, for the Respondents.

JUDGMENT.—The first respondent's (plaintiff's) suit was decreed by the learned District Judge on his finding that he (the plaintiff) was entitled by hereditary right to the office of Athikara Parapathyam in the Madura Meenatchi Temple. The final decree granted the following relief to the plaintiff:

(*a*) "that the plaintiff do recover from defendants the plaint mentioned office together with the right to the honours and perquisites attached thereto,"

(*b*) "that the defendants be restrained by an injunction from interfering with the plaintiff's discharge of the duties of the office and from enjoying the honours, etc."

(*c*) "that the defendants do pay plaintiff Rs. 100 for past profits and also subsequent profits at Rs. 100 from the date of suit to the date of plaintiff's restoration,"

(*d*) "that defendants pay Rs. 294-15-5 (proportionate costs) to plaintiff and bear their own costs."

The defendants Nos. 2 to 10 (the Stanika Bhattars of the temple and the person, 10th defendant, appointed by them in supersession of the plaintiff to the office) have filed two Appeals Nos. 269 of 1909 and 122 of 1910 (one against the preliminary decree which did not ascertain the mesne profits and the other against the final decree which mentioned the definite sum due to the plaintiff for mesne profits). The first defendant (who is the temple trustee and manager) has filed a separate third appeal (Appeal No. 262 of 1909) against the preliminary decree which made him liable along with the other defendants for the plaintiff's proportionate costs and for the mesne profits due to the plaintiff.

The principal point for decision in the suit is whether the plaint office descended hereditarily to the plaintiff or whether it was an office to which the Stanikars (defendants Nos. 2 to 9) could appoint anybody they chose from time to time, removing their nominee at their pleasure.

Mr. T. Rangachariar for the Stanikars (defendants Nos. 2 to 9) discussed the judgment of the learned District Judge and the evidence in the case fully before us, but we see no sufficient reason to differ from the conclusion of the learned District Judge on the above question. We may not be prepared to agree with the learned District Judge in his rather wide observation that "it is a matter of common knowledge that the old temple offices are by custom hereditary," and one of us has in more than one case expressed a rather strong view that Courts should always hesitate to recognize hereditary rights in temple offices.

The learned District Judge might also have too readily accepted the plaintiff's story that Chokkappan or Chokkayyan who held the office in 1802 (Exhibit G) was the plaintiff's ancestor, having regard to the recitals in Exhibits I and III and the evidence of defence witness No. 3 who was a Dayadee of the plaintiff and whose branch never enjoyed any share in the office in dispute.

But there is sufficient evidence in this particular case to support the conclusion of the learned District Judge that the office itself descended by hereditary right. Taking it that the plaintiff's grandfather Jevanthi Aiyar usurped the office, the descent from him seems to have followed the established rule of heredity and though the formal appointment of Javanthi Aiyer's descendants by the temple manager was prayed for from time to time, the documents (Exhibits I, III, K G series, M series and the *Rajeenama* Exhibit A) support the conclusion that the tenure of the office descended by right of heredity and was not of the nature of a mere service, terminable at the will of the manager or the Stanikars. (See especially Exhibit M in 1895 where the plaintiff and the plaintiff's natural brother who was his cousin by adoption, said that they would "be entitled to manage the office" by hereditary right).

In *Appasami* v. *Nagappa* (1), it was no doubt held that the mere descent of a temple trusteeship from father to son "does not create an hereditary right," but it is conceded there that "it is doubtless some evidence of an hereditary right," though "it is not conclusive evidence." In that particular case *Appasami* v. *Nagappa* (1), there were numerous circumstances which negatived the plaintiff's claim to hereditary right and hence on the facts of that particular case, it was found that the plaintiff's hereditary right was not established. In the present case, the learned District Judge has referred to corroborative evidence establishing the plaintiff's claim to an hereditary right in the office in question, and we are not prepared to dissent from his conclusion.

We, therefore, dismiss the two appeals filed by the Stanikars and their nominee defendants Nos. 2 to 10.

As regards the appeal by the Manager (the 1st defendant) his learned Vakil (Mr. C. S. Venkatachariar) contends that as he did not deny the plaintiff's claim or obstruct his enjoyment of the office he ought not to have been made liable to the plaintiff jointly with the other defendants either in respect

(1) 7 M. 400.

of the injunction relief granted to the plaintiff or the relief relating to mesne profits and costs.

Though the 1st defendant's written statement is more carefully worded than the written statements of the other defendants, it also concludes with a prayer that the whole suit of the plaintiff may be dismissed. In the 9th and 10th grounds of the appeal memorandum presented by the 1st defendant even to this Court, he puts forward the contention that the plaintiff is "a *mere* servant of the Stanikars" and that no preliminary decree ought to have been passed. We have very little doubt that the defendants Nos. 1 to 10 all acted together against the plaintiff's rights. The first defendant's appeal is, therefore, also dismissed.

The defendants Nos. 1 to 10 will bear their own costs in these appeals and pay one set of costs to the plaintiff's legal representative brought in as the additional respondent.

Appeals dismissed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 124 OF 1911.

July 15, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

ADHAR CHANDRA PAL—PLAINTIFF —APPELLANT

versus

DIBAKAR BHUYAN—DEFENDANT —RESPONDENT.

Possession—Dispossession—Title to possession.

A person who has been in possession of a piece of land and paying rent for it to the admitted landlord for a number of years, if dispossessed, has a right to possession.

Letters Patent Appeal from the decision of Mr. Justice Coxe, in Appellate Decree No. 1812 of 1909.

Babu *Mohinimohan Chatterjee* (with him Babu *Prabodh Chandra Dutt*), for the Appellant.

Dr. *Dwarkanath Mitter*, for the Respondent.

JUDGMENT.

JENKINS, C. J.—This is an appeal under clause 15 of the Letters Patent in a suit brought for recovery of possession of land and for declaration of the plaintiff's right therein. The plaintiff claims to be entitled to possession of the land under the Raja of Narajole. His right was affirmed by the Munsif who passed a decree in his favour. But on appeal, the learned Judge of the lower Appellate Court reversed that decree and dismissed the suit. The judgment now under appeal has affirmed the decree of the lower Appellate Court. It is quite true that the plaintiff alleged a title in himself to possession derived from one Tripura and that this title of Tripura's has been negatived by the lower Appellate Court. The plaintiff's right, however, as formulated in the plaint, did not rest on that alone, but there were allegations of possession over a considerable number of years and also of payment of rent to the Raja of Narajole, who admittedly was the proprietor of the land and able to give a right to possession.

The lower Appellate Court has obviously fallen into error on at least one point. But it is unnecessary for us to base our decision on that. It is enough for us to take the facts as they are established, and consider whether on those facts the position is not this that the plaintiff not only was in possession but had a title to possession. Though the lower Appellate Court evidently was not satisfied on the evidence as to Tripura's possession, the plaintiff's possession was held to be proved, nor was there any disturbance of the finding of the Munsif that, as an incident of that possession, rent was paid by the plaintiff to the landlord. It appears, therefore, to us that we must accept those two facts as established in this case, and from those two facts the legal inference flows that the plaintiff to this case was not only in possession but was in possession by virtue of a title derived from the owner of the land which gave the plaintiff a right to possession. It is, therefore, not necessary for us to deal with that conflict of authority between the decisions of this Court on the one hand and those of the other High Courts in India on the other, as to whether possession by itself is a sufficient basis for a possessory suit outside section 9 of the Specific Relief Act. Here we have something more than that, for the plaintiff had a right to pos-

session which entitled him to bring a suit in the ordinary course for the purpose of recovering the possession to which he was entitled and of which he had been deprived. It does not appear necessary to send down the case for further investigation for we have ample materials before us for our decision that the plaintiff has made out his right to have possession restored to him in this suit.

We accordingly set aside the judgment under appeal as also the decree of the lower Appellate Court and restore the decree of the Munsif; and the plaintiff must get his costs throughout this litigation.

MOOKERJEE, J.—I agree.

Appeal allowed.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 87 OF 1913.

February 28, 1914.

Present:—Mr. Justice Piggott.

MAKHAN LAL AND OTHERS—PLAINTIFFS—APPLICANTS

versus

BOMBAY, BARODA AND CENTRAL INDIA RAILWAY COMPANY—DEFENDANTS—OPPOSITE PARTY.

Railways Act (IX of 1890), s. 80—Claim for compensation and damages—Consignment of goods at Railway for delivery—Loss on other railway—Cause of action—Omission of essential facts in plaint—Replication filed—Civil Procedure Code (Act V of 1908), O. VII, rr. 5, 11.

A suit was brought against the Bombay, Baroda and Central India Railway Company for the shortage of goods consigned to the plaintiff's address from a station on the Bengal and North-West Railway to the Agra Fort Railway Station. The plaint omitted to state that the Agra Fort Railway Station was under the control of the railway administration impleaded as defendant; but taken as a whole it alleged the existence of a cause of action against the defendant Company, asserting that they were bound to deliver the entire goods consigned to the plaintiff. The defendant Company pleaded that the plaint disclosed no cause of action against them and that the suit without impleading the original booking line was bad in law and not maintainable.

Thereupon a replication was filed by the plaintiff alleging that the Company had accepted the liability for loss:

Held, that the plaint together with the replication disclosed a cause of action against the defendant Company and that the plaintiff had the option of taking action either against the railway administration to which the goods were delivered by the consignor or against the railway administration on whose line the loss occurred.

Civil revision from an order of the Judge of the Small Cause Court of Agra.

Mr. *S. K. Dar*, for the Applicants.

Mr. *Benode Behari*, for the Opposite Party.

JUDGMENT.—This is an application in revision against an order of the Judge of the Small Cause Court at Agra rejecting a certain plaint under the provisions of Order VII, rule 11, of the Code of Civil Procedure on the ground that it does not disclose any cause of action. The plaintiff is a merchant residing at Agra. The case set forth in the plaint is that forty-one bags of sugar were consigned to the plaintiff's address from a Railway Station named Bhata Pokhar to the Agra Fort Railway Station; and that when delivery was made nine bags of sugar were missing and there was a total shortage of twenty-seven maunds five seers of sugar. In respect of that shortage the plaintiff claims compensation and damages. The plaint is, no doubt, badly drafted. It omits to state in plain language even so essential a fact as that the Agra Fort Railway Station is under the control of the railway administration impleaded by him as defendant, *i. e.*, the Bombay, Baroda and Central India Railway Company. At the same time, in view of the statement made in paragraph 3 of the plaint, I am not prepared to say that the plaint does not contain an allegation showing that the defendant is liable to be called upon to answer the plaintiff's demand within the meaning of Order VII, rule 5, of the Code of Civil Procedure. Reading the plaint as a whole it seems to me that it does allege the existence of a cause of action against the defendant Company based on the assertion that they were bound to deliver forty-one bags of sugar to plaintiff and actually delivered only thirty-two. At any rate the plaint as drafted was admitted by the Court below and summons was issued to the defendant Company. The written statement filed by that Company began with the assertion that the plaint discloses no cause of action against the defendant and that the suit without impleading the original booking line is bad in law and not maintainable.

The reference is in the first place to a fact which does not appear in the plaint itself, *viz.*, that Bhata Pokhar Railway Station is situated within the railway administration, not of the Bombay, Baroda and Central India Railway Company, but of the Bengal and North-West Railway. Now under the provisions of section 80 of the Railways Act (IX of 1890) the plaintiff had the option of impleading either the railway administration to which the goods were delivered by the consignor or the railway administration on whose railway the loss, injury, or destruction of a portion of the consignment had occurred. What the defendant really meant by this written statement was that, in the absence of an explicit averment in the plaint that the loss, injury, or destruction of a portion of the consignment of sugar had occurred while that consignment was in transit on the Bombay, Baroda and Central India Railway, the plaint should not be regarded as disclosing a cause of action against the defendant. To this written statement the plaintiff put in a replication. It would seem that his legal advisers felt themselves very much at a loss as to the proper line to take under the circumstances. They put forward a suggestion, which seems to me quite inadmissible, that the Bengal and North-West Railway administration might at the stage be added as defendants under the orders of the Court. They did also make certain further allegations which seem to me of some importance. They said that, when the defendant Company had delivered the consignment short by nine bags to the plaintiff, the latter entered into correspondence with them and was in a position to produce letters tending to show that the defendant Company had accepted liability for the loss, and asked the Court below in the first place to hold that the defendant Company was estopped in consequence of this correspondence from denying that the loss, injury, or destruction of portion of the consignment had taken place on their line. In the alternative they suggested that the conduct of the defendant Company in connection with the case justified the inference that the said loss, injury, or destruction had occurred to the consignment while in transit on their line. I think that this implies at any rate a suggestion that the plaintiff might be allowed to prove this fact. The replication closed with a general prayer that the Court should pass such order as it might think necessary in the interests of justice, and in any case should grant the plaintiff an adjournment of the hearing. In dealing with this replication the learned Judge of the Court below seems to have concentrated his mind only on the suggestion that the Bengal and North-West Railway administration might be added as defendant. Holding this to be impossible he declined to take any other action on this replication and on the following day passed the order complained of rejecting the plaint. I think the plaintiff was hardly treated and a good case is made out for the interference of this Court in revision. Badly drafted as the plaint was, I am not prepared to say that it discloses no cause of action. Looking at the pleadings at the stage which they had reached after the defendant's written statement and the plaintiff's replication had been put in. I think it becomes clear that the plaintiff should have been allowed an opportunity of proving that the loss, injury, or destruction of a portion of the consignment had taken place on the railway under the administraton of the defendant Company, whether he could prove this by direct evidence of the fact, or by means of admissions or conduct on the part of the defendant Company and whether or not the admissions put forward by him were such as to have the effect of estoppel. The plaintiff has, no doubt, lost the readiest remedy available to him by not taking action against the railway administration to which the goods were delivered by the consignor, and it may be very difficult for him to satisfy the Court of the facts necessary to render the Bombay, Baroda and Central India Railway Company liable for this claim. On the pleadings as they stood, however, at the time when this plaint was rejected, I think that the necessary issue had fairly been raised between the parties and that it ought to have been tried out. I set aside the order of the Court below and return the record to that Court directing it to restore this case on to its file of pending suits and to dispose of it according to law. Costs of this application will be costs in the suit.

Application allowed.

NARAYAN PROSAD MONDAL *v.* JOTINDRA NATH BHATTACHARJEE.

CALCUTTA HIGH COURT.

CIVIL RULE No. 21 OF 1914.

February 2, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice N. Chatterjea.

NARAYAN PROSAD MONDAL—PETITIONER

versus

JOTINDRA NATH BHATTACHARJEE—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Revision—Material irregularity—Ex parte *decree, set aside when case about to be transferred.*

A Judge acts with material irregularity if he sets aside an *ex parte* decree knowing that the case is about to be transferred from his Court.

Civil Rule in the matter of Judicial Miscellaneous Suit No. 20 of 1912 No. 63 of 1913 of the Subordinate Judge, first Court of Midnapur, and in the matter of Judicial Miscellaneous Case No. 99 of 1913 of the Court of the District Judge of Midnapur.

Babus *Sib Chunder Palit* and *Khirode Narain Bhuiya*, for the Petitioner.

Babu *Jyotish Chandra Hazra*, for the Opposite Party.

JUDGMENT.—This is a Rule obtained by the plaintiff in a mortgage suit, calling on the other side, who is the defendant No. 2, to show cause why the order of the Subordinate Judge, first Court, Midnapur, dated the 29th November 1913, and the order of the District Judge of that place, dated the 2nd December 1913, should not be set aside.

The present plaintiff brought originally a suit upon a certain instrument of mortgage and in that suit he made the mortgagor and the present defendant No. 2 and certain other encumbrancers parties. Subsequently the defendant No. 2 applied to the Subordinate Judge to set aside the decree in the mortgage suit so far as regards him, on the ground that that decree had been passed *ex parte*. The plaintiff thereupon applied to the District Judge; and the learned District Judge issued a rule on the defendant No. 2 to show cause why the proceedings should not be transferred from the file of the Subordinate Judge before whom the matter was then pending to the file of some other Judge. It is not contested that the defendant No. 2 was served with notice of that rule. The matter came on to be heard before the Subordinate Judge on the 29th November 1913; and, notwithstanding the fact that the defendant No. 2 had been served with the rule and that apparently such fact had been brought to the notice of the learned Subordinate Judge, the learned Subordinate Judge set aside the decree on the mortgage suit so far as regards the defendant No. 2, on the ground that it was, in fact, an *ex parte* decree.

On the 2nd December 1913, the District Judge dismissed the application for transfer, on the ground that he had no jurisdiction to deal with the matter, the Subordinate Judge having already set aside the decree in the mortgage suit as being *ex parte*.

We think this is a case in which the Court can and ought to interfere, as it seems to us that the learned Subordinate Judge acted in a materially irregular manner when he, knowing that the District Judge was about to consider the application for transfer, proceeded to deal with the case by setting aside the decree which he thought to be *ex parte*. As a matter of fact, the learned Pleader for the opposite party, who shows cause, has not offered any very active opposition.

It seems to us that the two orders mentioned in the Rule should both be set aside and that the matter should go back to the District Judge to decide whether there should be a transfer, and that then, according as the District Judge thinks the proceedings should or should not be transferred to some other learned Judge, the application of the defendant No. 2 will be heard with reference to the setting aside of the decree in the mortgage suit.

We are not satisfied in this case as to whose fault it was that the learned Subordinate Judge dealt with this case on the 29th November 1913, and we think we had better make the costs of this Rule abide the result of the application before the learned District Judge for transfer. The hearing fee in this Court is assessed at one gold *mohur*.

Rule made absolute.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 75 OF 1913.

March 2, 1914.

Present:—Mr. Justice Piggott.

RAM KIRPAL—PLAINTIFF—PETITIONER

versus

GAYA DAT AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 23—Landlord and tenant—Suit for ejectment—Compromise—Landlord withdrawing his suit in consideration of tenant's executing a promissory-note—Consideration, whether lawful.

A *zemindar* sued a tenant for ejectment. The tenant pleaded that he was an occupancy tenant in respect of the holding, being the heir of the last tenant under the Tenancy Act. The suit was compromised. The *zemindar* withdrew the suit acknowledging the defendant to be an occupancy tenant. The defendant, on the other hand, executed a promissory-note for a sum agreed to be paid by him in consideration of the withdrawal of the suit:

Held, that the consideration of the promissory-note was not unlawful or opposed to public policy.

Civil revision against an order of the Judge of the Court of Small Causes of Allahabad.

Mr. *A. Haider* (for Mr. *Haider Mehdi*), for the Petitioner.

Mr. *Safi-uz-zaman*, for the Respondents.

JUDGMENT.—This was a suit upon a promissory-note executed by the three defendants in favour of the plaintiff. The plaintiff very frankly stated in his plaint the circumstances under which this promissory-note came to be executed and the nature of the consideration therefor. The defendants seem to me to have induced the Court below to treat the case throughout as if the suit had been one for the recovery of money independently of the promissory note altogether. The real question in issue on the pleadings was simply whether in view of the circumstances of the case the consideration for which this promissory note was executed was unlawful under the provisions of section 23 of the Indian Contract Act, IX of 1872. It appears that the defendants were tenants of the plaintiff. The tenant of an occupancy holding within the plaintiff's *zemindari* died, and the defendants took possession of the holding claiming a right to succeed as heirs of the deceased tenant under section 22 of the Agra Tenancy Act (Local Act II of 1901). The plaintiff contested their right to do this by suing to eject them under the provisions of section 58 of the same Act. That suit was pending and some evidence had been recorded when the defendants executed this promissory-note in favour of the plaintiff and the plaintiff in return for this acknowledged the status of the defendants as occupancy tenants and withdrew the suit for ejectment. It seems to me that nothing more took place than the compromising of a doubtful litigation and that the consideration for the pro-note was not in itself unlawful or opposed to public policy. The learned Judge of the Court below has confused the issue, making the whole case turn on the expression *nazrana* used in the plaint, but the plaint itself makes it quite clear that the real consideration was the settlement of the pending litigation in favour of the defendants; for the plaintiff says that had this agreement not been come to, he would have contested the matter, if necessary, to the highest Court of appeal on the revenue side. I think the nature of the suit has been misconceived by the Court below and that the order dismissing the same cannot be upheld. I set aside the decree in this case and return the record to the Court below with orders that the suit be re-admitted on to the file of pending cases and disposed of according to law. Costs of this application will be costs in the suit.

Application allowed; Case remanded.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 300 OF 1912.

July 16, 1914.

Present:—Sir John Wallis, Kt., Offg. Chief Justice, and Mr. Justice Kumaraswami Sastri.

VENKATACHELLA MUDALY—PLAINTIFF—APPELLANT

versus

ARUNACHELLA MUDALY AND OTHERS—DEFENDANTS—RESPONDENTS.

Public charities—Trust created by non-resident foreigner—Trust property in British India—Succession by foreigner.

In cases of public charities (not coming within the terms of the Trust Act) a Hindu is not incapable of succeeding to the office of hereditary trustee, under a deed of trust created by a non-resident foreigner, of property situated in British India, merely on the ground that such trustee resides outside British India

MUHAMMAD ABDUL GHAFUR KHAN v. GOKUL PRASAD.

Appeal against the decree of the District Court of South Arcot, in Original Suit No. 35 of 1910.

FACTS.—One Venkatachella Mudali of Pondicherry executed on 21st June 1865 a registered document by which he devoted the income from certain properties to charities to be conducted by his daughter-in-law, Perundeir Ammal, and his granddaughter, Janaki Ammal, and the surplus income to be enjoyed by them personally. The said Janaki Ammal died in 1870 when quite young and on her death Perundeir Ammal conducted the charities, under the supervision of Govinda Raja Mudali and Arumuga Mudali. She died on 31st March 1907. After her, plaintiff is entitled as a reversioner to succeed to the estate of Venkatachella Mudali, for the purpose of conducting the charities and for enjoying the surplus income personally. Plaintiff is a native of Pondicherry employed in the Nizam's Dominions. After Perundeir's death, 1st defendant, her brother, unlawfully took possession of the charity properties, neglected to conduct the charities. Defendants Nos. 2 to 4 are the undivided sons of the 1st defendant; and defendants Nos. 5 to 7 are members of the family of the 1st defendant claiming some right over the properties. The present suit is by the plaintiff for declaration of his right to enjoy and administer the suit charity properties, and for payment of mesne profits.

The District Judge framed eight issues in the case, and one of those issues is:

"Is plaintiff not incompetent to be a trustee by reason of his residence in Nizam's Dominions."

He found on that issue as follows:

"Plaintiff is not a resident of British India. He is a French subject now employed in Nizam's Dominions. Now, manifestly a person domiciled abroad is an unfit person to be treated as a trustee as he is not amenable to the jurisdiction of the Court. I am well aware that the Indian Trusts Act does not apply to charitable endowments, but I do not think that a Court should allow a person to administer a charitable trust when it is manifest that that person could set the Court at defiance if he mismanaged the trust."

He accordingly dismissed the suit. The present appeal is against that decision.

Mr *M. O. Parthasarathy Aiyangar* (with him Mr. *P. M. Sivagnana Mudaliar*), for the Appellant.

Mr. *S. Muthiah Mudaliar*, for the Respondents.

JUDGMENT.—The plaintiff in this case claims to be the hereditary trustee for public charitable purposes of certain property in British India under the terms of a deed of trust created by his ancestor, who like the plaintiff was a non-resident foreigner. The District Judge has dismissed the suit on the ground that the plaintiff is a non-resident foreigner and so disqualified. No authority has been cited before us to show that there is any such disqualification in the case of a public charitable trust which does not come within the terms of the Indian Trusts Act, and we think there is no ground for holding that a Hindu is incapable of succeeding to the office of hereditary trustee of property situated in British India merely on the ground that he resides outside British India. The decree is set aside and the suit remanded for disposal according to law. Respondents will pay the costs of the appeal.

Decree set aside; Suit remanded.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 33 OF 1913.

February 27, 1914.

Present:—Mr. Justice Piggott.

MUHAMMAD ABDUL GHAFUR KHAN —PLAINTIFF—APPELLANT

versus

GOKUL PRASAD AND OTHERS—DEFENDANTS —RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), s. 23 —Power of Court to return plaint for presentation to another Court—Practice.

The Judge of a Small Cause Court has a discretion to return a plaint under the provisions of section 23 of the Provincial Small Cause Courts Act merely on a finding that the relief claimed by the plaintiff would depend upon the proof or disproof of title, which that Court could not finally determine. The Judge should be careful to frame his order so as to put this point beyond doubt, because certain legal consequences follow an order under that section which do not follow on an order merely holding that the Small Cause Court had no jurisdiction in the matter.

Civil revision against an order of the Small Cause Court Judge of Cawnpore.

Mr. *A. P. Dube* (with him. Mr. *G. L. Agarwala)*, for the Appellant.

Mr. *Gulzari Lal*, for the Respondent.

JUDGMENT.– This was a suit which on the face of it purported to be one for the recovery of house-rent. The plaintiff, however, admitted that he was only the proprietor of a certain share, namely 9/16th of the house, and he impleaded as defendants, not only the lessee from whom the rent was claimed, but also certain other persons, namely, a former usufructuary mortgagee of the house and a person alleged to be the owner of the remaining 7/16th share. The Munsif, in whose Court the suit was filed, held that the suit was one of a nature cognizable by a Court of Small Causes and returned the plaint for presentation to such a Court. The learned Judge of that Court has again returned it for presention to a Court of regular civil jurisdiction. The difficulty which I feel in dealing with the application now before me is that the learned Judge of the Court below has given too many reasons for his order. He gives a number of reasons for his order. He gives a number of reasons why the suit must necessarily fail, which, if valid at all, could be reasons for dismissing the suit, but not for passing the order which he has passed. He then refers to three Articles of Schedule II of the Provincial Small Cause Courts Act, two of which are certainly inapplicable, while there might be some controversy as to the applicability of the remaining one, that is Article 7; but it is useless for me to go into the question whether the suit was or was not one reserved by law to be for the cognizance of a Court of Small Causes, because the learned Judge of that Court has cut the ground from under my feet by referring to section 23 of that Act. There can be no doubt that the present suit was one to which the provisions of that section might reasonably be applied. The learned Judge of the Small Cause Court had, therefore, a discretion to return this plaint under the provisions of section 23 aforesaid merely on a finding that the relief claimed by the plaintiff would depend upon the proof or disproof of title which a Court of Small Causes could not finally determine. The point to be noticed, however, is that when the Judge of a Court of Small Causes acts under section 23 of Act IX of 1887, he should be careful to frame his order so as to put this point beyond doubt, because certain legal consequences follow an order under that section which do not follow on an order merely holding that the Small Cause Court had no jurisdiction in the matter. Not only is there a provision in clause 2 of section 23 for saving limitation ; but it is also quite clear that the effect of an order under section 23 is to remove any bar which might otherwise exist by reason of the provisions of section 16 of the Small Cause Courts Act to a trial of the suit by a Court of ordinary civil jurisdiction. I think it expedient, therefore, to interfere in revision to this extent only, that I direct that the order of the Court below be amended so as to make it clear that the plaint is returned for presentation to a Court having jurisdiction to determine the question of title raised and that this order is passed under the provisions of section 23 of Act IX of 1887 and not otherwise. The parties will bear their own costs of this application.

Order modified.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1015 OF 1913.

January 22, 1914.

Present:—Mr. Justice Scott-Smith.

Musammat NARAIN DEVI—PLAINTIFF—APPELLANT

versus

BILLA AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation—Waste land—Abadi *in village—Possession and dispossession within twelve years*—Onus *of proof—Limitation Act (IX of* 1908*), Sch. I, Arts.* 142, 144.

As possession goes with the title, the waste land allowed to remain so by the proprietor cannot be declared to be a discontinuance of possession and the onus is, in such a case, shifted on to the defendant to prove when his possession became adverse.

Muhammad Yar v. *Ghulam*, 49 P. R. 1881 and *Rimzan Ali* v. *Basharat Ali*, 105 P. R. 1901, followed.

Second appeal from the decree of the District Judge of Hoshiarpur, dated the 20th of February 1913, reversing that of the Munsif, first Class, Una, dated the 25th of October 1912, decreeing the claim.

FACTS.—Plaintiff claimed for possession of a few *marlas* of land on the allegation that the land in suit belonged to her and it was given to *T* deceased for cultivation. After *T*'s death it came back into the possession of the owner from whom *B* took for cultivation seven years ago, and built thatches upon it without her permission and paid her no rent.

The defendants pleaded that the land did not belong to her, and that it was possessed by them adversely for a long time, and that the *kothas* built thereon were old ones.

The first Court found all the issues in favour of the plaintiff and decreed her claim. But the District Judge dismissed it for the reasons which appear from the following extracts from his judgment:

"The land has *khasra* number, but it is not assessed to land revenue and in the papers it is recorded as *banjar qadim*. A suit for ejectment was brought in a Revenue Court but the plaint was returned as the land was not found agricultural.

"The lower Court, finding that according to entries in revenue papers relation of landlord and tenant existed and the possession was permissive, decreed the claim. But this finding is clearly wrong on the face of it. The Revenue Court found that the relations of landlord and tenant do not exist. It is also admitted that the defendants do not pay rent, and according to plaintiff's own statement the thatches were made without the plaintiff's consent. The revenue papers show that since 1896-97 the uncle of the defendants has been in possession without payment of any rent.

"The land has never been entered as under cultivation. In the Settlement of 1869-70 the owners of the plot were recorded as Suba and Gurmukh. Gurmukh is the ancestor of the plaintiff, etc., etc. Be what it may we are not concerned with this. It is the duty of the plaintiff to prove that she has been in possession within twelve years."

Mr. *Sundar Das*, for the Appellant.

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

JUDGMENT.—The learned Judge who admitted this appeal noted that if the land in suit was land as defined in the Punjab Tenancy Act, the appeal from the first Court's order lay to the Divisional Judge and not to the District Judge, who heard it. No objection on the score of jurisdiction of the District Judge has been raised by either party and as the land is shown now in the Revenue Records as *abadi* it appears that the lower Appellate Court had jurisdiction to hear the appeal.

The lower Appellate Court held that plaintiff's suit was barred by time as she had not proved possession and dispossession within twelve years.

The land, however, has not been under cultivation, but has been lying waste for many years, and this is sufficient to shift the burden on to defendant to show when his possession became adverse. See *Muhammad Yar* v. *Ghulam* (1) and *Ramzan Ali* v. *Basharat Ali* (2).

Thakru, uncle of defendant Billa, was in possession in 1869-1870 and in 1896-1897, but it is not shown that Billa's possession is a continuance of that of Thakru. In 1892-1893 the land was shown to be *abadi*, but after that it was shown as *banjar qadim* until 1908-1909, when it was again shown as *abadi*. Billa has erected a hut upon the land. I note that in the first Court, he denied plaintiff's title and said on 27th August 1912 that he himself was in possession with the permission of the proprietors. Under such circumstances it is difficult to see how he can set up the plea of adverse possession. Having regard to the principle enunciated in the rulings quoted above I am of opinion that defendant Billa has not proved his adverse possession for twelve years.

I accept the appeal and setting aside the decree of the lower Appellate Court, restore that of the first Court with costs throughout.

Appeal accepted.

(1) 49 P. R. 1884.
(2) 105 P. R. 1901

RAMESWAR MANDAL *v.* PROVABATI DEBI.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 642 OF 1911.

May 27, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

RAMESWAR MANDAL AND OTHERS—DEFENDANTS 1ST PARTY—APPELLANTS

versus

PROVABATI DEBI—PLAINTIFF—RESPONDENT.

Suit by reversioner on death of Hindu widow—Defence, legal necessity—Loan taken to pay rent to superior landlord—Legal necessity—Intention.

A person who claims title under an alienation from a Hindu widow must prove that there was legal necessity for it, that is, such a pressure on the estate at the time the loan was taken or alienation made as justified her act. He can also protect himself by proof of *bona fide* inquiry and if the fact of such inquiry is established, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his title.

The true rule is that the creditor, to protect himself, where he is not shown to have made a *bona fide* inquiry, must prove that there was an actual pressure on the estate.

A widow is at liberty to bind herself or to bind the estate in her hands. Whether in a particular case she did the one or the other would be a question of intention to be gathered from the statement, if any, in the deed, or from the surrounding circumstances.

Appeal from the decree of the District Judge of Burdwan, dated 2nd December 1910, modifying that of the Subordinate Judge of Burdwan, dated the 9th September 1905.

Mr. *S. P. Sinha* (with him Babus *Provash Chandra Mittra* and *Hira Lal Sanyal*), for the Appellants.

Dr. *Rash Behary Ghose*, (with him Babus *Bepin Behary Ghose* and *Bankim Chandra Mookerjee*), for the Respondent.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the first nine defendants in a suit by a Hindu reversioner for declaration that certain alienations, made by a widow in possession of the estate of her husband, were in excess of her authority and do not bind the inheritance. The properties in dispute belonged to the father of the plaintiff, Rakhal Chandra Mookerjee, and his brother Bagala Chandra Mookerjee. Rakhal Chandra Mookerjee died in 1883, leaving a widow Sukhada Sundari Debi and an unmarried daughter by her, Pravabati Debi, now plaintiff-respondent before us. On the 25th November 1885 Sukhada Sundari and her brother-in-law, Bagala Chandra, borrowed a sum of Rs. 399 from Rameswar Mandal, the first defendant in this suit. The creditor sued on the money-bond and obtained an *ex parte* decree on the 6th April, 1888. The decree was executed in due course and the right, title and interest of the judgment-debtors in the disputed properties was sold on the 2nd July 1888, when the decree-holder, now represented by the appellants, became the purchaser, for Rs. 745, in the name of one Moheswar Bhattacharjee. The sale was confirmed on the 7th January 1889, and the sale certificate was issued in the name of the ostensible purchaser on the 12th February 1889. Meanwhile, on the 22nd November, 1888, Sukhada Sundari had sold the same properties again to the defendants other than the appellants. Sukhada Sundari died on the 21st November 1901, when the succession opened out to the plaintiff as the reversionary heir to the estate of her father. On the 18th November 1904, the plaintiff commenced the present action for declaration that the execution sale as also the private alienation were without legal necessity and were not operative after the death of her mother. She further impeached the validity of the execution sale on the ground that the decree-holder held a mortgage on the property sold and had acted in contravention of the provisions of section 99 of the Transfer of Property Act. She did not sue for recovery of possession, as the estate was in the hands of an under-tenure-holder who had saved it from a sale under the Patni Regulation and had obtained possession which would continue till his advance was re-paid or satisfied from the profits. The defendants resisted the claim of the plaintiff on the ground, amongst others, that the sales had taken place for legal necessity. The Subordinate Judge found this point in favour of the purchaser at the execution sale but against the purchasers at the private sale. In this view, he gave the plaintiff a conditional decree against the former, who became entitled to receive a proportionate share of the purchase money, and an unconditional decree against the latter, whose conveyance was declared to be wholly inoperative. On appeal by the defendants, the District Judge reversed this decree and dismissed the suit on the ground that it was bad for misjoinder of parties and of causes of action. On

appeal to this Court, Brett and Sharfuddin, JJ., held on the authority of the decisions in *Isan Chunder Hazra* v. *Rameswar Mandal* (1), *Nund Kumar Naiker* v. *Brannath Gayan* (2) and *Lalla Rup Narain* v. *Gopal Dass* (3) that there was no misjoinder of parties or of causes of action and that the plaintiff was competent to maintain one suit against all the transferees in respect of the estate of her father to which she had become entitled on the death of her mother. The appeal was accordingly allowed and the case remanded, so that the appeal preferred to the District Judge might be heard on the merits. In so far as the private sale is concerned, no attempt appears to have been made to assail the conclusion of the Subordinate Judge that it was bad for want of consideration and legal necessity and his decision upon this point must be taken to have become final. We are concerned at this stage only with the effect of the execution sale of the 2nd July 1883. As regards this sale, the Subordinate Judge found, *first*, that the money had been borrowed by the widow for payment of rent to the *zemindar* and was applied for that purpose; *secondly*, that the sale was void because held in contravention of section 90 of the Transfer of Property Act, and *thirdly*, that a declaratory decree should be made in favour of the plaintiff, conditional on payment by her of a sum of Rs. 309-1-6 to the first nine defendants, as such money had been applied by the widow for the benefit of the estate. Upon appeal, the District Judge has found, *first*, that the loan was taken by the widow and the money borrowed was applied by her for payment of rent due to the superior landlord; *secondly*, that as laid down in *Ashutosh Sikdar* v. *Behari Lal Kirtania* (4), the sale was not void but merely voidable, because held contrary to the provisions of section 90 of the Transfer of Property Act; and *thirdly*, that it was unnecessary to avoid the sale, because it had passed to the purchaser nothing beyond the limited estate of the widow, as laid down in the cases of *Mohima Chunder Roy Chowdhry* v. *Ram Kishore Acharjee Chowdhry* (5) and *Braja Lal Sen* v. *Jiban Krishna Roy* (6) which was confirmed on appeal to the Judicial Committee: *Jiban Krishna Roy* v. *Braja Lal Sen* (7). The District Judge has also overruled the contentions that the suit was not maintainable for a pure declaratory decree without consequential relief, and, was, in any view, barred by limitation. In this view, the District Judge has modified the decree of the primary Court and has given the plaintiff an unconditional declaration that the execution sale does not bind the estate in her hands. On the present appeal, besides the two subordinate points last mentioned, namely, the grant of a declaratory decree without consequential relief and the bar of limitation, the substantial question which has emerged for consideration is, what was the true nature of the debt created by the bond, of the decree in the bond suit, and of the proceedings thereon and what was the legal effect of the execution sale on the estate in the hands of the widow.

It has been found by the District Judge, in concurrence with the Subordinate Judge that the money was raised and was applied by the widow for payment of rent to the superior landlord. On this basis, it has been argued that the loan was taken for legal necessity. This contention, in our opinion, is not well-founded. The powers of a Hindu widow, in respect of alienation of the estate of her husband, are similar to those of a guardian of an infant, as defined by their Lordships of the Judicial Committee in *Hanoomanpersad Panday* v. *Babooee Munraj Koonweree* (8); *Rameswar Pershad* v. *Run Bahadur Singh* (9), *Lala Amarnath Sah* v. *Achan Kuar* (10) and *Bhagwat Dayal Singh* v. *Devi Dayal Sahu* (11). Consequently, a person who claims title under an alienation from her must prove that there

(1) 24 C. 831.
(2) 29 C. 871.
(3) 3 Ind. Cas. 332; 36 I. A. 103; 36 C. 780; 13 C. W. N. 920 (P. C.); 6 A. L. J. 537; 10 C. L. J. 58; 5 M. L. T. 423; 11 Bom. L. R. 833; 93 P. R. 1909; 143 P. W. R. 1909.
(4) 35 C. 61; 11 C. W. N. 1011; 6 C. L. J. 320.
(5) 23 W. R. 174; 15 B. L. R. 142.
(6) 26 C. 285.
(7) 30 C. 551 (P. C.); 30 I. A. 81; 7 C. W. N. 425; 5 Bom. L. R. 428.
(8) 6 M. I. A. 393; 18 W. R. 81 *note*; Sevestre 253 N.; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 Eng. Rep. 147.
(9) 8 I. A. 8; 6 C. 843 (P. C.); 8 C. L. R. 361; 4 Shome L. R. 81; 4 Sar. P. C. J. 210; 5 Ind. Jur. 157.
(10) 10 I. A. 190; 14 A. 420 (P. C.); 6 Sar. P. C. J. 197.
(11) 35 I. A. 48; 35 C. 420 (P. C.); 12 C. W. N. 393; 7 C. L. J. 335; 10 Bom. L. R. 230; 5 A. L. J. 184; 18 M. L. J. 100; 3 M. L. T. 344; 14 Bur. L. R. 40.

was legal necessity for it, that is, such pressure on the estate at the time the loan was taken or the alienation made as justified the act of the widow. He can also protect himself by proof of *bona fide* inquiry, and if the fact of such inquiry is established, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his title. In the case before us, there is no proof of *bona fide* inquiry by the creditor, and further reference need not consequently be made to this possible aspect of the matter. The question then reduces to this, was there legal necessity for the loan? The mere fact that the loan was taken to pay rent and the money raised was applied for that purpose, is clearly not sufficient. It may be conceded that the extreme view taken in *Matiullah* v. *Radhabinode* (12) and *Radhamohan* v. *Gridhari Lal* (13), namely, that the creditor must not only show that the money was borrowed or required for a necessary purpose, but also that the necessity was attributable to causes beyond the control of the widow, is unsound and cannot be supported on principle; for, as their Lordships of the Judicial Committee pointed out in *Hunoomanpersad Panday* v. *Babooee Munraj Koonweree* (8), the creditor is not affected by any precedent mismanagement of the estate, provided that he has not been a party to the misconduct which has produced the danger he helps to avert by his loan. On the other hand, the opposite extreme view that the creditor is protected if the money raised has been applied for the benefit of the estate, is equally untenable. The true rule is that the creditor, to protect himself—where he is not shown to have made a *bona fide* inquiry—must prove that there was an actual pressure on the estate, such as an outstanding decree or an impending sale which the widow had no funds capable of meeting [*Lala Amarnath Sah* v. *Achan Kuar* (10), *Dharam Chand Lal* v. *Bhawani Misrain* (14), *Shrinath* v. *Ratanmala*(15), *Srimohan Jha* v. *Brij Behary Missri*(16), *Lalla Byjnath Pershad* v. *Bissen Beharee Sahoy*(17), *Mata Pershad* v. *Bhageeruthee*(18), *Ghansham Singh* v. *Badiya Lal* (19), *Lakshman* v. *Radhabai* (20)]. Tested from this point of view, the creditor in the case before us has laid no solid foundation for his claim. We know nothing about the state of the family at the time of the loan, and no explanation has been offered why the widow in possession of a valuable *patni* should have found herself unable to pay even the current rent to the superior landlord. We must hold accordingly that the creditor has not proved legal necessity for the transaction.

Even if we assume, however, that there was legal necessity for the loan, the position of the creditor is beset with inextricable difficulties. Where a Hindu widow obtains a loan, she is at liberty to bind herself personally, or, when the purpose for which she borrows is a necessary one, she is equally entitled to bind her husband's estate. Whether in a particular case the widow intended to bind herself alone or to bind the estate as well, must be gathered from the statements, if any, in the deed, or from the surrounding circumstances: *Damodar* v. *Bai Jankibai* (21), *Prosanna Kumar Nandi* v. *Umedar Raja Chowdhary* (22). In this respect, there is no real distinction in principle between a case where a charge is formally created by the widow, and another where she executes a bond for the money advanced: *Hurry Mohun Rai* v. *Gonesh Chunder Doss* (23), *Ramcoomar Mitter* v. *Ichhamoyi Dasi* (24), *Veera Soorappa* v. *Errappa Naidu* (25), *Regulla Jogayya* v. *Venkatarathnamma*(26), *Veerabadra Aiyar* v. *Maruda Nachiar* (27), *Sakrabhai* v. *Mayanlal* (28), *Umrootram* v. *Narayandas*(29), *Derji* v. *Sambhu* (30), although the contrary view has sometimes been maintained: *Rama-*

(12) (1856) Beng. S. D A. 596.
(13) (1857) Beng. S. D. A. 460.
(14) 24 I. A. 183; 25 C. 189 (P. C.); 1 C. W. N. 697.
(15) (1859) Beng. S. D. A. 421.
(16) 2 Ind. Cas. 152; 36 C. 753.
(17) 19 W. R. 80.
(18) 2 N. W. P. H. C. R. 78.
(19) 24 A. 547; A. W. N. (1902) 169.
(20) 11 B. 609.
(21) 5 Bom. L. R. 350.
(22) 3 Ind. Cas. 692; 9 C. L. J. 88; 13 C. W. N. 353.
(23) 10 C. 823 (F. B.).
(24) 6 C. 36; 6 C. L. R. 429; 5 Ind. Jur. 579.
(25) 29 M. 484; 1 M. L. T. 287; 16 M. L. J. 499.
(26) 5 Ind. Cas. 271; 7 M. L. T. 112; 20 M. L. J. 412; 33 M. 492.
(27) 8 Ind. Cas. 1072; 21 M. L. J. 320; 9 M. L. T. 235; 34 M. 188; (1910) M. W. N. 799.
(28) 26 B. 206 (F. B.); 3 Bom. L. R. 738.
(29) 2 Borr. 225.
(30) 24 B. 135; 1 Bom. L. R. 627.

sami v. *Sellattammal* (31), *Narana Maiya* v. *Vasteva Karanta* (32), *Giribala Dassi* v. *Srinath Chandra Singh*(33), *Prasanna Kumar* v. *Umedar Raja* (22), *Gadgeppa Desai* v. *Apaji* (34), *Dhiraj Singh* v. *Manga Ram* (35), *Kallu* v. *Faiyaz Ali Khan* (36). It is possible, however, that where a charge has been created by the widow on the estate, there may be surer indication of her intention to make the estate liable than where she had executed a promissory-note; but once the intention is established, the effect of her act must depend upon the nature of the debt which is recoverable from the estate in the hands of the reversioner if it has been incurred for necessary purposes. Tested in the light of these principles, the creditor here is in a precarious position, as there is nothing to indicate that the widow intended to make the estate liable for the loan. The rent was primarily payable out of the income as it accrued, and if by reason of any temporary difficulty, the widow was driven to raise a loan, there is no reason why one should assume, in the absence of clear indication to that effect, that she intended to throw a permanent burden upon the inheritance rather than to re-pay the loan out of the income for subsequent years which could be absolutely at her disposal. In this connection we must bear in mind that as laid down by their Lordships of the Judical Committee in *Jiban Krishna Roy* v. *Brojo Lal Sen* (7) and by this Court in *Kristo Gobind Majumdar* v. *Hem Chunder Chowdhury* (37), *Mahomed Sadut Ali* v. *Hara Sundari Debya* (38) and *Bireswur Das Dey* v. *Kamal Kumar Dutt* (39) a decree for rent which has accrued due after the death of her husband, is *prima facie* a personal decree against the widow, although when such a decree has been obtained by the entire body of landlords, under the provisions of the Bengal Tenancy Act, the tenure itself may pass into the hands of the purchaser, as the result of a sale in execution. Apart from this initial difficulty, there is a graver obstacle in the path of the creditor in the case before us. It is not enough to show that the widow intended to create a liability upon the estate in her hands. The creditor has further to establish that he intended to enforce such liability. The real question in fact is, what was liable to be sold and what in fact was actually sold. In the investigation of this question, the frame of the suit, the judgment, the decree, the execution proceedings, the sale-proclamation, the amount of purchase-money and the conduct of the parties, must all be taken into account; the sale certificate is by no means conclusive. As the proceeding may be against the widow personally or against the widow as representing her husband's estate, the true test is to see whether the proceedings in which the sale was directed was brought against the widow personally or with a view to affect the whole inheritance: *Jugul Kishore* v. *Jotendro Mohun Tagore* (40), *General Manager of the Raj Durbhanga* v. *Maharajah Coomar Ramaput Singh* (41), *Srinath Dass* v. *Hari Pada Mitter* (42), *Ram Lal* v. *Akhoy Charan Mitter* (43), *Roy Radha Kissen* v. *Nauratan Lal* (44), *Brojo Nath Pal* v. *Juggeswar Bagchi* (45), *Kisto Moyee Dassee* v. *Prosunno Narain Chowdhry*(46), *Bisto Behary* v. *Bijnath Pershad* (47), *Baijun Doobey* v. *Brij Bhookun Lall* (48), *Bireswur Das Dey* v. *Kamal Kumar Dutt* (39), *Mahomed Sadut Ali* v. *Hura Sundari Debya*(38), *Trilochan* v. *Bikkeswar* (49). It is not necessary that the reversioner should be joined as party to the suit, but if he is so joined, the fact would afford clear indication that the creditor intended to make the inheritance liable and not to restrict his remedy to the qualified interest of the widow: *Bhagirathi*

(31) 4 M. 375.
(32) 17 M. 208; 4 M. L. J. 63.
(33) 12 C. W. N. 769.
(34) 3 B. 237.
(35) 19 A. 300; A. W. N. (1897) 69.
(36) 30 A. 394; 5 A. L. J. 367; A. W. N. (1908) 173.
(37) 16 C. 511.
(38) 15 Ind. Cas. 351; 16 C. W. N. 1070.
(39) 16 Ind. Cas. 437; 17 C. W. N. 337.
(40) 11 I. A. 65; 10 C. 985 (P. C.); 8 Ind. Jur. 455; 4 Sar. P. C. J. 553.
(41) 14 M. I. A. 605; 10 B. L. R. 294; 17 W. R. 459; 2 Suth. P. C. J. 575; 3 Sar. P. C. J. 117; 20 E. R. 912.
(42) 3 C. W. N. 637.
(43) 7 C. W. N. 619.
(44) 6 C. L. J. 490.
(45) 1 Ind. Cas. 62; 9 C. L. J. 346.
(46) 6 W. R. 304.
(47) 16 W. R. 49; 7 B. L. R. 213.
(48) 2 I. A. 275; 1 C. 133 (P. C.); 24 W. R. 306; 3 Suth. P. C. J. 207; 3 Sar. P. C. J. 541.
(49) 14 Ind. Cas. 839; 15 C. L. J. 423.

Dass v. *Baleswar Bagarti*(50), *Mohima Chunder Chowdhry* v. *Ram Kishore Acharjee Chowdhry* (5), *Srinath Dass* v. *Hari Pada Mitter* (42), *Nujenderchunder Ghose* v. *Kaminee Dossee* (51), *Lloyd* v. *Johnes*(52); Story on Equity Pleadings, Article 144. Tested in the light of these principles, what is the position of the creditor in the case before us? There is no indication whatever that in the suit on the money bond he intended to obtain a decree which would operate against the inheritance. The claim was, in form, personally against the widow. The decree in the face of it was personally against her. In the execution proceeding, her right, title and interest was put up to sale and was purchased by the decree-holder, who paid for the share of the property now in dispute, one-half of Rs. 745, though the value thereof was, according to the plaintiff, not less than Rs. 2,100. What was sold was, *prima facie*, her limited interest, and it is impossible for us to hold that the entire inheritance was intended to be and was actually brought to sale. Consequently, the interest acquired by the purchaser terminated on the death of the widow. In this view, it is immaterial that the sale, though voidable because held in contravention of section 99 of the Transfer of Property Act, was not avoided by the widow; her omission to do so could not give the sale greater efficacy than it possessed or enlarge the interest acquired by the purchaser thereunder. We hold accordingly that the plaintiff became entitled to the property on the death of her mother.

It is plain that no question of limitation arises. Whether we apply Article 120 or Article 141 the suit is obviously in time. Nor can objection be taken to the grant of a declaratory decree under section 42 of the Specific Relief Act. The property is not in the possession of the defendants and the plaintiff could not ask for ejectment as against them: *Subramanyan* v. *Paramaswaran* (53), *Malaiya Pillai* v. *Tirumalaperumal Pillai* (54)

(50) 19 Ind. Cas. 636; 19 C. L. J. 155; 17 C. W. N. 877; 41 C. 69.
(51) 11 M. I.A. 241; 8 W.R. (P. C.) 17; 2 Suth. P. C. J. 77; 2 Sar. P. C. J. 275; 20 E. R. 92.
(52) (1804) 9 Ves. (Jun.) 37; 32 Eng. Rep. 514; 7 R. R. 147.
(53) 11 M. 116.
(54) 12 Ind. Cas. 170; 10 M. L. T. 277; (1912) M. W. N. 161; 21 M. L. J. 1022; 36 M. 62.

Nor could she join in this suit the under-tenure-holder who has obtained possession under the Patni Regulation for the satisfaction of his lien; his possession is rightful and the plaintiff has no cause of action against him. The only question in controversy is, whether on the death of the plaintiff's mother, the property vested in her or still continued in the hands of the execution-purchaser: for the reasons assigned, it has been rightly declared that the property vested in the plaintiff.

The result is that the decree of the District Judge must be affirmed and this appeal dismissed with costs.

BEACHCROFT, J.—I agree.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 338 OF 1913.

April 9, 1914.

Present:—Mr. Justice Rafique and Mr. Justice Piggott.

BIRBAL—DEFENDANT—APPELLANT

versus

KISHORI LAL—PLAINTIFF—RESPONDENT.

Contract—Principal and agent Agent buying property with principal's money—Liability to account.

When an agent uses a debt due to his principal in order to obtain valuable property for himself, he in fact realises that debt for and on behalf of his principal and is liable to account for the same.

Second appeal from a decree of the Second Additional Judge of Aligarh.

Messrs. *M. L. Agarwala* and *Gobind Prasad*, for the Appellant.

Dr. *Satish Chandra Banerji*, for the Respondent.

JUDGMENT.—In disposing of this second appeal we are bound by the findings of fact recorded by the lower Appellate Court. We take it then that in the month of July 1907, Tilok was the agent of a *zemindar*, named Tara Chand. There was a person named Hanuman Prasad who was indebted to Tara Chand to the extent of Rs. 416-4-0 on two items of account. One of these was a small sum due on account of costs of a certain decree. The other item was one of Rs. 390-4-0 due on account of arrears of revenue which had been paid by Tara Chand on behalf of Hanuman Prasad, Tara Chand being *lambardar*. Under these

circumstances on the 6th of July 1907, Tilok joining with himself his cousin, Chhiddu Lal, entered into a contract of sale with Hanuman Prasad. By this contract the latter purported to transfer certain immoveable property to Tilok and Chhiddu Lal and covenanted that a sum of Rs. 416-4-0 out of the consideration was to be left with the vendees to pay off a debt due from Hanuman Prasad to Tara Chand. The present suit is one against Tilok after the termination of the agency to recover from him this sum of Rs. 416-4-0 as also other items realised by him as *karinda* which are not now in dispute. The contentions before us in appeal are that the suit will not lie against Tilok alone and that no decree at all can be passed against him, because there was no privity of contract as between Tara Chand and Tilok in respect of the sale of July the 6th, 1907. It seems to us that the Courts below have taken a correct view. When an agent uses a debt due to his principal in order to obtain valuable property for himself he in fact realises that debt for and on behalf of his principal and is liable to account for the same. It seems to us of no consequence that Chhiddu Lal was joined with Tilok in this transaction. The money representing the debt of Rs. 416-4-0 virtually came into the possession and control of Tilok and as a matter of fact he tendered evidence, though it has not been believed in the Courts below, to prove that he alone actually paid this money to Tara Chand. We dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1271 OF 1913.

January 9, 1914.

Present:—Mr. Justice Coxe and Mr. Justice D. Chatterjee.

DEBI PROSAD—PETITIONER

versus

RAM GHULAM SAHU AND OTHERS—OPPOSITE-PARTY.

Limitation Act (IX of 1908), Sch. I, Art. 64—Sorkhol *—Entry of balance—Debt barred—No promise to pay—Account stated—Contract Act (IX of 1872), s. 25.*

A *sorkhol* showing merely a balance due and not containing any promise to pay within the meaning of section 25 of the Contract Act, cannot be relied on to recover a time-barred debt entered therein.

Civil Rule against the decision of the Munsif of Sewan.

Babu *Rajendra Prosad*, for the Petitioner.

Dr. *Dwarka Nath Mitter*, for the Opposite Party.

JUDGMENT.—This was a suit on a document called *sorkhol* which ran as follows: "Interest at the rate of Re. 1 per cent. Sd. Debi Prosad of Maharajgunj. By my own pen.

"*Lekha* (account) of Ram Ghulam Sahu and Naubat Rasu Kulwar of Maharajgunj, *Sambat* 1969."

"Credit—credited on the 8th *Assin Badi*. Sd. Debi Ram Rs. 130.

Cash rupees twenty-five, Rs. 25. Former cash Rs. 105, or total Rs. 130.

"Debit—Nil."

The suit was decreed and the defendant has obtained from this Court a Rule on the opposite party to show cause why the decree should not be modified on the ground that a portion of the claim is barred by limitation. We are informed that out of the entry of "Rs. 105 former cash" in the *sorkhol* sums aggregating to Rs. 54-4 were advanced on or before the 22nd April 1909 and were, therefore, barred on the 4th October 1912, the date of the *sorkhol*. It is argued on behalf of the petitioner that the suit as regards this amount of Rs. 54-4 is barred by limitation. A number of decisions has been shown to us out of which we may cite *Shankar* v. *Mukta* (1), *Govind Das* v. *Sarju Das* (2) and *Ramaswami Pillai* v *Kuppuswami Pillai* (3). They all support the petitioner's plea.

On the other hand, it has been argued that the case may be regarded as one coming within the scope of Article 64 of the first Schedule of the Limitation Act. That Article refers to money due on accounts stated between the parties. The *sorkhol*, however, as described above does not appear to us to be an account stated but merely a balance. A perusal of the document shows that there is no promise to pay within the meaning of section 25 of the Contract Act.

The Rule is made absolute and the principal sum decreed is reduced by Rs. 54-4.

Rule made absolute.

(1) 22 B. 513.
(2) 30 A. 268; 5 A. L. J. 274; A. W. N. (1908) 123.
(3) 7 Ind. Cas. 901; 8 M. L. T. 282; 20 M. L. J. 656; (1910) M. W. N. 547.

SHIBA SUNDARI DASI *v.* RAM GOBINDA DAS.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 848 OF 1912.

May 27, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

SHIBA SUNDARI DASI—PLAINTIFF—APPELLANT

versus

RAM GOBINDA DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Alienation by widow—Mortgage of whole estate—Consent of next reversionary heir—Sale of estate under mortgage-decree before widow's death—Reversioners, right of.

A complete alienation by a Hindu widow of her entire interest in her deceased husband's estate with the consent of the whole body of persons entitled to succeed as immediate reversionary heirs, passes a good title to the transferee as against the actual reversionary heirs. Similarly, an alienation by a widow by way of mortgage of a portion of the estate of her deceased husband, without proof either of legal necessity or of reasonable inquiry and honest belief as to its existence but with the consent of the next reversioner for the time being, will be valid and binding on the actual reversioner, if the presumption of legal necessity or reasonable inquiry and honest belief raised by such consent is not rebutted by cogent proof.

Debi Prosad Chowdhry v. *Golap Bhagat*, 19 Ind. Cas. 273; 40 C. 721; 17 C. W. N. 701; 17 C. L. J. 499, relied upon.

Pulin Chandra Mandal v. *Bilai Mandal*, 8 C. L. J. 280; 12 C. W. N. 837; 35 C. 939; *Hari Kissen Bhagat* v. *Bajrang Sahai Singh*, 1 Ind. Cas. 434; 13 C. W. N. 544; 9 C. L. J. 453, referred to.

Therefore, where a conditional alienation by way of mortgage, by a Hindu widow, of her entire interest in the estate is made with the consent of the next reversioner and that alienation becomes complete by operation of law by the sale of the mortgaged property before the right to object to the alienation accrues to the actual reversioner, he cannot impugn it afterwards.

Appeal against the decree of the Officiating District Judge of Zillah Rangpore, dated the 10th of January 1912, modifying that of the 1st Munsif at Gaibandah, dated the 27th of July 1911.

Babu *Surendra Chandra Sen*, for the Appellant.

Babu *Samatul Chandra Dutt*, for the Respondents.

JUDGMENT.—This is an appeal from the judgment and decree of the learned District Judge of Rangpore in a suit for rent for the years 1315 and 1316 brought by the plaintiff as 4 annas co-sharer landlord. The defendants Nos. 3 to 5 are the landlords of the 12 annas, and the defendants Nos. 1 and 2 are tenants. One Shibu was the original proprietor of the 4-annas estate. He died leaving a widow named Surjamoni. She mortgaged the whole 4-annas with the consent of the then nearest reversioner a daughter's son named Ramratan, to defendants Nos. 6 and 7. The 4-annas was sold in execution of the mortgage decree and purchased by the defendants Nos. 6 and 7 who sold it to the plaintiff in the year 1908. Upon the death of Surjamoni which took place in 1315 (1908-09) which must have been after the sale, inasmuch as her name appears in the sale certificate, the defendants Nos. 3 to 5, the then nearest reversioners, became entitled to the estate, Ramratan having died previously in the year 1900. The Munsif, following the decision of this Court in *Pulin Chandra Mandal* v. *Bilai Mandal* (1) held that the entire estate had passed to the plaintiff by his purchase from defendants Nos. 6 and 7. The learned Judge in the Court below, following another decision reported as *Hari Kissen Bhagat* v. *Bajrang Sahai Singh* (2), has held that the widow with the consent of the nearest reversionary heir cannot mortgage her husband's estate so as to bind all the reversionary heirs in future and he has, therefore, held that the plaintiff is only entitled to the rent up to the end of the year 1315, and that from the year 1316 when the succession opened to defendants Nos. 3 to 5 he is not entitled to the rent. When these decisions of the lower Courts were passed the judgment of the Full Bench in the case of *Debi Prosad Chowdhry* v. *Golap Bhagat* (3) had not been delivered. According to that ruling alienation by way of mortgage by a Hindu widow as the heiress, of a portion of the estate of her deceased husband, without proof either of legal necessity or of reasonable inquiry and honest belief as to its existence, but with the consent of the next reversioner for the time being, will be valid and binding on the actual reversioner, if the presumption of legal necessity or reasonable inquiry and honest belief raised by such consent is not rebutted by more cogent proof.

In dealing with this matter the Full Bench held that a complete alienation by

(1) 8 C. L. J. 280; 12 C. W. N. 837; 35 C. 939.
(2) 1 Ind. Cas. 434; 13 C. W. N. 544; 9 C. L. J. 453.
(3) 19 Ind. Cas. 273; 40 C. 721; 17 C. W. N. 701; 17 C. L. J. 499.

the widow, that is to say, the alienation of her entire interest in the estate inherited by her from her husband with the consent of the whole body of persons entitled to succeed as immediate reversionary heirs would give the transferee a good title as against the actual reversionary heirs at the time of her death. The learned Judges who decided this question appear to have avoided expressing any decided opinion as to whether the mortgage of the entire interest was such an alienation. But Mr. Justice Stephen, who is the only Judge who pronounced an opinion upon the point clearly, says that "if the alienation is made with the consent of the then heirs of her husband." It is not suggested in this case that a mortgage is to be distinguished in this respect from a sale. The same inference can be drawn from the remarks of Mr. Justice Mookerjee at page 782, where he speaks of alienation by a Hindu widow of her entire interest in the estate and in the next sentence, speaks of alienation by way of mortgage making no distinction between the meaning of the word "alienation" in the two passages. One of us who was a party to the judgment of the Full Bench also holds the same view, although there was nothing expressed in the judgment as it was not necessary. There is one line in the judgment of the learned Chief Justice which might raise an inference to the contrary, where he says, "here the alienation is only of a part of the husband's estate and that by way of mortgage." But the question which he was then dealing with was the alienation of a part of the estate and there was in fact no decision as to the difference in effect between a sale and a mortgage, nor in this case does it appear to us to matter, for the sale was complete by operation of law before the defendants Nos. 3 to 5 obtained any right to object to the alienation. A conditional alienation of the entire interest was made by the widow with the consent of the next reversioner. That alienation became complete by the sale and we do not think that the present reversioners can impugn it.

That being so, the judgment of the learned Judge must be set aside and that of the Munsif restored with costs.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 2118 AND 2601 OF 1912.

July 22, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

IN S. A. No. 2118 OF 1912.

VIJAYA BHUSHANAMMAL—DEFENDANT—APPELLANT

versus

C. N. EVALAPPA MUDALIAR—PLAINTIFF—RESPONDENT.

IN S. A. No. 2601 OF 1912.

THRIUPATHI MUDALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

PONNURANGA MUDALI—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 67 (d)—Severance of mortgage-debt—Previous suit by co-mortgagee for his share of debt—Subsequent suit by other co-mortgagee for his share of debt not barred.

A mortgage-debt can be said to be severed with the consent of the mortgagor under section 67 (*d*) of the Transfer of Property Act, where in a suit brought by one of the co-mortgagees for his share of the debt in which the mortgagor was also a party, the Court passes a decree for sale to recover his share of the debt. On the basis of such severance, another co-mortgagee can legally maintain a suit to recover his share of the mortgage-debt.

Second appeals against the decrees of the District Court of Chingleput, in Appeal Suits Nos. 428 of 1911 and 449 of 1911, preferred against those of the Court of the District Munsif of Poonamallee, in Original Suits Nos. 693 of 1910 and 695 of 1910 respectively.

FACTS.—On 19th May 1877 the first defendant and his brother executed a mortgage-bond for Rs. 1,200 in favour of one Kandasami Mudali and Giribalu Mudali, mortgaging certain properties belonging to them. One Ponnuranga Mudali, the legal representative of Kandasami Mudali, brought a suit, Original Suit No. 212 of 1889, on the file of the Court of Poonamallee for recovery of his share of the mortgage-debt and obtained a decree for the same. The interest of Giribalu Mudali had become vested in several persons and finally in the plaintiff (as the heir of one Andalammal) in whom it became vested under a Will. The present suit by the plaintiff is to recover the share of the mortgage-debt due to Giribalu Mudali. Meanwhile, the mortgaged properties had passed into several hands by means of sale etc.

The District Munsif held that the plaintiff was entitled to sue and that the bond was genuine, but dismissed the suit on the ground that as the mortgaged properties had passed several hands, they might have purchased the properties in the belief that the mortgage had ceased to be enforceable and the new provision in section 31 of the Limitation Act cannot be utilized to deprive them of any right. The District Judge on appeal held "that though the decree passed in 1339 for a sale for half share of the mortgage-debt may be illegal, still that does not affect the position of what remains." The present suit is for the whole of the balance mortgage money and it is brought by the person who alone has an interest in the bond. As regards the question whether *bona fide* purchasers should be affected, he held "that the respondents are, therefore, in the position of persons who were ignorant that a valid mortgage existed upon the land, and it is a well-known rule of law that such a position cannot affect the right of the mortgagee." He accordingly set aside the order of the lower Court and passed a decree in favour of the mortgagee. The present appeal is against that decree.

Mr. *S. T. Srinivasa Gopalachariar*, for the Appellants.

Mr. *T. Narasimha Aiyangar*, for the Respondents.

JUDGMENT.—There are no merits in this second appeal. Some technical objections are raised, but the only arguable objection is that section 67 (*d*) of the Transfer of Property Act prohibits a suit by one of several co-mortgagees who is interested in part only of the mortgage money from suing for sale of a corresponding portion of the mortgaged property, "unless the mortgagees have with the consent of the mortgagor severed their interests under the mortgage", and that the present suit is such a suit.

The rather unhappy wording of the section, no doubt, lends some colour to this contention, but we do not think that the Legislature intended to enact that if the severance of the interests of the mortgagees took place in any other lawful mode legally *binding on the mortgagor* (say, by the decree of a Court of law in a suit to which the mortgagor was a party and which became binding on him though he did not give his consent to the passing of the decree which had the legal effect of creating the severance), the mortgagor could resist a suit for sale for recovery of a portion of the mortgage money on the basis of such severance. The Legislature merely intended to protect the mortgagor from the harrassment of a multiplicity of suits where the severance of the interests of the mortgagees took place without his consent. The decision of the Court of Justice creating such a severance and binding on the mortgagor must be at least as effective legally as the mortgagee's consent to the severance. In the present case, there was a decree in a suit brought by the plaintiff's co-mortgagee to which suit the mortgagor was a party and it declared that there had been a severance of the mortgage binding on the mortgagor. That decree might be erroneous but it was not appealed against and has become final. The plaintiff's claim for recovery of his share of the mortgage money on the basis of such severance cannot, therefore, be resisted by the mortgagor.

This second appeal fails and is dismissed with costs. The connected Second Appeal No. 2601 of 1912 follows.

As regards the memorandum of objections in Second Appeal No. 2601, the District Judge was right in crediting the amount paid by the sale of a portion of the mortgaged property towards the principal of the mortgage-debt, in the absence of any specific appropriation by either party. The principal amount is the earlier debt and though by indication from circumstances a payment might in some cases appropriately be credited towards interest in the first instance [See section 60 of the Contract Act and section 76, clause (*b*), of Act IV of 1882] there might be circumstances indicating the other way also and we think the learned District Judge was right in holding that there were such circumstances in this case.

The memorandum of objections is dismissed with costs.

Appeal and objections both dismissed.

MAHOMED MOZAFFER ALI v. ASRAF ALI.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 428 OF 1912.

May 14, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

Haji MAHOMED MOZAFFER ALI BHUYAN—DEFENDANT—APPELLANT

versus

ASRAF ALI—PLAINTIFF—RESPONDENT.

Sale or mortgage—Question of intention—Transfer of Property Act (IV of 1882), s. 58 (c)—Regulation XVII of 1806, s. 3—"Certain date"—Tender—Tender, if denied, cannot be questioned as insufficient.

Whether a particular transaction is an out and out sale or a mortgage by conditional sale depends on the intention of parties to be gathered from circumstances.

Regulation XVII of 1806 and section 58 (*c*) of the Transfer of Property Act both make time the essence of a mortgage by conditional sale and there is no difference between the two laws.

The words "on a certain date" in section 58 (*c*) do not imply that the mortgagor cannot make a tender before that date. The "certain date" means only the last date.

A person who denies that any tender was made to him cannot question its sufficiency or validity.

Appeal against the decree of the District Judge, Noakhali, dated 20th November 1911, reversing that of the Munsif at Sudharam, dated 17th May 1911.

Babu *Brojendra Nath Chatterjee*, for the Appellant.

Babu *Jotindra Mohan Ghosh*, for the Respondent.

JUDGMENT.—We are of opinion that the judgment of the learned Judge in the Court below must be affirmed although one or two errors into which he has fallen have been pointed out to us. He was not right in using the evidence of the two witnesses who told him that the whole transaction was a mortgage by conditional sale, and he was not right in his interpretation of the Transfer of Property Act by reference to Regulation XVII of 1806. But as regards the first point the circumstances which have always been held to be good evidence of the intention of the parties are sufficiently clearly set out to enable us to deal fully with the matter; and as regards the second objection the Judicial Committee of the Privy Council in the case of *Balkishen Das* v. *W. F. Legge* (1) have gone very near to doing what the learned Judge has done in this case; and in discussing the intention of the Legislature as indicated in Regulation XVII of 1806 and in the Transfer of Property Act they practically held that the effect of the Regulation of 1806 was to make time of the essence of the contract and that the Transfer of Property Act intended to state the existing law and practice of India, that is to say, that there is no difference between the two laws. As a matter of fact the crux of the question raised by the construction of these two Acts is that in the Regulation the word "by a certain date" is used, and in the Transfer of Property Act the words 'on a certain date' is used; and it is contended on the authority of a remark made by one of the Judges in the case of *Kinuram Mondol* v. *Nitye Chand Sirdar* (2) that the certain date of payment within the meaning of sub-section (*c*) of section 58 of the Transfer of Property Act is an essential element of a mortgage by conditional sale. The Chief Justice says in that case that in the particular case before the Court he did not think that there was any certain date of payment within the meaning of the section, but he does not lay down that "on a certain date" means that the tender cannot be made before that date. The certain date which is laid down must according to all rules of interpretation be the last date and it would be both inequitable and impossible to hold that in this country of long distances and poor means of communication a man must go travelling all over the country on the particular day on the chance of finding his creditor and tendering the money to him, and that he could not go on any previous day.

Having disposed of these preliminary points we will briefly set out the circumstances which induce us to hold that this transaction was a conditional sale between Muhammadans and not as it purported to be an out and out sale.

The first point is that the *kobala*, the *kabuliat* and the *ekrarnama* are contemporaneous documents, registration in our opinion, being the test of when a deed of sale is completed. The drafting and the execution of the deed of sale was eight days before the registration. But the *ekrarnama* which purported to deal with the deed of sale and

(1) 22 A. 149 (P. C.); 4 C. W. N. 153; 27 I. A. 58; 2 Com. L. R. 523; 7 Sar. P. C. J. 691.

(2) 11 C. W. N. 400 at p. 403; 6 C. L. J. 208.

the *kabuliat* was registered at the same time in the presence of both parties. We, therefore, think that the transaction was one and indivisible. When we come to look to the *ekrarnama* itself we find that there is a statement by the purchaser, who is the defendant, that there was an understanding between the parties that if the total sum of Rs. 150 taken as consideration money of the *kobala* be paid within 30th *Chaitra* 1316 without interest he would give up the said property, and in the meantime the plaintiff would pay an annual rent of Rs. 26-10-5 reserved by the *kabuliat*. This appears to us to be an admission that the intention of the parties was to treat the deed as one of conditional sale. No interest is stipulated for because the deed is between Mahomedans, and a deed of conditional sale is a specially suitable form for Mahomedans and is usually employed by them, because they are not allowed by their religion to take any interest, and it has been held on the highest authority that it is usual and natural for Mahomedans under these circumstances to make their documents appear as far as possible resemble deeds of out and out sale.

The next and third circumstance is that the money advanced was considerably lower than the true value of the property, and this certainly is an indication that it was a loan and not a consideration for an out and out sale.

The fourth point is that the plaintiff remained in possession, and this is the point which especially distinguishes this case from that of *Kinuram Mondal* v. *Nitya Chand Sirdar* (2) to which we have referred above; and the *miadi ryoti kabuliat* with a condition of renewal under which he remained in possession clearly fixed the same date for the expiry of the lease as was fixed for the redemption of the property.

On all these grounds we consider that the transaction between the parties was a conditional sale in the nature of a mortgage.

We now come to the second question of the tender which it is urged was not valid by reason of the whole amount due not having been tendered. Now the finding of the Judge is that the defence that no tender was made cannot be believed, and he finally found that it is impossible to believe that the plaintiff did not make the tender, that is, that the plaintiff did make the tender and the tender that he made was the same as the deposit which two days afterwards with the intervention of a holding he made in the Civil Court. That tender was of Rs. 150 stipulated for which bore no interest and a whole year's rent. It is admitted by both parties that for the rent up to the end of 1315 a suit had been brought by the defendant, and the only rent that remained due was the rent for the year 1316. Now plainly on the terms of the *ekrarnama* the annual *jama* is fixed at Rs. 26-10-5 and there can, therefore, be no arrear bearing interest within the year 1316. The only other sums which the plaintiff might have been called upon to tender were the *jabeda* and *bejabeda* "lawful and unlawful expenses as well as the expenses incurred owing to laches on the defendant's part for the property mentioned in the *kobala*." It is obvious that when the plaintiff made his tender he could not possibly divine what bill of costs for these expenses the defendant might present to him. It certainly was the defendant's duty to present him with this bill of costs if there were any; and if he had then refused to meet them it might very well be said that the tender was not a lawful tender; but the defendant placed himself out of Court on this point by denying that there was any tender at all; and the finding of the learned Judge on this point concludes him. The tender, therefore, of Rs. 150 and a year's rent appears to us to have been a full and lawful tender; and upon the finding of the Judge that there was a valid tender we must hold that the amount must have been considered to have been actually produced and ascertained.

It is sought to be urged that in consideration of the two slight errors made by the learned Judge which might, the learned Vakil says, have given rise to this appeal, no costs should be awarded to the other side. But we are unable to see the justice of this contention. The costs are not awarded to the learned Judge. They are awarded to the respondent who is put to the expense of coming here to defend his rights which he has already obtained in the lower Court.

We, therefore, think that this appeal must be dismissed with costs.

Appeal dismissed.

MAUNG THA KADO v. MA THIN MYAING.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 142 OF 1911.

February 16, 1914.

Present:—Sir Henry Hartnoll, KT., Offg. Chief Judge, and Mr. Justice Ormond.

MAUNG THA KADO—APPELLANT

versus

MA THIN MYAING—RESPONDENT.

Buddhist Law—Husband and wife—Desertion for more than one year—Dissolution of marriage.

Where the wife left her husband and lived separate from him for a period of six years and where in the meantime the wife sought a divorce from the husband for cruelty and the husband from the wife for adultery but no divorce was granted, and where 17 months after separation the husband took a second wife:

Held, on a consideration of the facts, that the conditions contemplated by section 17 of Chapter V of the *Manugye* for the dissolution of a marriage became complete.

Mr. *Dhar*, for the Appellant.

Mr. *Bomanji*, for the Respondent.

JUDGMENT.

ORMOND, J.—Ma Thin Myaing claims to be the adopted daughter of the deceased Ma Saung and the first matter to be decided is whether she has proved that she was. The learned Judge on the original side has found that she has proved the relationship which she alleges and on a perusal of the evidence I agree with this decision. There is no good reason to disbelieve U Tha Shwe, who was a very close neighbour of Ma Saung up to the time of her death. He says that he knows Ma Thin Myaing was Ma Saung's adopted daughter by repute and because Ma Saung told him so. From his evidence it is clear Ma Thin Myaing lived with Ma Saung before her marriage, and that she was married from Ma Saung's house. Mg. Tha Kado does not deny knowing of Ma Thin Myaing's existence. Why should Ma Saung have taken Ma Thin Myaing into her house and supported her and according to U Tha Shwe and Ma Thin Myaing in the life-time of her father?

There seems no reason to disbelieve Ma Thin Myaing in this statement of hers. Maung Ba Than, who says he is a clerk in the employ of the Burma Railways and so *prima facie* a respectable man, says that he once lived in Ma Saung's house and that the latter told him she had an adopted daughter at Tavoy. There is no reason to disbelieve this man. Ma Kyin Tha says that Ma Saung told her that Ma Thin Myaing was her daughter and treated her as such. She is a paddy trader and there is no good reason to disbelieve her. Maung Aung Myat, who says that he is a saw-pit owner, says that about 1908, Ma Saung said she had adopted a daughter. Maung Tha Kado has not met Ma Thin Myaing's case satisfactorily and no desertion by Ma Thin Myaing is proved. Her son-in-law, who was also Ma Saung's nephew, was with Ma Saung at her death, and according to U Tha Shwe her daughter used to live with Ma Saung. I consider Ma Thin Myaing's adoption established.

The next point for decision is whether the status of husband and wife existed between Ma Saung and Maung Tha Kado at the time of Ma Saung's death. They were married in 1896. In June 1903 Ma Saung left the house where she and Maung Tha Kado lived together, and sued him for divorce on the ground of cruelty. She failed to obtain a divorce. As she never returned to him, she must be taken to have deserted him in June 1903. She died in November 1909, and so the parties remained separate for some six years. But according to the Full Bench ruling of this Court *Thein Pe* v. *U Pet* (1), desertion of the husband by the wife for one year does not *ipso facto* and without any further and expressed act of volition on the part of either party to the marriage dissolve the marriage tie. Have there in this case been any acts of volition dissolving it? In December 1903, Maung Tha Kado sued Ma Saung for divorce on the ground of adultery. This was six months after her desertion of him. He may have been trying to get hold of her property by bringing such a suit, but in any case it shows that he wanted to divorce her. No divorce was granted as he was found not to have proved his case. In February 1905, he sued Ma Saung for restitution of conjugal rights and lost his case. He may in such suit have been actuated by a desire to get hold of her property and not by a desire to again cohabit with her, for he in that case allowed he had taken a temporary wife, one Ma Eik, and that he had been living with her for some twelve months. He made this state-

(1) 3 L. B. R. 175 (F. B.).

ment on 15th November 1905. So that would indicate that he took Ma Eik about November 1904 or about seventeen months after Ma Saung deserted him—at any rate after the expiration of the year of desertion laid down by the Dhammathat. He endeavoured to make out in 1905, that Ma Eik was not his wife. In the present case he allowed that Ma Eik was his wife. This was in August 1911.

He clearly took Ma Eik as his wife from the beginning and the taking of her as such was clearly an act of volition by him as indicating that he did not desire Ma Saung any longer, and that he finally severed the marriage tie between them by doing so. The whole of the conditions contemplated by section 17 of Chapter V of the *Manugye* for the dissolution of the marriage became complete. Ma Saung left his house. She did not return within the year. It is not shown that he maintained her in any manner after she left. Before he took Ma Eik as his wife he did not claim Ma Saung as such. On the contrary he tried to divorce her. He had the right to separate and marry again and he finally severed the tie between them by doing so. The fact that he sued Ma Saung for restitution of conjugal rights after taking Ma Eik seems to me not to affect the matter. Apart from the probability that he was then merely endeavouring to get hold of Ma Saung's property and that he had no intention of again cohabiting with her or treating her as a wife, she was no longer his wife for the reasons which I have set out above. It is true that Ma Saung did not defend the suit for restitution of conjugal rights on the ground that she was no longer the wife of Maung Tha Kado, but that she defended it on other grounds, which show as far as she was concerned a fixed determination not to resume conjugal relations; but, in my opinion, it was open to her to make such a defence and the argument can clearly be raised and considered in this case where the contest is between those left behind by Ma Saung as to who is entitled to inherit her property and where it is necessary to determine the legal status of each party to her. All facts showing what the status was must receive consideration. In my opinion at the time of Ma Saung's death there was no tie of marriage existing between her and Maung Tha Kado.

The second ground of appeal has manifestly no substance in it.

I would dismiss this appeal with costs.

HARTNOLL, OFFG. C. J.—I concur.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 881 OF 1913.

July 17, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

THEVARAYA REDDY AND OTHERS—DEFENDANTS—APPELLANTS

versus

VENKATACHALA PANDITHAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 83, 84—Deposit by mortgagor of mortgage money in Court—Cessation of interest—Tender before action and tender after action—Tender and deposit, distinction between.

A mortgagor deposited in Court, under section 83 of the Transfer of Property Act, the amount due upon the mortgage, but subsequently withdrew it and tendered the same in Court at the hearing of the suit brought on the mortgage:

Held, Per *Ayling, J. (Tyabji, J.*, dissenting)—

That a deposit so made is not such a "*deposit*" within the meaning of section 84 of the Transfer of Property Act as to make interest cease to run from the date of the deposit.

Krishnaswami Chettyar v. *Ramaswami Chettyar*, 8 Ind. Cas. 763; 35 M. 44; 9 M. L. T. 131; (1911) 1 M. W. N. 89, followed.

Per *Tyabji, J.*—Out of the two conditions essential to make interest cease to run under section 84 of the Transfer of Property Act, (1) that there should be a deposit in Court, (2) that the mortgagor should have done all in his power to make the mortgagee draw money from Court, the mortgagor having satisfied in this case the latter condition was entitled to claim exemption from payment of interest. It is not necessary that the mortgage-money should always remain in Court in deposit: it is enough if the mortgagee is, otherwise, in a position to draw money from Court.

Krishnaswami Chettyar v. *Ramasami Chettyar*, 8 Ind. Cas. 763; 35 M. M. 44; 9 M. L. T. 131; (1911) 1 M. W. N. 89, distinguished.

THEVARAYA REDDY *v.* VENKATACHALA PANDITHAN.

Velayuda Naicker v. *Hyder Hussan Khan Sahib*, 3 Ind. Cas. 729; 6 M. L. T. 262; 19 M. L. J. 648; 33 M. 100, *Champat Singh* v. *Jangu Singh*, 16 Ind. Cas. 830; 16 C. W. N. 793; 12 M. L. T. 482; 10 A. L. J. 379; (1912) M. W. N. 1151; 23 M. L. J. 738; 14 Bom. L. R. 1223; 17 C. L. J. 14, followed.

The rule of English Law, that a tender before action followed up by a tender in Court after action, is a legal tender, applies also to India even in cases of deposit of mortgage-money under section 83 of the Transfer of Property Act.

Haji Abdul Rahman v. *Haji Noor Mahomed*, 16 B. 141, *Jagat Tarini Dasi* v. *Nabo Gopal Chaki*, 34 C. 305 at p. 321; 5 C. L. J. 270, *Gyles* v. *Hall*, 2 P. Wms. 378, *Wallace* v. *M'Connell*, 13 Peters U. S. 136; 10 Law. Ed. 135; *Bissell* v. *Hayward*, 6 Otto U. S. 580; 24 Law. Ed. 678; *Dixon* v. *Clark*, 5 C. B. 365 at pp. 377, 8; 5 D. & L. 155; 16 L. J. C. P. 237, 75 R. R. 747, *Kinnaird* v. *Trollope*, 42 Ch. D. 610 at pp. 615, 616; 58 L. J. Ch. 556; 60 L. T. 892, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Trichinopoly in Appeal Suit No. 108 of 1912, preferred against that of the Court of the District Munsif of Kulitalai in Original Suit No. 414 of 1910.

Messrs. *C. V. Ananthakrishna Iyer* and *K. R. Rangaswami Iyengar*, for the Appellants.—Tender and deposit stand on the same footing. It is settled law that a valid tender out of Court, if improperly refused by the mortgagee, continues to be effective and disentitles the mortgagee to future interest. In the case of a deposit, the money instead of being shown to the mortgagee is deposited in Court and the latter is at liberty to draw the amount so deposited. To claim the benefit of section 84 of the Transfer of Property Act the mortgagor must, no doubt, have done all he could to enable the mortgagee to take the money out of Court. In the present case the money was in Court deposit for a full year. The mortgagors ought not to be prejudiced by disputes among the mortgagee's representatives which alone prevented them from taking the amount. Even after withdrawing the amount the mortgagors were ready to re-deposit the same in Court and did in fact do so immediately after the suit summons was served and long before any written statement was filed by them. *Krishnasami Chettiar* v. *Ramasami Chettiar* (1) has not been correctly decided.

Mr. *V. Purushottama Iyer* for Mr. *T. R. Venkatrama Sastriar*, for the Respondents.—The decision in *Krishnasami Chettiar* v. *Ramaswami Chettiar* (1) is quite correct. The words 'deposited in Court' in section 84 of the Transfer of Property Act contemplate the case of a 'continuing deposit' and not a case of withdrawal. As their Lordships say, the mortgagors might possibly have made use of it or derived some other benefit therefrom. By depositing in Court, the mortgagor does not lose his control over the fund in Court and the mortgagee does not become entitled to it unless and until the mortgagor has done all that should be done to enable the mortgagee to take the money out of Court.

(1) 8 Ind. Cas. 763; 35 M. 44; 9 M. L. T. 131; (1910) M. W. N. 89.

JUDGMENT.

AYLING, J.—The suit out of which this second appeal arises was brought to recover the amount due on a mortgage-bond (Exhibit A) executed on 27th May 1895 by the defendants Nos. 1 and 2 (1st and 2nd appellants) in favour of the late Ramakrishna Panditan, manager of the family to which the plaintiff and the defendants Nos. 7 to 9 belong. After the mortgagee's death, as the appellants wished to discharge the mortgage and as his legal representatives were disputing among themselves, the appellants paid the full amount due into Court on 1st October 1903 under section 83 of the Transfer of Property Act. Notice appears to have been given as required by that section, but as the mortgagee's representatives could not settle their disputes, the money remained in Court till about a year later when the appellants withdrew it. The present suit was filed on 6th August 1910. The sole question is whether under section 84 of the Transfer of Property Act, interest on the mortgage-debt ceases to run from the date of the deposit in Court (1st October 1903) in spite of the subsequent withdrawal.

The lower Appellate Court differing from the District Munsif and relying on *Krishnasami Chettiar* v. *Ramasami Chettiar* (1) has held that it does not cease to run.

I have had the advantage of perusing the judgment of my learned brother and fully appreciate the cogency of much of the reasoning therein contained. I am, however, regretfully constrained to differ as to the decision we should come to in this case.

I think we should follow the ruling in the reported case above quoted. I am unable to effectively distinguish between that case and the present case, and the reasoning and conclusion of the two learned Judges in the

reported case seem to me equally applicable to the one before us. Even if I were satisfied (which I am not) that their view was wrong, I do not think it should be departed from without a reference to a Full Bench.

I would dismiss the second appeal with costs.

As regards the memorandum of objections, I see no reason why the plaintiff should not get his costs throughout and would allow the memorandum of objections, and order accordingly.

TYABJI, J.—The only question of this second appeal is, whether the mortgagees when seeking to recover the mortgage-debt can claim interest on the mortgage amount for any period after the 1st October 1903. On that date the mortgagors had deposited into Court the sum that was due for principal and interest on the mortgage. The sum was not taken out of Court by the mortgagees and was withdrawn about a year later by the mortgagors.

The decision of the case depends primarily upon section 84 of the Transfer of Property Act.

The following words of Lord Dunedin express the well-recognised principle with so much clearness and authority that I will cite them at length, before dealing with the section: "It is well, I think, in considering the cases, which are numerous, to keep steadily in mind that the question to be answered is always the question arising upon the very words of the Statute. It is often useful in striving to test the facts of a particular case to express the test in various phrases. But such phrases are merely aids to solving the original question, and must not be allowed to dislodge the original words. Most of the erroneous arguments which are put before the Courts in this branch of the law will be found to depend on disregarding this salutary rule. A test embodied in a certain phrase is put forward, and only put forward, by a Judge in considering the facts of the case before him. That phrase is seized on and treated as if it afforded a conclusive test for all circumstances, with the result that a certain conclusion is plausibly represented as resting upon authority, which would have little chance of being accepted if tried by the words of the Statute itself:" *Plumb* v. *Cobden Flour Mills Company Limited* (2).

Section 84 of the Transfer of Property Act deals with two courses of action, the law relating to each of which may have to be kept distinct: (1) tender and (2) deposit in Court. The portion of the section now relevant is as follows:

"When the mortgagor ....has .. deposited in Court under section 83 the amount remaining due on the mortgage, interest on the principal money shall cease... as soon as the mortgagor.....has done all that has to be done by him to enable the mortgagee to take such amount out of Court."

It seems to me that the section is sufficiently clear. There seems to me to be no necessity for referring to English decisions on the point. The applicability of the section can be determined by findings on such issues as I shall indicate later. I observe, however, that several Indian decisions have referred to English cases and English rules of law in this connection and in order to understand those Indian decisions and to determine how far and to what effect they are binding on me, I shall have to refer to the English Law.

The lower Appellate Court has disallowed to the mortgagor, the benefit of this provision on the ground that *Krishnasami Chettiar* v. *Ramasami Chettiar* (1) lays down that "section 84 presupposes the continuance of the deposit to justify the claim to the cessation of interest." The District Munsif in the Court of first instance, on the other hand, considered *Velayuda Naicker* v. *Hyder Hussan Khan Sahib* (3) applicable and held that interest had ceased to run after the deposit.

Before dealing with the decided cases I must point out that in order that the view of the Subordinate Judge may be upheld one of two things must on a consideration of the wording of the section have taken place: either (1) that the mortgagor has not deposited the amount in Court, or (2) that he has not done all that had to be done by him to enable the mortgagee to take such amount out of Court.

(2) (1914) A.C. 62 at p. 65; 83 L.J.K.B. 197 at p. 200.
(3) 3 Ind. Cas. 729; 33 M. 100; 6 M. L. T. 262; 19 M. L. J. 648.

These are the two conditions precedent to the applicability of section 84. I will consider them separately. With reference to the first condition, can it be said that when he has deposited the money and subsequently withdrawn it, he must in all circumstances be deemed not to have deposited at all? It is true that a deposit may be made and withdrawn under such circumstances that the mortgagor is unable to avail himself of the opportunity of taking the money out of Court. Had section 84, therefore, contained only this first requirement for the cessation of interest there might have been some temptation to read into this part of the section words implying that the deposit must be made under proper circumstances and continued for a sufficient length of time, so that the mortgagee may be enabled to take such money out of Court. But the second condition precedent contained in the section seems to me to take away any excuse that might have existed for falling into any such temptation, the portion of section 84 which requires the mortgagor to do all that has to be done by him makes it, in my opinion, unnecessary, even if it were otherwise permissible, to put the strain of such a construction as I have alluded to on those words of the section in which the first condition precedent is couched. Some observations of the learned Judges who decided *Krishnasawmi Chettiar's* case (1) touch this point. I shall consider them later.

The second condition mentioned above whether the mortgagor has done all that has to be done by him to enable the mortgagee to take the amount deposited out of Court involves questions which cannot, in my opinion, be dealt with without a consideration of the circumstances in each particular case. It is obvious that one of the things that has to be done by the mortgagor for enabling the mortgagee to take the money out of Court, is to let the money remain in Court for a reasonable time after notice to the mortgagee. This may not be the only matter to be considered, but the issue must, in my opinion, as I have already said, be worded and decided primarily with reference to the frame and the language of the section. The Subordinate Judge not having done so, I should have felt no doubt as to the necessity of a finding on an issue so worded but for the contention of the respondent that the non-continuance of the deposit is conclusive against the mortgagor irrespective of the finding that would be given on the issue so framed. This contention is based on a sentence occurring in *Krishnasami Chettiar* v. *Ramasami Chettiar* (1).

With reference to what I am about to say in a later portion of my judgment, I may add that the mortgagors in the case under appeal brought the mortgage-money into Court without any delay after the plaint had been filed in the suit out of which this appeal arises. The mortgagors also alleged that they had tendered the money out of Court and had expressed their readiness and willingness to pay it in a written statement filed by them in a partition suit, Original Suit No. 35 of 1908 on the file of the Subordinate Judge's Court at Trichinopoly. I must, therefore, in order to deal with the contention of the respondents last referred to, consider *Krishnasami Chettiar's* case (1) and the principles on which the decision proceeds. As I have the misfortune to differ from my learned brother as to the effect and binding force of that decision, it is necessary to examine the decision with some care. I think it also desirable to refer more fully to some rules of English Law to which the judgment briefly alludes, not for the purpose of elucidating the meaning of section 84 (which seems to me to be clear), but for understanding the basis on which *Krishnasami Chettiar* v. *Ramasami Chettiar* (1) proceeds.

In *Krishnasami Chettiar* v. *Ramasami Chettiar* (1) the mortgagor was the plaintiff in a redemption suit. He did not bring into Court the mortgage amount at the time when he instituted the suit, but relied for cessation of interest on the fact of a previous deposit without accounting for the money alleged to have been deposited. Upon the pleadings the High Court assumed with the District Judge that the plaintiff had withdrawn the deposit on the mortgagee having refused to take the money. This statement in the judgment of the High Court is made clear by the judgment under appeal of Mr. F. D. P. Oldfield, then District Judge. He says: "It is not clear what happened to the money

whether it remained in Court, or was drawn by plaintiff. As, however, the present plaint contains no reference to any tender by payment into Court at its date or to the money being available for the 1st defendant in Court as equivalent to it, it must be assumed that it was not there and that no tender was made. A plea of tender before action must be accompanied by the payment into Court after action, otherwise the tender is ineffectual."

The last sentence of the District Judge's judgment which I have cited is taken *verbatim* from the head-note in *Haji Abdul Rahman* v. *Haji Noor Mahomed* (4), a decision of Telang, J., which, however, is not cited by the District Judge nor by the High Court. The District Judge's remarks refer, I presume, to the allegations contained in paragraph 8 of the plaint which I find from the records to have been as follows:—"In spite of the tender of the above mortgage amount to the defendant and the demand made on several occasions on the defendant, and in spite of (my) having subsequently deposited the same in Miscellaneous Petition No. 840 of 1906 of this Court on 11th July 1906 under section 83 of the Transfer of Property Act, the said defendant objected to receive the said amount and deliver possession of the land to me. Therefore, the aforesaid petition was dismissed on 27th July 1906 and it was also ordered that the said amount will not carry interest from the above date."

The view of the law as laid down in *Haji Abdul Rahman* v. *Haji Noor Mahomed* (4) by Telang, J., that a plea of tender before action must be accompanied by a payment into Court after action is supported by the observations in *Jagat Tarini Dasi* v. *Naba Gopal Chaki* (5), where it is said: "Now it is well settled that while a tender does not extinguish the indebtedness, a valid tender, which is kept good, stops the running of interest after the tender; see *Gyles* v. *Hall* (6), *Wallace* v. *M'Connell* (7), and *Bissell* v. *Heyward* (8)," and assuming that the law as laid down in the Transfer of Property Act is the same as the English Law—on which point I think it unnecessary to express any opinion—I think I cannot do better than refer to the following exposition of the English Law by Lord, C. J. Wilde, delivering the considered judgment of the Court of the Common Pleas in *Dixon* v. *Clarke* (9): "In actions of debt and assumpsit, the principle of the plea of tender, in our apprehension, is, that the defendant has been always ready (*toujours prist*) to perform entirely the contract on which the action is founded; and that he did perform it, as far as he was able, by tendering the requisite money; the plaintiff himself precluded a complete performance, by refusing to receive it. And, as, in ordinary cases, the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready (*uncore prist*), but must be accompanied by a *profert in curiam* of the money tendered. If the defendant can maintain this plea, although he will not thereby bar the debt (for that would be inconsistent with the *uncore prist* and *profert in curiam*) yet he will answer the action in the sense that he will recover judgment for his costs of defence against the plaintiff,—in which respect the plea of tender is essentially different from that of payment of money into Court. And, as the plea is thus to constitute an answer to the action, it must, we conceive, be deficient in none of the requisite qualities of a good plea in bar.

"With respect to the averment of *toujours prist*, if the plaintiff can falsify it, he avoids the plea altogether. Therefore, if he can show that an entire performance of the contract was demanded and refused at any time when, by the terms of it, he had a right to make such a demand, he will avoid the plea. Hence, if a demand of the whole sum originally due is made and refused, a subsequent tender of part of it is bad, notwithstanding that, by part payment, or by other means, the debt may have been reduced in the *interim* to the sum tendered. And this is the principle of the decision of *Cotton* v. *Godwin* (10). If, however, the demand were of a larger sum than that originally due under the contract, a refusal to pay it would not falsify the *toujours prist*, even though the amount demanded were made up of the sum due

(4) 16 B. 141 at pp. 149, 150.
(5) 34 C. 305 at p. 321; 5 C. L. J. 270.
(6) (1726) 2 P. Wms. 378.
(7) (1839) 13 Peters, U. S. 136; 10 Law. Ed. 135.
(8) (1877) 6 Otto, U. S. 580; 24 Law. Ed. 678.
(9) (1843) 5 C. B. 365 at pp. 377, 378; 5 Dawl. & L. 153; 16 L. J. C. P. 287; 75 R. R. 747; 135 E. R. 919.
(10) 7 M. and W. 147; 9 D. P. C. 763; 10 L. J. Ex. 243.

under the contract, and some other debt due from the defendant to the plaintiff. And this is the principle of the decisions of *Brandon* v. *Newington* (11) and *Hesketh* v. *Fawcett* (12) which appear to overrule *Tyler* v. *Bland* (13)."

In *Kinnaird* v. *Trollope* (14), Stirling, J., (as he then was) cites this passage and observes:

"It, therefore, appears, that, if the plea of tender is to be successful at law, two matters are requisite—*first*, that the defendant must not only make the tender, but must always be ready to perform entirely the contract on which the action is founded; and *secondly*, that the plea must be accompanied by a payment into Court. ****It, therefore, appears at law that a plea of tender, to be successful, must be accompanied by a payment into Court. No such payment has been made; and even if it be assumed in the defendant's favour that a formal offer of the money before action brought was waived by the plaintiffs, still the summons of the 12th of November 1833 (which seeks a month for payment) cannot, I conceive, be treated as equivalent to a plea of tender; and, even if it could, the defence would fail by reason of its not being followed, still less accompanied, by a payment into Court."

The decisions, therefore, seem to lay down that the rule contained in the Transfer of Property Act, that interest shall cease on tender or deposit, is itself suspended if it is proved by the mortgagee that after the tender or deposit the mortgagor was not always ready to pay, and such absence of readiness may appear from such circumstance as his not bringing the money into Court when he sues, as in *Krishnaswami Chettiar* v. *Ramasami Chettiar* (1), or is sued, as in *Kinnaird* v. *Trollope* (14), or failure to pay on a subsequent demand by the mortgagee, as suggested in *Velayuda Naick* v. *Hyder Hussain Khan Saib* (3). See also *Haji Abdul Rahman* v. *Haji Noor Mahomed* (4).

If this is so, then the facts of the case in *Krishnaswami Chettiar* v. *Ramasami Chettiar* (1) being as I have stated, the rules of law applicable to them may be very different from those applicable to the facts now before us. In the words of Lord Chancellor King, "the contrary being proved that the mortgagor was not ready to pay it, therefore, the interest must run on:" *Gyles* v. *Hall* (6). I may respectfully say that the fact in itself that the mortgagor did not bring the money into Court seems to me, on the authorities to which I have referred, to supply a sufficient reason for coming to a different conclusion on the facts before the Court in *Krishnasami Chettiar* v *Ramasami Chettiar* (1) from the conclusion to which I think the law must bring us in the present case. But it must be conceded that some observations in *Krishnasami Chettiar* v. *Ramasami Chettiar* (1) support the contention of the respondents and I must now deal with those observations.

The Judges of the High Court in *Krishnasami Chettiar* v. *Ramasami Chettiar* (1) accept the findings of fact above referred to and proceed to consider whether the mortgagor had done "all that had to be done by him." They point out that "neither section 83 nor 84 states expressly what are all the things the mortgagor has to do;" and that though the mortgagor may be at liberty to withdraw the money "even before the mortgagee appears to claim it," if he does so, he certainly cannot stop interest from running. After this the judgment seems to me to proceed on a reasoning which, taking the words in themselves apart from the facts of the case, appears to be inconsequential. For in considering what is included in that "all that has to be done by the mortgagor," it is apparently assumed that because the bare deposit and the bare notice under section 83 (without adding thereto the lapse of sufficient time to allow the mortgagee to take the amount deposited) cannot constitute that "all", therefore, various other considerations become relevant. These considerations fall under five heads. In referring to them I will adhere, as far as possible, to the language of the judgment, *first*, they say, that there is nothing in section 83 to preclude the mortgagee changing his mind after having once refused to take the money and applying for payment. Conceding without admitting that the mortgagee is at

(11) 3 Q. B. 915; 3 G. and D. 194; 12 L. J. Q. B. 20; 7 Jur. 60; 114 E. R. 760; 61 R. R. 436.

(12) 11 M. and W. 356; 12 L. J. Ex. 326, 2 Dowl. N. S. 827; 63 R. R. 629.

(13) 9 M. and W. 338; 1 D. (N. S.) 608; 11 L. J. Ex. 257.

(14) 42 Ch. D. 610 at p. 616; 58 L. J. Ch. 556; 60 L. T. 892.

liberty so to change his mind, is that any criterion for determining what has to be done by the mortgagor in order to enable the mortgagee to take the amount out of Court? This concession would apparently place the mortgagor in a worse position if he deposits the money in Court than if he tenders it out of Court. *Secondly*, they ask: "Why should the mortgagor who has taken back the money and possibly made use of it or derived some other benefit from it be entitled to the cessation of interest from the date of the original deposit?" This consideration may not perhaps be available in interpreting an act of the Legislature. Assuming that it is available, is it not a sufficient answer that the mortgagor has to pay interest not because he derives benefit from the mortgage-money, but either because he has agreed to pay interest or for some such reason or policy as underlies the Interest Act or the Indian Trusts Act, section 23; and that the interest ceases not because the mortgagor does not make use of the money but for such reasons as are alluded to in the judgment of Wilde, C. J., above referred to and in the Indian Contract Act, section 38? *Thirdly*, they say that "in the case of tender," as distinct from deposit, continued readiness to pay has been held in England to be "necessary for the cessation of interest." The danger of referring to English Law instead of our own Acts has frequently been adverted to. In regard to this particular matter the Judges themselves seem to point to a distinction between deposit and tender. If the English Law of tender is to be relied upon for the law of deposit, and it seems to me that if it can be relied upon at all it must be for the principles contained in it which with the necessary changes would be applicable to both tender and deposit, then the observations of Wilde, C. J., in *Dixon* v. *Clark* (9) clearly show that if the money has once been tendered and the debtor avers his continued readiness to pay, evidencing that readiness by bringing the money into Court, the burden of proof is on the person who alleges that the mortgagor was not always ready and willing, though the burden is not placed on the creditor at all unless at the time of suit the debtor has paid into Court. In *Krishnasami Chettyar* v. *Ramasami Chettyar* (1) the mortgagor did not bring the money into Court: that fact, taken in conjunction with the findings, would have been sufficient, according to the decisions I have cited and in the veiw of the law which was evidently taken in that case, *viz.*, that English law would be referred to for interpreting the section of the Transfer of Property Act to put the plaintiff out of Court. The *fourth* consideration contained in the judgment is to this effect: assuming that there is a departure in India from the rule of English Law as to continued readiness after tender, still the decision in *Velayuda Naicker* v. *Hyder Hussan Sahib* (3) where this departure is suggested, itself contains the observation: "It is not alleged in this case that there was a subsequent demand by the mortgagee for the amount and that the mortgagor failed to pay." This would indicate that the divergence between Indian and English Law is not so complete as to make an allegation of failure of readiness to pay irrelevant under the Indian Law. I have already referred to the rule of English Law, that the effect of tender may be nullified by absence of continued readiness to pay. It may be that the Transfer of Property Act, section 83, does not preclude the incorporation therein of this rule of English Law. But if the observations in *Krishnasami Chettiar* v. *Ramasami Chettiar* (1) are to be read in complete detachment, restricted neither by reference to the facts of the case nor by a fuller consideration of the English Law to which the Judges briefly allude, then the Transfer of Property Act would be much less favourable to the mortgagor after deposit than the English Law is after tender. For under English Law once the mortgagor proves tender in the past and avers his present willingness to pay, his continued willingness to pay in the *interim* is presumed and interest ceases to run from the date of the tender, unless the mortgagee alleges and proves that the mortgagor was at some time in the interval unready or unwilling to pay, whereas according to the argument for the respondents though the appellants tendered the money by depositing in Court and tendered it again in the written statement already referred to and though it is not found that after the deposit and tender they were not ready or not willing

to pay the money, still interest must continue to run. Assuming that *Krishnasami Chettiar* v. *Ramasami Chettiar* (1) must be followed in regard to the point that the English Law is to be relied upon for interpreting section 84 of the Transfer of Property Act, I think that the English Law must be looked for in the English decisions and that it would be wrong to take the brief reference to that law which was sufficient for the facts then before the Court as being conclusive for all subsequent cases. Finally it is said in *Krishnasami Chettiar* v. *Ramasami Chettiar* (1) that if the law as regards tender is different in India from that in England, less favourable to the mortgagee in India than in England, still the law is "on a clearer footing as regards deposit." The reasons for this last proposition are stated as follows: "We cannot understand the words 'has deposited in Court' to include 'has deposited in Court and subsequently withdrawn.' It is quite conceivable that tender may be complete even though after it is once rejected there is no subsequent readiness to pay, but we cannot speak of a person having deposited in Court, if he has withdrawn his deposit." With great respect I am unable to follow this reasoning. In the first place, it is not suggested in *Velayuda Naicker* v. *Hyder Hussan Khan* (3) that the Indian Law differs from the English Law in that in India "tender may be complete even though after it is once rejected there is no subsequent readiness to pay." For the English Law itself makes the tender *prima facie* "complete," unless the party impeaching its completeness shows an absence of readiness to pay. *Secondly*, with reference to the construction of the Act, the alternative to the construction put upon it in *Krishnasami Chettiar* v. *Ramasami Chettiar* (1) is not that the words "has deposited in Court" mean "has deposited in Court and subsequently withdrawn." The construction that is necessary for supporting the view apparently taken by the learned Judges is that "has deposited" means "has deposited and has allowed the deposit to remain continuously in Court" presumably until it lapses to Government: [see *Champat Singh* v. *Jangu Singh* (15)].

(15) 16 Ind. Cas. 830; 17 C. L. J. 14; 16 C. W. N. 793; 12 M. L. T. 482; 10 A. L. J. 379; (1912) M. W. N. 1151; 23 M. L. J. 738; 14 Bom. L. R. 1223.

I see no warrant for this construction. And the words "as soon as" suggest that no further events have to be considered.

Finding, as I do, that the law is laid down with sufficient clearness by the Legislature in section 84 of the Transfer of Property Act and that the decision in *Krishnasami Chettiar* v. *Ramasami Chettiar* (1) had reference to facts which do not furnish any analogy to the facts now before us, it seems to me that the present decision should not be affected by the observations to which I have referred; especially as those observations allude to English Law and are, therefore, capable of being read in the light of the fuller statement of that law in the English decisions. To these considerations I must add that unless so read, those observations seem to me to conflict with *Velayuda Naiker* v. *Hyder Hussan Khan* (3). They can be distinguished only on the ground that the law relating to tender out of Court is quite different from the law relating to deposit in Court, a ground for distinction which for the purposes of the rules which are now under consideration cannot, it seems to me, be supported on principle.

For the reasons I have already given I would ask for findings on the following issues:—

1. Whether the defendants Nos. 1 to 6 did all that had to be done by them to enable the mortgagees to take out of Court the amount deposited in Court on the 1st of October 1903 by the defendants Nos. 1 to 6 under section 83 of the Transfer of Property Act?

2. If the first issue is answered in the affirmative then: whether the defendants Nos. 1 to 6 were at any time after withdrawing the said amount from the Court not ready or unwilling to pay the sum due to the mortgagees?

For the reasons that I have already given the onus of the 2nd issue would, in my opinion, lie on the respondents.

The questions, whether, if the 2nd issue were answered in the negative, interest would continue to run on the mortgage amount in spite of section 84 of the Transfer of Property Act, and if so, at what rate, and for what period, do not arise at the present moment, even if my view on the other points were not correct, and I express no opinion on them.

I have already given my reasons for thinking that the second appeal should not be dismissed. Assuming that the interpretation I put on section 84 of the Transfer of Property Act is wrong, I should be inclined to think that the second appeal fails on a technical ground and I should, therefore, make no order as to costs and would also dismiss the memorandum of objections with costs.

BY THE COURT.—In the result the second appeal and the memorandum of objections are dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1738 OF 1913.

May 18, 1914.

Present:—Mr. Justice Coxe and Mr. Justice Mullick.

Chowdhry Babu MAHADEO PRASAD —DEFENDANT—APPELLANT

versus

Shaikh NABI BUKHSH—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), s. 42—Suit for declaration—Right to kill one's own cattle—Cause of action—Individual right, suit for declaration of—Joinder of persons with similar right, if necessary—Custom, essentials of—Forbearance.

Where evidence proves that the defendant has all along denied and has all along been interested in denying the plaintiff's right, the plaintiff has a cause of action against such defendant within the meaning of section 42 of the Specific Relief Act, 1877.

Where the plaintiff claims an individual right of his own, he is entitled to sue for a declaration of it, whether other persons who have a similar right join him or not.

Mere non-exercise of a right will not defeat it.

Where, therefore, evidence shows that circumstances and practice have introduced among Muhammadans a certain amount of abstention from cattle-killing which has not in fact been practised as constantly and openly as in a purely Muhammadan village but in many cases with precautions for secrecy out of consideration for the feelings of the *Malik* and the Hindus, it cannot be said that such abstention was so universal or certain as to have ripened into the custom contended for.

Prodyote Kumar Tagore v. *Rakhal Chandr Sarkar*, 5 Ind. Cas. 243; 11 C. L. J. 209; 14 C. W. N. 487, referred to.

There is no analogy between suits for damages for wrong done and suits for declaration of right against persons who deny those rights in which no compensation is sought. In the latter cases the denial may clearly be perfectly honest and may be made in perfectly good faith, but that would not affect the rights of the person whose right was denied.

Appeal from a decision of the District Judge of Muzaffarpore, dated 9th April 1913, modifying that of the Munsif of Sitamarhi, dated 30th May 1912.

FACTS.—The plaintiff is a Muhammadan inhabitant of *Mouza* Barharwa *alias* Hasanpur and he and his ancestors have been living there since a very ancient time. Defendant No. 1 is the landlord of the village and defendants Nos. 2 to 5 are his servants and they are all Hindus. The Muhammadans under their law and religion are bound to perform *Quorbani* for themselves and their families; and they have been so doing since ancient times in their own houses with due precautions and regard to privacy so as not to hurt, the feelings of the followers of other religions, without objection from anybody.

In 1908 about the *Quorbani* time, the defendant No. 1 who ordinarily resides at Allahabad and has barely any correct knowledge of the habits and practices of his Muhammadan tenants, upon some false informations sent by his servants, the defendants Nos. 2 to 5, wired to the Sub-Divisional Officer of Sitamarhi that the Muhammadans of the place never sacrified cows, but that that year they were ready to do so and riot and dispute were apprehended, and requested the Magistrate to take preventive measures in which he said his *amlas* would assist; and these *amlas* also won over the Sub-Inspector, Police, of Pupri, a Hindu by religion, and caused a similar report to be submitted by him; whereupon a notice under section 144, Criminal Procedure Code, was issued without sufficient inquiry and the Muhammadans were prevented from performing their *Quorbani* and they were besides appointed special constables under section 17 of the Police Act and made to attend *thana*.

This trick has been repeated during every following year and the plaintiff and the other Muhammadans have been prevented from performing the *Quorbani* in their houses privately and they have suffered much religious demit and personal indignity. On these facts the plaintiff sued for a declaration of his right to perform *Quorbani* in his own house with due privacy and precautions, so as not to hurt the feelings of persons of other religious persuasions, and without interfer-

ence of such persons, and for declaration of the illegality and invalidity of the executive orders aforesaid and for injunction dating his cause of action from the several dates of the order passed under section 144, Criminal Procedure Code, and section 17 of the Police Act, *viz.*, dated 12th January 1908, 3rd January 1909, and 20th December 1909.

The defendants filed a joint written statement mainly contending that the suit was not maintainable; the plaint did not disclose any cause of action and no cause of action against these defendants; there had been a general abstention on the part of the Muhammadans from cattle-killing from time immemorial and this has ripened into a binding custom.

The suit was brought in the Court of the Munsif of Sitamarhi who dismissed it, and upon appeal to the District Judge of Muzaffarpore by the plaintiff the appeal was allowed with the grant of an injunction and the suit decred in a modified form.

On second appeal preferred by the defendant No. 1, three points were urged, (1) plaintiff had no cause of action against these defendants as they were in no way interested in denying nor did deny the plaintiff's right, (2) that the Muhammadans generally of the place are interested in the declaration and the plaintiff cannot sue alone: (3) that the decision of the District Judge was wrong on the question of custom when he said that the mere fact of the Muhammadans not killing kine in any of the villages since a long time could not deprive them of the right to do so etc., etc.

Dr. *Rash Behary Ghosh* and Babus *Sharoshi Charan Mitra* and *Bankim Chandra Mukherjee*, for the Appellant.

Mr. *Caspersz* and Moulvi *Kurshed Hosain*, for the Respondent.

JUDGMENT.

COXE, J.—This was a suit for a declaration that the plaintiff was entitled to kill bullocks and cows, and for a perpetual injunction against the defendants, restraining them from interfering with that right. The suit has been decreed against the 1st defendant and the 1st defendant appeals.

Several points have been taken on behalf of the appellant, but they have all been so exhaustively discussed in the excellent judgment of the learned District Judge that it is unnecessary to deal with them at great length.

The first point taken is that the plaint discloses no cause of action. It appears to me, reading the plaint as a whole, as I am bound to read it, that the plaint certainly discloses a cause of action. The plaintiff states in paragraphs 8 and 9 of the plaint that defendant No. 1 sent a telegram to the Sub-Divisional Officer of Sitamarhi and that the Sub-Divisional Officer issued a notice under section 144 of the Criminal Procedure Code, forbidding the plaintiff to kill cattle. It has been faintly suggested that there is no evidence that defendant No. 1 sent this telegram. On this point, the finding of fact of the Courts below is conclusive and it is, moreover, evidently right. The defendant No. 1 does not categorically deny sending this telegram. He says that he does not remember it. It is a perfectly safe inference that, if he had not sent the telegram, his memory would have been clear on the point.

Next, it is argued that the Magistrate did not take any action on this telegram. Apparently, he had already issued notices under section 144 of the Criminal Procedure Code before the receipt of this telegram. The telegram informed the Magistrate that the appellant's manager had been directed to see him and asked the Magistrate to take him under his orders and avert cow sacrifices. The order of the Magistrate of the 10th January mentions the receipt of this telegram and directs the issue of notices. The order of the 12th January mentions an interview of the Magistrate with the appellant's manager in accordance with this telegram and makes the orders in the notices absolute. It is perfectly clear, therefore, and this is really the substance of the plaint, that the plaintiff was prevented from exercising his right to kill his own cattle by the order of the Magistrate and that that order was passed, at any rate in part, at the instance of the appellant. It is argued that it was the appellant's duty to inform the Magistrate of the probability of a breach of the peace, and several cases have been cited to show that such an action involves no civil liability. Almost all these cases, however, are decisions in suits for *damages for wrong done*, and

there is no real analogy between such a suit and a suit for declaration of a right against persons who deny that right, in which no compensation is sought. In such ases, the denial may clearly be perfectly honest and may be made in perfectly good faith. But that would not affect the right of the person whose right was denied. I think, therefore, it is not necessary to discuss the decisions that a person who has set the law in motion in good faith is not liable for damages, as such cases are not, in my opinion, really relevant. The case of *Madhub Chunder Gooho* v. *Kumla Kant Chuckerbutty* (1) was a case in which it was held that the plaintiff had no right to sue even for a declaration. That, however, was a case of quite a different nature. The plaintiff had built a bridge over a *Khal*, which was removed by the Magistrate, as it was an obstruction to navigation. Clearly he was not entitled to sue for a declaration of his right to build a bridge which was an obstruction to navigation, while his right to build a bridge, which was not such an obstruction, had never been disputed or interfered with. That case, therefore, in my opinion, has no application. The contention that the plaintiff has no cause of action wears an air of unreality, to my mind, in a case of this kind, in which hundreds of witnesses have been examined, and the case has been hotly contested up to this Court, in order that the right claimed may be negatived. The 1st defendant, in my opinion, has all along denied and has all along been interested to deny the plaintiff's right within the meaning of section 42 of the Specific Relief Act, 1877. I hold, therefore, that the plaintiff has certainly a cause of action.

The next point taken is that the decree itself is too vague and indefinite. The form of the decree is evidently founded on the decision in *Shahbaz Khan* v. *Umrao Puri* (2) and if it is not as specific and definite as might be desired, that seems to be a matter of which the plaintiff alone may reasonably complain and not the defendant. The words, however, in the decree, "And on any land belonging to him in Barharwa" seem to go beyond the reliefs sought in the plaint and should, in my opinion, be expunged.

Thirdly, it is argued that the suit must fail because numerous other persons besides the plaintiff are interested in the establishment of the right. I cannot accept this contention. The right of the plaintiff to kill his own cattle is an individual right of his own and he is entitled to sue for a declaration of it, whether other persons who have similar rights join him or not. Indeed, it is a right which can by no means be confined to Muhammadans. Even Hindus, in the absence of any binding custom, may be regarded as having a legal right to kill their own cattle, however irreligious such an action may be. The plaintiff could sue, therefore, as an individual and not necessarily as a Muhammadan. It is certainly not necessary that he should join every one who may have this right as well as himself.

Next, it is argued that the District Judge's decision on the question of custom is wrong. It is said that a custom takes its rise from voluntary forbearance and that when the Judge holds that the mere fact that the Muhammadans did not kill kine in any of the villages could not deprive them of their right to do so, he overlooks the fact that the restriction may have been accepted by the Musalmans and in that case this mutual forbearance may have ripened into a binding custom. Reference is made to certain passages of his judgment on this point. In one place, he says that "the evidence that cows have not in fact been killed in any of these villages, if it stood by itself, would not be sufficient to prove the existence of a custom prohibiting the killing of cattle. It would be consistent with the existence of a right to kill cattle, and would only show that the right had not been exercised. Mere non-exercise will not defeat a right." Later on, he remarks that "if consideration in the matter of rearing swine is given in return for the abstention of the Muhammadans from killing cattle, then the fact is decidedly against the existence of the custom as showing that the abstention from killing kine is due not to a custom having the force of law but to natural and revocable agreement." Another observation is that "If the right to prohibit cow-killing rests on contract, this fact is also inconsist-

(1) 15 W. R. 292; 6 B. L. R. 642.

(2) 30 A. 181; A. W. N. (1908) 64; 5 A. L. J. 147; 7 Cr. L. J. 381.

ent with the existence of a general prohibitory custom." This question of custom has, however, been discussed by the learned District Judge at considerable length and his judgment must be taken as a whole and should not be dealt with on the strength of two or three isolated passages. Reading it as a whole it is quite clear that the learned District Judge fully understood the essentials of a valid custom. He refers specifically to the decision in *Prodyote Kumar Tagore* v. *Rakhal Chandra Sarkar* (3) in which the whole matter is fully discussed, and to several other cases. But it is clear that in his opinion the evidence which has been given is not sufficient to prove the existence of a valid and binding custom. For instance, he points out that many of the plaintiff's witnesses in cross-examinations made admissions favourable to the defendants on the question of a custom, but holds that "these statements must not be taken as meaning more than that circumstances and practice had introduced among Muhammadans a certain amount of abstention from the practice of cattle-killing." He then refers to certain conversations which are said to have taken place and says: "If the practice is fixed and certain these conversations are unnatural. If it is irregular and uncertain, then they are natural." Clearly, therefore, he thinks that this evidence proves that Muhammadans did partly, but not entirely, abstain from the practice of cattle-killing and that this practice of abstention was irregular and uncertain. After summing up the evidence on this point, he says: "the truth appears to be that cattle-killing has not in fact been practised as constantly and openly as it probably would be in the case of a purely Mohamadan village population, but has been practised on occasions sufficiently frequent, though comparatively rare, and in many cases with precautions for secrecy, out of consideration for the feelings of the *Malik* and the Hindus." Later on, the Judge observes: "The custom put forward has not been shown to be either universal or certain, and the attempt to prove it has failed." These appear to me to be findings of fact, with which we cannot interfere in second appeal. Reference has been made to the case of *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (4). But I do not understand that the learned Pleader for the appellant desires us to go so far as that decision, in which it was laid down that when the question of a custom arises, the evidence for, and against it, is to be weighed in second appeal. Indeed, it would not be possible for us to weigh the evidence in this case, which consists of the depositions of 450 witnesses, besides a number of documents, inasmuch as this evidence has not been placed before us.

Nor do I think that the fact that cattle were killed with precautions for secrecy conclusively proves the existence of a custom that cattle cannot be killed. This is evidence in favour of the plaintiff and has to be weighed as evidence. The learned District Judge has weighed it, and, in my opinion, we cannot in second appeal interfere with his decision upon it.

Next, it is said that the learned District Judge has overlooked that a decree under section 42 of the Specific Relief Act is a matter of discretion. This contention also seems to me to be quite unsustainable. On the findings of fact arrived at by the learned District Judge, he was bound, in my opinion, to give the declaration which the plaintiff sought.

Next, it has been argued that the learned District Judge erred in referring to the fact that the existence of this custom was neither mentioned in the Record of Rights nor in the Gazetteer. I am not, by any means, satisfied that the fact that this custom was not mentioned is not admissible in evidence under section 11 of the Evidence Act. But it is not necessary to deal with this point, because it is clear that this was a point of quite minor importance and that the admission of these two documents could not have made any real difference to the Judge's decision.

Finally, it is contended that the lower Court had no jurisdiction to issue a temporary injunction, inasmuch as that remedy could only be granted *in personam* and not against the first defendant who did not reside within the jurisdiction of the Court. Section 20 of the Civil Procedure Code, however, authorises the institution of

(3) 5 Ind. Cas. 243; 11 C. L. J. 209; 14 C. W. N. 487.

(4) 29 M. 24; 16 M. L. J. 8.

a suit, subject to the limitations in the preceding section, in any Court within the local limits of whose jurisdiction the cause of action wholly or in part arises, and thus it is clear that a suit for a permanent injunction, such as the present suit, could have been instituted where the plaintiff's rights were interfered with.

I would, therefore, expunge from the decree of the lower Appellate Court the words, "And on any land belonging to him in Barharwa." But with this trifling exception, I would affirm the decision of the Court below with costs.

MULLICK, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1412 OF 1912.

April 9, 1914.

Present:—Mr. Justice Wallis and Mr. Justice Sadasiva Aiyar.

RACHAMADUGU LAKSHMINARAYANA—DEFENDANT No. 4—APPELLANT

versus

SANNUTHI RAMA SUBBIAH CHETTY (DIED) AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 TO 3 AND PLAINTIFF'S LEGAL REPRESENTATIVE—RESPONDENTS.

Mortgage—Mortgagee to be put in possession on failure to pay mortgage amount on certain day—Clog on redemption—Condition invalid.

The provision in a mortgage-deed executed in 1871, that on default of payment on a particular day the mortgagee shall be put in possession of the mortgaged property as if sold to him, is invalid and inoperative as a clog upon the equity of redemption.

Thumbusawmy Moodelly v. *Hoosain Rowthen*, 1 M. 1; 2 I. A. 241; 3 Suth. P. C. J. 198; 3 Sar. P. C. J. 531, followed.

Second appeal against the decree of the Court of the Subordinate Judge of Kurnool, in Appeal Suit No. 296 of 1910 preferred against that of the District Munsif of Nandiyal, in Original Suit No. 17 of 1910.

FACTS.—By an instrument dated 25th October 1871, certain property was hypothecated to secure the payment of a loan of Rs. 100. The document provided that the principal amount with interest thereon at 14 annas per cent. per mensem was payable in three instalments of fixed dates and that in case of default of "payment of any instalment on the due date, we (mortgagors) shall sell to you (mortgagee) the pledged lands for the principal and interest then due and put you (mortgagee) in possession thereof." The property was subsequently brought to sale through Court execution of a money-decree and was purchased by the present appellant in 1880. In a suit instituted in 1910 for the recovery of the principal and interest due upon the mortgage or in the alternative for possession of the property, the auction-purchaser contended that the mortgage was not binding upon him as his title was paramount to that of the mortgagee and that he had perfected the same by adverse possession as against the mortgagor and mortgagee. The Court of first instance held that the possession of the auction-purchaser was adverse to that of the mortgagee and dismissed the suit. On appeal, the Subordinate Judge held *contra* and decreed the suit. The purchaser in Court auction then appealed to the High Court.

Mr. *V. O. Seshachari*, for the Appellant.—Under the terms of the mortgage-deed the mortgagee was entitled to be put into possession when default had been made in paying the mortgage money. That right evidently accrued to the mortgagee more than twelve years before suit. The possession of the purchaser was, therefore, clearly adverse to the mortgagor and mortgagee. See *Ismdar Khan* v. *Ahmad Husain* (1), *Ittappan* v. *Manavikrama* (2), *Ammu* v. *Ramakishna Sastri* (3), *Ramasawmi Chetti* v. *Ponna Padayachi* (4). The case in *Valliammal* v. *Raja Shanmugam Pillai* (5) is distinguishable inasmuch as in this case the mortgagee was not a mere simple mortgagee, but was entitled to possession when default had been made and before the appellant purchased the property in Court auction. His neglect in asserting his rights will not save him from the bar of limitation by adverse possession.

Mr. *M. Govindarajulu Naidu*, for the Respondents, was not heard.

(1) 30 A. 119 at p. 121; A. W. N. (1908) 25; 5 A. L. J. 85; 3 M. L. T 125.
(2) 21 M. 153 at p 165; 8 M L. J. 92.
(3) 2 M. 226 at p. 229.
(4) 9 Ind. Cas. 28; (1911) 2 M. W. N. 209; 21 M. L. J. 397; 9 M. L. T. 264; 36 M. 97.
(5) 6 Ind. Cas. 285; 7 M. L. T. 223; 21 M. L. J. 466 at p. 468.

JUDGMENT.—The deed hypothecates the property and goes on to provide that if default is made in the payment of any instalment, the whole amount shall become due and the property shall be put in possession of the mortgagee as if sold to him for that amount.

It was executed in 1871, and following the decision in *Thumbusawmy Moodelly* v. *Hoosain Rowthen* (7), the document must nonetheless be regarded as a mortgage and the provision which deprives the mortgagor of his right of redemption is invalid. As the mortgage continued in existence, the purchase by the 4th defendant was subject thereto and the decree of the lower Appellate Court is right. The time for redemption is extended by three months from to-day.

The appeal is dismissed with costs.

Appeal dismissed.

(7) 1 M. 1; 2 I. A. 241; 3 Suth. P C. J. 198; 3 Sar. P. C. J. 531.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 977 AND 978 OF 1912.

April 21, 1914.

Present:—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

GANAPATHI MUDALI—DEFENDANT—APPELLANT

versus

VENKATALAKSHMINARASAYYA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Adverse possession—Tenant by sufferance—Agricultural leases not governed by Transfer of Property Act (IV of 1882)—Presumption of tenancy by sufferance—Lease by conduct of parties—Limitation Act (IX of 1908), s. 28, Sch. I, Art. 139—Construction—Usufructuary mortgagee.

Per *Miller and Sadasiva Iyer, JJ.*—A usufructuary mortgagee cannot eject a tenant already on the land unless the tenant actually attorns to him, but he can only claim profits of the land.

Per *Sadasiva Iyer, J.*—A subsequent trespasser whose title has not been perfected by twelve years' possession cannot successfully resist a suit in ejectment brought by a plaintiff who had been *in lawful possession* of the suit land for however short a time before the defendant's possession (which is proved or admitted to be unlawful) commenced.

Lawful possession, however short, is presumptive evidence of title as owner and of the title to possession, and in a suit for ejectment by such owner, the presumption should be rebutted by the defendant.

Bala Kushaba v. *A. A Vaghmode*, 11 Bom. L.R. 1003 at p. 1009, 4 Ind. Cas. 246, *Rimzan Khan* v. *Mahomed Yakub Khan*, 11 Ind. Cas. 537 at p. 539; 7 M. L. T. 289, 19 M. L. J. 732, 33 M. 263; (1910) M. W. N. 145, referred to.

The fiction of a tenancy by sufferance after the expiry of a lease cannot be applied to agricultural leases not governed by the Transfer of Property Act.

In regard to such leases, a tenant continuing in possession after the expiry of the lease cannot be said to be in adverse possession, unless he actually surrenders possession to his landlord.

K. V. K. K. Haji v. *Rev. A. Goreas*, 19 Ind. Cas. 563, 13 M. L. T. 350, 24 M. L. J. 472, (1913) M. W. N. 339, followed.

Subsaveti Ramah v. *Gundala Ramanni*, 4 Ind. Cas. 1080; 33 M. 260; 7 M. L. T. 289; 19 M. L. J. 732; (1910) M. W. N. 145; *Vadapalle Narasimha* v. *Dronamaraju Seetharama Murthi*, 31 M. 163; 18 M. L. J. 26; 3 M. L. T. 256, dissented from.

In such cases, the lease is created by the conduct of the parties, and there is no adverse possession unless there has been an actual surrender of possession to the landlord.

Usman Koya v. *Chudru Mokkansa 'Akoth*, 15 M. L. J. 368, followed.

Second appeals against the decrees of the District Court of Chingleput, in Appeal Suits Nos. 274 and 275 of 1910, presented against those of the District Munsif of Conjeevaram, in Original Suits Nos. 64 of 1910 and 233 of 1909, respectively.

Mr. *K. Jagannadha Aiyer*, for the Appellant.

Mr. *C. Madhavan Nair*, for the Respondents.

These second appeals coming on for hearing on the 2nd October, the Court (Sadasiva Aiyar and Spencer, JJ.) delivered the following

JUDGMENT.—We are satisfied that there has been some confusion created in the decision of the two appeals out of the two suits by the lower Appellate Court. The lease on which the plaintiff relied in the plaint in one of the suits was a lease or *muchilika* from year to year alleged to have been created in the plaintiff's father's favour for a premium of Rs. 10 and a yearly rent of Rs. 7. The right in dispute in that suit was the *mirasi* right in certain lands.

The lease on which the plaintiff relied in the other suit was a lease or *muchilika* alleged to have been created in favour of one Krishnaswami Iyer who is alleged to have transferred his rights as lessor to the plaintiff by sale-deed, Exhibit G.

The lower Appellate Court relies on the evidence of the plaintiff's 2nd witness to find in the plaintiff's favour that the defendant was the plaintiff's tenant in respect of both the *mirasi* lands and the *shrotriem* lands. On a perusal of the plaintiff's 2nd witness's evidence, it is clear to us that he refers to a *muchilika* for one year certain relating to the *mirasi* land alone in the

plaintiff's father's favour and does not speak about the alleged lease in favour of Krishnasami Iyer. The learned Judge has also overlooked the circumstance that while the plaint in the *mirasi* land suit relies on a yearly tenancy, the evidence of the plaintiff's 2nd witness relates to a tenancy for one year certain.

We might further say as regards the alleged letting of the *mirsai* land under a *muchilika*, secondary evidence should not have been allowed till the loss of the document alleged to have embodied the terms of the lease was proved. Realizing this, the evidence of one witness was let in on the plaintiff's side about the loss, but the District Judge does not state whether he believes the evidence of that witness as to the alleged loss of the original.

We are unable to accept the finding in either suit on the question of letting and we request the District Court to submit fresh findings in both suits on the evidence on record on the question of tenancy having regard to the above observations.

The finding should be submitted within four weeks from the date of receipt of the records from this Court and ten days will be allowed for filing objections.

In compliance with the order contained in the above judgment the District Judge of Chingleput submitted the following

FINDING.—I am directed to submit findings as to an alleged letting of the *shrotriem* and *mirasi* right in certain lands. The lands consist of a half *pangu* in Kil Kadirpur village comprising *kanis* 5-7-10 wet, *kanis* 1-14-0 dry and *kani* 0-6-0 garden. In Original Suit No. 233 of 1909 (Appeal Suit No. 275 of 1910) the plaintiff sued to establish his *mirasi* (or *kudivaram*) right and in Original Suit No. 64 of 1910 (Appeal Suit No. 274 of 1910) he sued to establish his *shrotriem* (or *melvaram*) right.

2. In the *mirasi* suit the issue which is referred to me is, (2), whether the plaintiff let the land to the defendant and whether the suit is in time. My predecessor has found that under Exhibit B dated 4th March 1891, Devalla Subramania Iyer obtained the *mirasi* right in the half *pangu* and sold it by Exhibit E on the same date to the plaintiff's father for the plaintiff. The plaintiff's father is said to have leased it to the defendant in 1897, and it is alleged in the plaint that this was a lease from year to year for a premium of Rs. 10 and a yearly rent of Rs. 7. It is admitted on both sides that Polampalli Krishnasami Iyer was in possession of the lands as usufructuary mortgagee of the *mirasi* right, and Exhibit B shows that under compromise of Original Suit No. 136 of 1890 of the Tiruvallur Court, he gave it over to Devalla Subramania Iyer, who sold it to plaintiff's father. Possession presumably passed then. The defendant, on the other hand, while admitting the usufructuary mortgage to Krishnasami Iyer, asserts that the mortgage was redeemed but cannot say by whom or when; and he contradicts himself as to how long he has himself been in possession, first saying twelve years and then saying nine years. He has stated distinctly that prior to the date of his sale-deed, Exhibit XII (4th February 1901), he had no concern with the suit land, and he does not know who enjoyed it before that, so he clearly has not been in adverse possession for twelve years, and the presumption ought to be that previous possession was with the plaintiff, who has established title. As regards the alleged lease to the defendant, the plaintiff, as P. W. No. 4 stated that he was present when the defendant gave a *muchilika* for Rs. 7 rent and paid Rs. 10 as an advance, and that this *muchilika* used to be amongst his father's records in Madras; but he has been unable to find it now. One witness Gurusami Iyer (P. W. No. 2) states that he recommended the defendant as a cultivator to the plaintiff's father, and he attested the *muchilika* which the defendant gave. In view of the other evidence as to title and possession, I see no reason to doubt this evidence as to the execution and the loss of the *muchilika*, and I find accordingly. There is an apparent discrepancy in that P. W. No. 2 says it was a *muchilika* for one year, whereas the plaint says it was a lease from year to year, but I attach no importance to this discrepancy, because it does not appear to have been elicited whether P. W. No. 2 knows the difference. Sub-tenancies or leases of *kudivaram* right are usually for one year only, though such tenants may be allowed to hold over from year to year, so that such a *muchilika* would most probably have been for a year only.

3. As regards the *shrotriem* or *melvaram* right, the issue is whether the defendant entered into possession as lessee under Krishnasami Iyer and paid rent. The only possession that the land-holder's right admits of, is the right to collect rent from the *ryot* or holder of the *mirasi* right. The plaintiff in this suit is shown to have title to the *shrotriem* or land-holder's interest, and in the absence of a lease or other contract, he must have an inherent right to collect the *melvaram* rent from the *ryot*. It is said that Krishnasami Iyer leased the *shrotriem* right to the defendant for Rs. 24, and that this lease was transferred when the *shrotriem* right was sold under Exhibit G on 7th January 1898 to the plaintiff's father. Prior to Exhibit G the position was that P. Krishnasami Iyer held the *shrotriem* right and was entitled to Rs. 24 as *melvaram* from the holder of the *mirasi* right, the plaintiff (by his father) owned the *mirasi* right but had let the cultivation to the defendant for a rent of Rs. 7. It is evident that the defendant had to pay also the Rs. 24 for the *mirasidar* could not have been . . Rs. 17 out of pocket annually for the pleasure of being an owner of property and, moreover, Rs. 7 would be an absurdly inadequate rent for 7 *kanis* of land mostly wet. A lease of *shrotriem* right would simply mean that the defendant had to pay the *melvaram* direct to the land-holder instead of its passing through the hands of the *mirasidar*, and it seems to me immaterial whether such a lease existed or not. Further, when the plaintiff's father acquired the *shrotriem* right in 1898 the position ordinarily would have been that the sub-tenant paid the *melvaram* Rs. 24 *plus kudivaram* rent Rs. 7 to the plaintiff's father as *mirasidar*, and the latter transferred Rs. 24 to his other pocket as *shrotriemdar*, but owing to the existence of the alleged lease the sub-tenant as lessee of the *shrotriem* right had to pay Rs. 24 to the plaintiff's father as *shrotriemdar* and Rs. 7 *kudivaram* rent to the plaintiff's father as *mirasidar*. I must admit that I cannot see the material importance of the alleged lease. There is no evidence of the lease, and I must find the issue in the negative.

4. The Vakil for the plaintiff has some documents which he says will explain Exhibit H, the entry in the suit register for Small Cause Suit No. 752 of 1899, and show that the suit was in respect of rent for the plaint *shrotriem* interest. I have, however, no authority to admit them and the Vakil must apply to the High Court.

5. My findings are, therefore, that the suit lands were let to the defendant as a sub-tenant under the plaintiff as *mirasidar*, but that the *shrotriem* right was not leased to him.

This second appeal coming on for final hearing on the 20th April 1914 and having stood over for consideration till this day, after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.

MILLER, J.—As to the title we must take it that the first compromise was valid, as both Krishnasami Ayyar and the predecessors of the defendants have dealt with it on that footing in previous proceedings and transfers. That being so, both as regards the *mirasi* half *pangu* in question and the *shrotriem* half *pangu* Krishnasami Iyer's title must be taken to have been that of usufructuary mortgagee and the plaintiff derived title from him as usufructuary mortgagee. Accepting the District Judge's finding that there was a lease of the *mirasi* half *pangu*, and no lease of the *shrotriem* half *pangu*, the plaintiff is in these circumstances entitled to possession from the defendant of the *mirasi* half *pangu* and to a declaration in respect of the other that he is usufructuary mortgagee of the *shrotriem pangu*, and to the profits thereof. The decree of the District Judge in Appeal Suit No. 275 of 1910 will accordingly be modified so as to show that the plaintiff is entitled to possession of the *mirasi* half *pangu* as usufructuary mortgagee, and the decree in Appeal Suit No. 274 of 1910 must be modified also: the declaration will show that the plaintiffs are entitled to the usufructuary mortgage right in the half *shrotriem pangu*, and the decree will direct the defendants to pay them the profits of that half *pangu* from the year before suit to delivery of possession of the *mirasi pangu* or three years from date of decree, as the case may be. The District Munsif will hold the necessary inquiry and pass the final decree for mesne profits in both suits. There will be no order as to the costs in this Court.

SADASIVA AYIAR, J.—I entirely agree. I might, however, be permitted to make some

observations on the points of law which have been argued in this case. I am inclined to hold (*a*) that a subsequent trespasser whose title has not been perfected by 12 years' possession cannot successfully resist a suit in ejectment brought by a plaintiff who had been *in lawful possession* of the suit land for however short a time before the defendant's possession (which is proved or admitted to be unlawful) commenced. Lawful possession, however short is presumptive evidence of title as owner and of the title to possession and such presumption should be rebutted by the defendant [see *Bala Kushaba* v. *Abai Amrita Vaghmode* (1) and *Ramzan Khan* v. *Muhammad Yakub Khan* (2)]; (*b*) that while the observations in *Subraveti Ramiah* v. *Gundala Ramanni* (3) against "the fiction of a tenancy by sufferance" might apply to cases governed by the Transfer of Property Act, they should not be applied to those agricultural leases which are not governed by that Act. [In *Kummatha Vittil Kunhi Kuthalai Haji* v. *Reverend Antoni Goveas* (4), Benson and Bakewell, JJ., refused to treat a Malabar Kuzhikam tenant holding over as in adverse possession even after the 12 years' lease term had expired]; (*c*) that seeing that it is very common in this Presidency for illiterate tenants to be let in as occupiers of small bits of lands and tenements by illiterate landlords, on oral leases nominally for a single year and that almost as a matter of course, the tenants and his representatives continue in possession under the same terms as tenants from year to year till quarrels arise, I should like that the observations in *Subraveti Ramiah* v. *Gundala Ramanni* (3), and even those in *Vadapalle Narasimha* v. *Dronamaraju Seetharama Moorthy* (5), [which decision is criticised adversely in *Subraveti Ramiah* v. *Gundala Ramanni* (3)], so far as these observations tend to treat a tenant holding over or the legal representative of a tenant whose term has expired as in *adverse* possession and so far as they incline to the view that a tenant by sufferance even of agricultural land is a trespasser in adverse possession should be re-considered and confined within narrow limits; (*d*) that while the clear words of Article 139 of the Limitation Act should be given effect to, there is no reason why Courts should not, having regard to the usual course of events and probabilities, view with favour evidence adduced to show that though the original tenancy for a fixed period had expired, the relationship as between a landlord and a tenant from year to year had been afterwards created by conduct between the parties to the original contract of letting; (*e*) that where a tenant has been let into possession by a landlord, he or his legal representative cannot be permitted to dispute the landlord's title even after the expiry of the lease term till he or his legal representative first surrenders possession to the landlord *Usman Koya* v. *Chidria Mokkansa Akoth* (6), and that if he does not so surrender possession he cannot resist a suit in ejectment by the landlord unless Article 139 of the Limitation Act comes in the way of the landlord. The title, in such a case, vests in the tenant, not by reason of any adverse possession of such tenant for 12 years (which can only be if and from the time that the tenant holding over gives clear notice to the landlord that he intends to be in adverse possession) but by reason of section 28 of the Limitation Act which extinguishes the title of the landlord and converts the tenant's possession after such extinguishment of the landlord's title into possession in the tenant's own right as he cannot thereafter be considered a tenant by sufferance under the landlord who had so lost his rights.

Decrees modified.

(6) 15 M. L. J. 368.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL No. 325 OF 1913.

January 8, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

FULKUMARI BIBEE—PETITIONER—APPELLANT

versus

BUDH SINGH DHUDHURIA AND ANOTHER—OPPOSITE PARTY—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), s. 17—

(1) 4 Ind. Cas. 246; 11 Bom. L. R. 1093 at p. 1099.
(2) 11 Ind. Cas. 537 at p. 539.
(3) 4 Ind. Cas. 1080; 33 M. 260; 7 M. L. T. 289; 19 M. L. J. 732; (1910) M. W. N. 145.
(4) 19 Ind. Cas. 563; (1913) M. W. N. 339; 13 M. L. T. 350; 24 M. L. J. 472.
(5) 31 M. 163; 18 M. L. J. 26; 3 M. L. T. 256.

FULKUMARI BIBEE *v.* BUDH SINGH DHUDHURIA.

Guardian of minor, appointment of—Considerations for Court—Discretion of first Court—Interference by Appellate Court.

In selecting a guardian of the person of a minor, the interest, well-being and happiness of the minor ought to be the main and paramount consideration for the Court.

Re Goolbai and Lilbai, 32 B. 50; 9 Bom. L. R. 923 and *Bindo* v. *Sham Lal*, 2.) A. 210; A. W. N. (1907) 24; 4 A. L. J. 22, followed.

In the interest of the true welfare of the minor the recognized rights of guardianship under the law to which the minor is subject must, if necessary, be assigned a relatively subordinate position.

Tota Ram v. *Ram Charan*, 8 Ind. Cas. 785; 7 A. L. J. 1140, *Muthveerappa Chetty* v. *Linjammah* (*Ponnuswami Chetty*), 13 Ind. Cas. 16; (1911) 2 M. W. N. 561; 10 M. L. T. 477; 22 M. L. J. 63 and *Akima Bibee* v. *Azeem Strung*, 9 W. R 334, referred to.

In making the selection of a guardian for a minor the Court should also have regard to the wishes of the deceased parents, unless such a course would be disadvantageous to the minor, and also to the wishes of the minor himself when of years of discretion.

Kristo Kissor v. *Katermoyee*, 2 C. L. R. 583, *Hill* v. *Storer*, 1 Y. & C. 556 and *In re Kaye*, 1 Ch. App. 387; 12 Jur. (N. S.) 350; 14 L. T. 388; 14 W. R. 597, followed.

Unless the Court of Appeal is of opinion that the order of the first Court was not for the true welfare of the minor, it will be reluctant to interfere with its discretion in the matter of the appointment of a guardian of the person of a minor.

In the circumstances of the present case the maternal aunt was preferred to the paternal uncle.

Appeal from the order of the District Judge of Murshidabad, dated 5th July 1913.

Dr. *Rash Behary Ghosh* and Babu *Brojo Lal Chakravarti*, for the Appellant.

Mr. *Sinha*, Counsel, with Babus *Hemendra Nath Sen*, *Ram Chandra Majumdar*, *Biraj Mohan Majumdar* and *Surendra Kumar Bose*, for the Respondents.

JUDGMENT.—This appeal is directed against an order for the appointment of a guardian of the person of an infant, by name Ranjit Singh, one of the grandsons of Rai Budh Singh Dhudhuria of Azimganj. The rival claimants for the office of guardian are the first cousin of the father of infant, Raja Bijoy Singh Dhudhuria, who has been proposed for appointment by the grandfather, and Fulkumari Bibee, the sister of the mother of the infant, who was nominated for appointment as guardian by the mother in a Will executed by her on the 7th June 1912. The District Judge has given preference to the uncle and has appointed him guardian of the person of the infant. Against that order this appeal has been preferred by the aunt, and the uncle as also the grandfather have been joined as parties respondents.

To appreciate the circumstances under which the question of the appointment of a guardian of the person of this infant has come before the Court, it is necessary to recite briefly the history of the family. Inder Chand Dhudhuria, the father of the infant and one of the sons of Rai Budh Singh Dhudhuria, went to England in 1889. On his return to this country, caste difficulties arose, and the ultimate result was that he was outcasted. The members of the community, however, subsequently relented and agreed to limit the excommunication to Inder Chand himself and to all children that might be born after his visit to England. The infant now before the Court was born about the year 1898. The result of the excommunication of Inder Chand was that he had to live with his wife and children and separate from his father. This state of things continued up to the 9th April 1899, when Inder Chand died. Shortly after his death, his father was appointed guardian of the person and property of the infant on the 8th July 1899. It is clear, however, from the materials on the record that the grandfather was not able to keep the infant in his own custody, as the pressure of caste difficulties was insurmountable. Consequently, on the 18th December 1905, with the acquiescence, if not the actual assent, of the grandfather Indra Kumari, the mother of the infant, was appointed guardian of his person. The grandfather, however, continued to be the guardian of the property of the infant and it is not disputed that upto the present moment he is such guardian. Indra Kumari died on the 1st June 1913. A year before her death, she had executed a Will on the 7th June 1912 which was registered on that very day. No probate has yet been obtained of the Will, but its genuineness has not yet been questioned in the present proceedings and it has been received in evidence by consent of all the parties and accepted in proof of the wishes of the mother in respect of the appointment of a guardian of her infant son after her death. On this subject, the Will is perfectly clear in its terms. The mother expressed a decided preference for her sister as the fittest person to be appointed guardian of the person of her infant son. She stated this explicitly, and by this instrument she nominated her sister Fulkumari Bibee as her successor in the guardianship of the person of her minor son Ranjit Singh,

Immediately, upon her death, the matter was brought inevitably into Court, and an application was made by Fulkumari Bibee for appointment as guardian of the person of the infant. But she had been anticipated, and the grandfather had already expressed a desire that his nephew, Raja Bejoy Singh Dhudhuria, should be appointed guardian. It is worthy of note, however, that Raja Bejoy Singh himself has never made an application in this behalf. The attitude he has consistently taken throughout the proceedings, both here and in the Court below, is that he is not unwilling to accept the office of guardian. He is ready to be burdened with its responsibility, more out of a feeling that he should meet the wishes of his uncle than from a sense of attachment towards his nephew. The District Judge, as already stated, has decided in favour of the uncle as against the aunt. He has attached no weight to the wishes of the mother in this respect. He has also held substantially that the wishes of the minor, who is now about 15 years old, should not have any weight in the decision of this matter. The question for consideration before the Court, consequently, is whether the uncle or the aunt should be appointed guardian of the person of the minor.

The principle upon which the question should be decided is laid down in section 17 of the Guardians and Wards Act. Sub-section (1) of that section provides that in appointing the guardian of a minor the Court shall be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. Sub-section (2) provides that in considering what will be for the welfare of the minor, the Court shall have regard to the age, sex, and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent and any existing or previous relations of the proposed guardian with the minor or his property. Sub-section (3) provides that if the minor is old enough to form an intelligent preference, the Court may consider that preference. The primary point for consideration consequently is, what, in the circumstances of this case, is for the welfare of the minor. As observed by Mr. Justice Davar in the case of *Re Goolbai and Lilbai* (1), in making orders appointing guardians for the persons of minors, the most paramount consideration for the Judge ought to be what order, under the circumstances of the case, would be best for securing the welfare and happiness of the minors? With whom will they be happy? Who is most likely to contribute to their well-being and look after their health and comfort? Who is likely to bring up and educate the minors in the manner in which they would have been brought up by the parents, if they had been alive? In fact, the main question for the Court to consider in the case of the unfortunate minors, who have lost their natural guardians, is who, amongst the relations, or for the matter of that, friends of the minors, can you select, who will supply, as nearly as possible, the place of their lost parent or parents? The interest, well-being and happiness of the minors ought to be the main and paramount consideration for the Court in selecting the guardian of the person of a minor. The same principle has been laid down by the Allahabad High Court in the case of *Bindo* v. *Sham Lal* (2). Indeed the question of the true welfare of the minor is of such paramount consideration that the recognised rights of guardianship under the law to which the minor is subject must, if necessary, be assigned a relatively subordinate position [*Tota Ram* v. *Ram Charan* (3), *Mathuveerapa Chetty* v. *Lingammah* (*Ponnuswami Chetty*) (4)] or, as has sometimes been said, propinquity must yield to fitness [*Akima Bibee* v. *Azeem Sarung* (5) *Sohna* v. *Khalak Singh*(6)]. Besides it is clear from the decision in *Kristo Kissor* v. *Kadermoyee* (7) the uncle, merely because he is a paternal uncle, is not, as a matter of right, entitled to supersede the aunt on the sole ground that she is the maternal aunt. The fundamental point to be considered is, what is for the welfare of the particular minor, and that leads us at once to the question, what are the circumstances of the present case?

It is beyond dispute that ever since the return of Inder Chand to this country and

(1) 32 B. 50; 9 Bom. L. R. 923.
(2) 29 A. 210; A. W. N. (1907) 24; 4 A. L. J. 22.
(3) 8 Ind. Cas. 785; 7 A. L. J. 1149.
(4) 13 Ind. Cas. 16; (1911) 2 M. W. N. 561; 10 M. L. T. 477; 22 M. L. J. 68.
(5) 9 W. R. 334.
(6) 13 A. 78; A. W. N. (1891) 1.
(7) 2 C. L. R. 583.

his excommunication from society, he lived separate from his father with his wife and son (the infant now before the Court). After the death of Inder Chand, the grandfather found himself unable, it may be owing to the unsurmountable pressure of social difficulties, to take back his widowed daughter-in-law and his infant grandson into his family circle. His nephew, Raja Bejoy Singh, whom he now proposes for appointment as guardian of the person of his infant grandson, has never taken the remotest interest in the minor. The result was that Indra Kumari was driven to seek the society of her sister; and, although a suggestion was faintly made in this Court at one stage that Indra Kumari lived separate, not merely from her father-in-law but also from her sister, it was indisputably proved from an affidavit which had been filed on the 25th August 1911 by Rai Budh Singh himself that Indra Kumari and her infant son had resided for years with Fulkumari. After Indra Kumari had been appointed guardian, she found it difficult to maintain her child and an application was made by her on the 19th June 1911 to the District Judge for an order upon her father-in-law, who was the guardian of the property of the infant, for payment of expenses incurred in connection with the maintenance of the child. This application was opposed by the grandfather and in an affidavit filed on the 25th August 1911 Rai Budh Singh pledged his oath that the then petitioner (his daughter-in-law) was living with her minor son in the house of Babu Norpat Singh, the husband of her sister, as members of the same family, and that she had no separate establishment, nor was there any necessity for it. This is in agreement with other statements found on the record and was confirmed by the infant who was examined in this Court. The position, therefore, has been that for many years past and certainly during the last ten years the infant has been treated as an outcaste by the family of his father, his grandfather and his uncle have both disowned him and he has been brought up in the family of the sister of his mother. That sister of his mother is now willing to take charge of him. The application is resisted by the grandfather, who is himself unable to take charge of the boy and puts forward his nephew as a desirable candidate for the office of guardian. We put it to the learned Vakil for the grandfather whether he was willing to look after his infant grandson himself and to take him back into his family circle. The answer was a decided negative. We put it to the learned Vakil for the uncle, who has been proposed for appointment as guardian, whether the uncle was prepared to take his nephew into his family circle. The answer was an equally emphatic negative, and it was added that if the uncle was appointed guardian, the infant would be kept in a house at Berhampore in charge of a tutor. The effect of this statement was realized a little later, and it was then suggested on behalf of the grandfather that if the uncle was appointed guardian of the person of the infant, the infant might be kept in a house at Azimgunj. It is manifest, however, that neither the grandfather nor the uncle is willing to take the infant into his family circle. Here it may be added that the uncle who has been proposed for appointment as guardian is a separated uncle, and it is not disputed that the grandfather and the uncle are not members of the same joint family. In view of all these facts, it is clearly not for the welfare of the infant that the uncle should be appointed guardian of his person.

Apart from these circumstances, however, there are two other factors for consideration. As already stated, the mother has nominated her sister for appointment as guardian, and the selection was obviously in the best interest of the minor. Her wishes in this respect should not be summarily disregarded, for though it may be conceded that the wishes of a deceased parent are by no means conclusive, considerable weight must be attached to the preference indicated by the mother [*Hall* v. *Storer* (8), *In re Kaye* (9)]. As was observed in *Ex parte Mountfort* (10), in appointing a guardian the Court will pay great attention to the wishes of the father or the mother of the infant, and the Court will do so unless, as stated in *Hartley* v. *Smith* (11) and *In re Wood* (12), such a

(8) 1 Y. & C. 556.
(9) 1 Ch. App. 387; 12 Jur. (N. S.) 350; 14 L. T. 388; 14 W. R. 597.
(10) 15 Ves. 445; 33 E. R. 822.
(11) 9 Jur. (N. S.) 97; 134 R. R. 773.
(12) (1868) 16 W. R. (Eng.) 164.

course would be disadvantageous to the infant. It has not been established in this case that the appointment of the aunt as guardian of the person of the infant would be to his disadvantage; on the other hand, the circumstances stated all point to the conclusion that it would be to his advantage.

There is a further circumstance to be considered, namely, the wishes of the minor himself, to which regard is always paid, if he be of years of discretion [*Ex parte Edwards* (13), *Ex parte Birchall* (14), *Pollard* v. *Rouse* (15)]. The minor frankly stated in this Court that for the last ten years he has been brought up in the family of his aunt, that he has found in her family circle a comfortable and affectionate home, that his uncle has never taken the remotest interest in him, and, that consequently, he does not feel attracted towards him in the least degree. To summarise, the welfare of the infant, tested from the point of view of the mode of life it has been his lot to live during the last ten years, the emphatically expressed wishes of his mother and his own decided preference, justifies the appointment of the maternal aunt in preference to the paternal uncle and the reasons which weigh in favour of such appointment become conclusive, when we remember that the uncle is practically a stranger to the infant, is by no means keen to undertake the responsibilities of guardianship and is in any event unable to take his nephew into his family circle and to exercise personal supervision over him.

It has been contended, however, that as the boy is now 15 years old, it is not desirable that he should have a *pardah-nashin* lady as guardian of his person. We are unable to accept this contention as sound. It is, in our opinion, undesirable that at this stage the boy should be taken away from the healthy influences of home life. In so far as the education of the boy is concerned, the District Judge recorded an opinion on the 22nd May 1912, that so far as he was able to judge, his education had been satisfactory and that there was no necessity for change in the arrangements. There is no conceivable reason why under the guardianship of his aunt the infant should not be properly educated, if suitable direction is given by the District Judge for the appointment of a tutor. We are further of opinion that it would be desirable to compel the guardian of the property of the infant to spend more money for his education than has been done in the past and it is obvious that as he continues to make progress in his studies, tutors better qualified and more experienced than those who have acted in the past will be required to look after him.

It has finally been suggested that the effect of the appointment of the aunt as guardian of the person of the infant might be to accentuate the estrangement between him and the members of his father's family, and that the ultimate result might be not quite beneficial so far as the worldly prospects of the infant are concerned. In fact it has been broadly hinted that the estrangement might be of such a character as to make it impossible for the grandfather to leave more property to his infant grandson. We trust that the effect of the order which we propose to make will not be what is anticipated by the learned Vakil for the grandfather, and that the grandfather will accept, without feelings of resentment towards the infant, the order about to be made to secure the welfare of his grandson. There is no conceivable reason, however, why, although the aunt is appointed guardian of the infant, the grandfather and the uncle should not have free access to the child, and on behalf of the appellant an assurance has been given in this Court that such access will be freely allowed. Should, however, any practical difficulty or inconvenience arise in this respect, the District Judge will give suitable directions.

We may add that we are not unmindful that in the matter of appointment of a suitable guardian, a Court of Appeal is always reluctant to interfere with the discretion of the Court of first instance, except for strong reasons, *In re Kaye* (9). In the present case, however, upon an examination of all the circumstances, we are constrained to take the view that the

(13) 3 Atk. 519; 26 E. R. 1099.
(14) 3 Atk. 813; 26 E. R. 1264.
(15) 6 Ind. Cas. 754; 34 M. 283 at p. 293; 8 M. L. T. 47; (1910) M. W. N. 187.

order made by the lower Court is not for the true welfare of the minor. We fully appreciate that the grandfather may regard it as a loss of family prestige that the appellant, a lady of a different family, should be appointed guardian of the person of even that infant grandson of his whom he has been constrained, by stress of circumstances, to treat as an outcaste. But we cannot take into account the feelings of the grandfather to the detriment of the infant.

The result is that this appeal is allowed, the order of the District Judge set aside, and the appellant appointed guardian of the person of the infant, Ranjit Singh. The costs of the appellant both here and in the Court below will come out of the estate of the infant; the costs of the respondents will be borne by themselves.

Appeal allowed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 61 OF 1913.

CIVIL REVISION PETITION No. 622 OF 1913.

July 20, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Napier.

CHAKRAVARTHI NAINAR—PETITIONER—APPELLANT

versus

AMMAIAPPA NAINAR AND ANOTHER—COUNTER-PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 60, 62—Execution—Entered closed—Opening by getting over roof—Subsequent entry by amin—Attachment, legality of—Cattle and seed—Grain of agriculturists, how far exempt from attachment.

An attachment of moveables effected by an *amin* is not invalidated by the fact that he entered the house, which had been closed, after the same had been opened by certain persons who gained entrance into it by getting over the roof.

Under section 60 of the Civil Procedure Code seed-grain and cattle of agriculturists are not absolutely free from attachment. That section is only intended for the benefit of *indigent* agriculturists and an attachment of such cattle and seed-grain is perfectly valid especially when the judgment-debtor is able to replace them without much inconvenience.

Appeal against the order of the District Court of Chingleput, in Appeal Suit No. 3 of 1913, preferred against that of the Court of the District Munsif of Conjeeveram, in Execution Petition No. 285 of 1912 (in Original Suit No. 705 of 1909) and setition under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of Chingleput in Appeal Suit No. 3 of 1913, preferred against that of the District Munsif of Conjeeveram, in Execution Petition No. 285 of 1912 (in Original Suit No. 705 of 1909).

FACTS.—*A* obtained a decree against *C* and applied for the execution of the same by attachment of *C*'s moveables. The *amin* entrusted with the warrant of attachment went to *C*'s house but found it closed. Thereupon some of the decree-holder's men got into the house by getting over the roof and opened the outer door from inside the same. The *amin* then went into the house and attached certain cattle and seed-grain. The judgment-debtor objected to the attachment on two grounds:—(1) that the properties attached were exempt from attachment under section 60 of the Civil Procedure Code and (2) that the entry of the *amin* into the house was in contravention of the express provisions of law and the attachment effected was in consequence illegal. Both the lower Courts overruled these contentions. The judgment-debtor thereupon appealed to the High Court and also presented a civil revision petition.

Mr. *N. Visvanatha Aiyar*, for the Appellant—The lower Court erred in not holding an inquiry as to what portion of the seed-grain or the cattle was necessary for the immediate use of the agriculturist. Section 60 of the Civil Procedure Code was imperative and cast upon the Courts the duty of holding the inquiry. The opulence of the agriculturist ought not to have weighed with the Courts. Section 60 was intended for the protection of the agriculturists as a class, irrespective of the fact that the judgment-debtor happened to be opulent or indigent. The *amin* had no power to open an outer door which had been closed. As the attachment had been effected after opening the outer door by getting over the roof, it is illegal.

TARA PRASANNA BOSE *v.* NILMONI KHAN.

JUDGMENT.—The first point taken is that the District Munsif failed to deal with the allegation that the entry into petitioner's house by certain persons named did not comply with the provisions of section 62, Civil Procedure Code. A sufficient answer is that the allegation was in any case useless, since the person executing the process, the *amin* is, it is admitted, not one of those persons.

We think that the lower Courts correctly interpreted section 60, Civil Procedure Code. The other ground argued, therefore, fails also.

The second appeal and the civil revision petition are, therefore, dismissed.

Appeal and petition dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 343 OF 1912.

July 29, 1913.

Present:—Mr. Justice Richardson and Mr. Justice Newbould.

TARA PRASANNA BOSE—OPPOSITE PARTY—APPELLANT

versus

NILMONI KHAN AND OTHERS—PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 2, 47, O. XXXIV, r. 5—Transfer of Property Act (IV of 1882), ss. 56, 81—Property mortgaged by mortgagor after mortgage-decree—Second mortgagee having no notice of first mortgage or decree thereon—Representative of judgment-debtor—Notice—Objection—Pleadings.

After a mortgagee of several properties had obtained a decree upon his mortgage in the usual form, the mortgagor mortgaged by way of conditional sale one of those properties to a third person who, having acquired the property as an unincumbered one without notice of the previous mortgage and the decree based thereon, foreclosed his mortgage and entered into possession of the property. Soon after when the first mortgagee obtained an order for the sale of the properties mortgaged to him, the second mortgagee applied that the properties other than that of which he had obtained possession by foreclosure should be sold first and that that property should be sold last. His application was opposed both by the mortgagor and the first mortgagee but it was allowed. Upon this the mortgagor alone appealed against the order of the Court:

Held, that (1) as the subsequent mortgagee was bound by the decree on the previous mortgage, as regards the property which had been mortgaged to him he was the representative of the mortgagor and that, therefore, his application was an application under section 47, Civil Procedure Code, and the order of the Court amounted to a decree within the meaning of section 2 and not merely to an order under Order XXXIV, rule 5, of the Code;

(2) the second mortgagee, being in the position of a purchaser from the mortgagor, had as against him a positive right under section 56 of the Transfer of Property Act to have the first mortgagee satisfied out of the properties (so far as they went) other than the property which he had foreclosed;

(3) the first mortgagee not having preferred an appeal against the lower Court's order, it was not open to the mortgagor to take an objection which the first mortgagee did not care to press;

(4) as the question of notice of the first mortgage was not raised in the Court below or in the grounds of appeal, it could not be allowed to be raised for the first time at the hearing of the appeal;

(5) the Courts have power, in appropriate circumstances, to make such orders under sections 56 and 81 of the Transfer of Property Act.

Appeal against the order of the Subordinate Judge of Manbhum, dated March 15th, 1912.

Babu *Bankim Chandra Mukherji*, for the Appellant.

Babu *Golap Chandra Sarkar* (with him Babu *Sarat Chandra Dutt* and *Rishindra Nath Sarkar*), for the Respondents.

JUDGMENT.—Thirteen properties were mortgaged by the judgment-debtor, the appellant before us, to the decree-holder, the first respondent, by an instrument dated the 15th *Ashar* 1312 (29th June 1905). The first respondent, Mahananda Chakravartti, brought a suit upon his mortgage on the 4th December 1908, and on the 22nd April 1909, a decree was made therein in the usual form for payment of the mortgage-debt or in default for the sale of the mortgaged properties. On the 24th June 1909, the appellant mortgaged one of the thirteen properties (No. 11) by way of conditional sale to the other respondents in this appeal who are described as the petitioners. The latter brought a suit upon their mortgage and under the decree which they obtained, dated the 8th June 1911, they foreclosed the mortgage and entered into possession of property No. 11. Mahananda Chakravartti having obtained in the execution department an order for the sale of the properties mortgaged to him, the petitioners came in and applied that the properties other than No. 11 should be sold first and that No. 11 should be sold last. The application was opposed both by Mahananda Chakravartti and the appellant but was allowed by the learned Subordinate Judge by an order dated the

15th March 1912. Mahananda Chakravartti has not appealed from that order. The appellant is, as we have said, the judgment-debtor, Tara Prasanna Bose. It will be observed that the petitioners' interest arose after Mahananda obtained his decree.

The first question which arises is, whether the petitioners were at liberty to come in under section 47 of the Civil Procedure Code and apply as they did. In our opinion, on the authorities, the question must be answered in the affirmative. It is clear that the petitioners are bound by the decree made in the suit brought by Mahananda Chakravartti. They are, therefore, as regards property No. 11, the representatives of Tara Prasanna Bose within the meaning of section 47: *Ishan Chunder Sirkar* v. *Beni Madhub Sirkar* (1). The question involved in the application was substantially a question arising between the petitioners and Mahananda Chakravartti, though it might also involve a separate and distinct question arising between the petitioners and Tara Prasanna Bose. The contention, therefore, urged on behalf of the appellant, that the application as an application under section 47 was incompetent, must be rejected. Then it was said that if the application was competent, the learned Judge had no power to make the order appealed from. The Courts, however, have power in appropriate circumstances, to make such orders, under sections 56 and 81 of the Transfer of Property Act.

In regard first to section 81, no doubt, that section only applies where the second mortgagee had no notice of the first mortgage. But no question of notice was raised in the Court below or in the grounds of the appeal preferred to this Court. Till the appeal came to be argued before us, it was never suggested either by Mahananda or by Tara Prasanna that the petitioners had notice of the mortgage to Mahananda. We cannot allow the question to be raised for the first time in appeal.

Apart from that, the petitioners being now in the position of purchasers from Tara Prasanna Bose, the relevent section is, in our opinion, section 56 and the petitioners have as against Tara Prasanna Bose a positive right to have Mahananda's mortgage satisfied out of the properties other than property No. 11 so far as they will extend.

On the merits it was argued that the petitioners had no right to have property No. 11 exempted from the burden of Mahananda's mortgage, because what they had acquired was merely the right to redeem Mahananda. But to say this is to raise the question of notice under section 81 in another form and even if the case fell to be decided under section 81 and not under section 56, the contention is met by the observation already made that no such suggestion was made in the lower Court. It was not suggested then—and so far as there are any indications on the record, it is not the case—that the petitioners dealt with or acquired property No. 11 otherwise than on the footing that it was an unincumbered property.

The case of *Kommineri Appayya* v. *Mangala Rangayya* (2), to which reference was made in the argument, is of no assistance to Tara Prasanna. Section 56, as we have said, gives the petitioners a positive right as against him. Mahananda, the first mortgagee, has not appealed and it is not open to Tara Prasanna to take the objection that the order should not have been made in opposition to Mahananda's wishes, an objection which Mahananda himself has not seen fit to press.

A preliminary objection was taken on behalf of the petitioners that the appeal does not lie. It was suggested that the order in question might be supported without reference to the Transfer of Property Act, as an order under clause (2) of rule 5 of Order XXXIV of the Civil Procedure Code, and it was argued that no appeal would lie from such an order. In the view we have already indicated it is unnecessary for us to express an opinion on the second branch of this contention or to say more than that in the circumstances this order made at the instance of the petitioners, who were not parties to Mahananda's suit, cannot be regarded merely as an order under rule 5 of Order XXXIV and that holding as we do that the case falls within section 47 of the Code, the order amounts to a decree within the meaning of section 2 of the Code and is, therefore, appealable.

(1) 21 C. 62; 1 C. W. N. 36.

(2) 31 M. 419; 3 M. L. T. 287; 18 M. L. J. 299.

KANIZ FATIMA BEGAM *v.* SAKINA BIBI.

The appeal fails and is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 24 OF 1913.

March 24, 1914.

Present:—Mr. Justice Piggott and Mr. Justice Rafique.

KANIZ FATIMA BEGAM—DECREE-HOLDER—APPELLANT

versus

SAKINA BIBI AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code' Act V of 1908), s. 60—Political pension—Sanad — Grant, interpretation of—Absolute estate granted to descendants of grantee—Property whether liable to be attached and sold in execution of decree.

The rights of a grantee of land must be determined by reference to the original *sanad*.

Where under the terms of a grant the descendants of the grantee were given an absolute estate in the property granted:

Held, that they had heritable and transferable right in the property; and that the property not being a political pension could be attached and sold in execution of a decree.

Lachm Narain v. *Makund Singh*, 26 A. 617; A. W. N. (1904) 154; 1 A. L. J. 338 and *Amna Bibi* v *Najm un-nissa*, 2 Ind. Cas. 100; 31 A. 382; 6 A. L. J. 519; 5 M. L. T. 388, followed.

Execution first appeal from a decree of the Subordinate Judge of Gorakhpur, dated October 12th, 1912.

The Hon'ble Dr. *Sunder Lal* (with him *Messrs. Abdul Raoof* and *Haribans Sahai*), for the Appellant.

Mr. *Gobind Prasad* (with him Mr. *Muhammad Ishaq*), for the Respondents.

JUDGMENT.—The two appeals, Execution First Appeals No. 24 and No. 25 of 1913 are connected. The appellant in both the cases is *Musammat* Kaniz Fatima Begam, the widow of one Ghulam Mohi-ud-din Ashraf Khan. She obtained a decree against the estate of her husband for her dower. In execution of her decree she applied for the attachment of certain landed property alleging it to have belonged to her deceased husband. She sought execution by two separate applications, one for costs and the other for the recovery of the dower-debt, and in both the applications she sought to attach the landed property of her deceased husband. The applications were opposed by some of the legal representatives of Ghulam Mohi-ud-din, who were in possession with others of his property. The main objection was that the said property was granted to an ancestor of Ghulam Mohi-ud-din, called Karim Khan, a Pindari Chief, for political considerations and, therefore, constituted a 'political pension' and hence was incapable of being attached and sold in execution of the decree of *Musammat* Kaniz Fatima Begam. The learned Subordinate Judge accepted the objection and rejected the two applications. The widow of Ghulam Mohi-ud-din, that is the decree-holder, has come up in appeal to this Court. She contends that the property, which she is seeking to attach and sell in execution of her decree, was not granted to Karim Khan as a political pension. On the other hand the learned Counsel for the respondents contends that the property in question does fall under the definition of "political pension." He bases his contention on three letters of Revenue Officers, dated 1846-1853. Those letters passed between the Board of Revenue, the Commissioner of the Division and the Collector of Gorakhpur, and give, no doubt, some support to the argument for the respondents. But we cannot treat them as anything more than a mere expression of opinion by the Board of Revenue as to the right of the *jagirdars* in the lands granted to them. The rights of Karim Khan and his descendants must, however, be determined by reference to the original *sanad* of the 13th of August 1819. The terms of that *sanad* distinctly show that whatever rights may have been given to Karim Khan himself for his life-time, an absolute estate in the property in suit was given to his descendants. They have, therefore, a heritable and transferable right in the estate in question. The point under discussion is covered, in our opinion, by two rulings of this Court, *viz.*, *Lachmi Narain* v. *Makund Singh* (1), and *Amna Bibi* v. *Nojm-unnissa Bibi* (2). We, therefore, allow the

(1) 26 A. 617; A. W. N. (1904) 144; 1 A. L. J. 338.

(2) 2 Ind. Cas. 100; 31 A. 382; 6 A. L. J. 519; 5 M. L. T. 388.

two appeals, set aside the orders of the Court below and remand the case to it for disposal according to law. Costs are allowed to the appellants.

Appeals allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEALS NOS. 60 AND 64 OF 1913.

February 12, 1914.

Present:—Mr. Stuart, A. J. C., and Mr. Kanhaiya Lal, A. J. C.

BISHESHAR BAKHSH SINGH—DECREE-HOLDER

versus

DEBI BAKHSH SINGH AND ANOTHER—OBJECTORS

AND

MATA BAKHSH SINGH AND ANOTHER—JUDGMENT-DEBTORS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6—Decree—Decree for sale of mortgaged property and personal decree against other property—Decree, construction of.

It is not necessary to obtain a fresh decree under Order XXXIV, rule 6, Civil Procedure Code, if the decree originally passed is both a decree for the sale of the property mortgaged and a personal decree against the other property of the judgment-debtor.

Sadho Singh v. *Maharaja of Benares*, 29 A 12; 3 A. L. J 606; A. W. N. (1906) 251 and *Lalla Tirbini Sahai* v. *Lalla Hurruk Narain* 21 C 26, referred to.

A decree might be construed in the light of the the judgment.

Sri Raja Rao Lakshmi Kantaiyammi v. *Sri Raja Inuganti Rajagopal Rau*, 21 M 344; 25 I. A. 102(P.C.), referred to.

Appeal against the order of the Subordinate Judge, Bahraich, dated 2nd September 1913.

Babu *Basudev Lal*, for the Appellant.

Pandit *Gokaran Nath Misra*, for the Respondents.

JUDGMENT.—The facts out of which these cross-appeals have arisen are that a sub-mortgagee obtained a decree against the original mortgagee and mortgagors for the recovery of a certain amount by the sale of the under-proprietary mortgagee rights sub-mortgaged to him. The decree provided that in the event of the mortgagee rights proving insufficient to meet the amount decreed, the sub-mortgagee could proceed against the other property of the mortgagee to the extent of the amount of the *post diem* interest at Rs. 12 per cent. per annum for the six years preceding the bringing of the suit on the capital sum then due. The decree was in effect an anomalous decree granting to the sub-mortgagee the immediate and subsequent reliefs successively contemplated by Order XXXIV, rules 4 and 6, of the Code of Civil Procedure. The original mortgagors meanwhile filed a suit for the redemption of their mortgage making the mortgagee and his sub-mortgagee parties to the suit and obtained decree by virtue of which they obtained redemption on payment of the mortgage-money, due on the original mortgage, to the sub-mortgagee. The sub-mortgagee now seeks to recover the interest due on his sub-mortgage money for the six years preceding the suit with the costs awarded to him by the decree from the other property of the mortgagee.

It is contended on behalf of the judgment-debtors, who are the heirs of the mortgagee, that the sub-mortgagee is not entitled to proceed against the other property of the judgment-debtors without obtaining a decree under Order XXXIV, rule 6, of the Code of Civil Procedure. But the decree in the present case granted relief under certain conditions both against the mortgagee rights and the other property of the mortgagee, and as held in *Sadho Singh* v. *Maharaja of Benares* (1) and *Lalla Tirbini Sahai* v. *Lalla Hurruk Narain* (2) it is not necessary to obtain a fresh decree under Order XXXIV, rule 6, of the Code, if the decree originally passed is both a decree for the sale of the property mortgaged and a personal decree against the other property of the judgment-debtor. The mortgagee rights are no longer saleable by reason of the redemption of the original mortgage by the mortgagors. The only question, therefore, for consideration is, what is the amount for which the sub-mortgagee should be allowed to execute his decree against the other property of the mortgagee?

We are unable to accept the contention

(1) 29 A. 12; 3 A. L. J. 606; A. W. N. (1906) 251.
(2) 21 C. 26.

of the learned Counsel, who appears for the sub-mortgagee, that his client is entitled under the terms of the decree to *post diem* interest for the six years preceding the suit on the mortgage-money then due, including the capitalized interest payable under the terms of the mortgage. The words, "the capital sum then due", could not have been intended to include the compound interest which was to be added under the terms of the deed to the principal money year after year, for the finding of the learned Additional Judge who passed that decree was that the claim for *post diem* interest, so far as it was sought to be recovered from the property of the judgment-debtors other than that mortgaged, for the period exceeding six years prior to the institution of the suit was barred by Article 116 of the Indian Limitation Act. It is not open to the parties to go behind that decree or to question the propriety of that finding. In *Sri Raja Rau Lakshmi Kantaiyammi* v. *Sri Raja Inuganti Rajagopal Rau* (3) their Lordships of the Privy Council held that a decree might be construed in the light of the judgment. The sub-mortgagee is, therefore, entitled to recover *post diem* interest at 12 per cent. per annum for the six years prior to the insitution of the suit on the sum of Rs. 8,500, which was the capital amount then remaining unpaid. The Court below erroneously awarded the principal sum of Rs. 8,500 in addition to the said interest, but we understand that that mistake has since been rectified by that Court on review. The mistake about the costs awarded by the decree against the mortgaged property has also been corrected.

The appeal of Thakur Bisheshar Bakhsh Singh, sub-mortgagee, is, therefore, dismissed with costs and that of Debi Bakhsh Singh and others, judgment-debtors, allowed with proportionate costs in so far that the execution will be limited against the non-mortgaged property of Manna Ratan Singh in the hands of the judgment-debtors to the extent of the *post diem* interest on Rs. 8,500 at 12 per cent. per annum for the six years preceding the suit, amounting to Rs. 6,120 as awarded by the Court below.

(3) 21 M. 344; 25 I. 102 (P.C.).

The sub-mortgagee will, under the circumstances, bear his own costs in either case.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1629 OF 1912.

July 27, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

KOLLICHINA VENKATARAMAYYA—DEFENDANT—APPELLANT

versus

GUDAVALLI SUBBARAYUDU—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. I, r. 13—Non-joinder, objection to.

An objection as to non-joinder of parties cannot be allowed to be raised after settlement of issues.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Masulipatam, in Appeal Suit No. 176 of 1911, preferred against that of the Court of the District Munsif of Bezwada, in Original Suit No. 527 of 1909.

Mr. *B. Narasimha Rao*, for the Appellant.

Mr. *V. Ramadoss*, for the Respondent.

JUDGMENT.—Order I, rule 13, Civil Procedure Code, clearly provides that "all objections on the ground of non-joinder shall be taken in all cases where issues are settled at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived."

The ground of objection in this case is that the plaintiff had two partners when and from long before he brought this suit. That ground of objection clearly, therefore, did not arise after settlement of issues. But it is argued that the defendant had no knowledge of this ground of objection till after the issues were settled and hence he is entitled to take the objection even after settlement of issues.

We cannot override the plain terms of the rule which allows the objection of non-joinder to be taken after settlement of issues only when the ground of objection itself arises subsequent to such settlement, and makes no exception where such ground

was not known to the defendant at or before settlement of issues.

That is the only point of law which arises in this second appeal and as we decide it against the appellant, we dismiss the second appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1075 OF 1911.

July 14, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

RAMASUBBA AIYAR—PLAINTIFF—APPELLANT

versus

AVUDAI AMMAL—DEFENDANT—RESPONDENT.

Burden of proof not to be minded after whole evidence on both sides has been let in—Court's duty after recording evidence—Transfer of Property Act (IV of 1882), s. 53—Fraudulent transfer—Fraudulent "alienation" and "acquisition," distinction between—Hindu Law—Property fraudulently alienated by one member—That member cannot recover his share by setting up other members to challenge transfer—Fraudulent transfer by father—Son cannot recover more than his own share—Pleading—Issue not clearly raised—Form of pleadings immaterial.

When the whole evidence on both sides has been let in it is not legally sound to lay stress on the burden of proof, and the Court should weigh the evidence let in and the probabilities as a whole and then arrive at its findings. The Courts should bear in mind that the burden of proof in most cases is not a burden "that goes on for ever resting on the shoulders of the person upon whom it is first cast."

On principle there is no distinction between the fraud by which a dishonest debtor alienates his properties nominally to a third person and the fraud by which he purchases properties nominally in the name of a third person. In either case the dishonest debtor is guilty of legal fraud.

A member of a joint Hindu family, after having fraudulently transferred the family properties and successfully defrauded creditors, ought not to be allowed to recover his share of the properties by setting up another member of his family (in this case his son) to recover the whole property including the former's share also. The member who sues can recover only his own share.

As a Hindu son does not claim his share in the joint family property under his father, the decision in *Yaramati Krishnayya* v. *Chundru Papayya*, 20 M. 326, which prevents not only the fraudulent debtor but also his heirs from recovering the fraudulently transferred property, is not applicable to a son's suit for possession of his own share in such property.

Where the pleadings in Indian Courts raise an issue with reasonable clearness, the fact that the party does not put the plea forward in a particular form is immaterial.

Per *Tyabji, J.*—There is no distinction between a fraudulent alienation and a fraudulent acquisition by a dishonest debtor: the fraud in each case consists of a dishonest mode of dealing with property.

Hall v. *Venkatakrishna*, 13 M. 394; *Subodra* v. *Bikramadit*, S. D. of 1858; *Haigh* v. *Kaye*, (1872) 7 Ch. 469; 41 L. J. Ch. 567; 26 L. T. 675; 20 W. R. 597, followed.

Lala Fateh Chand v. *Rani Kishen Kunwar*, 16 Ind. Cas. 67; 16 C. W. N. 1033; 23 M. L. J. 330; 12 M. L. T. 413; 10 A. L. J. 335; 14 Bom. L. R. 1090; 34 A. 579 (P. C); 17 C. L. J. 1; (1912) M. W. N. 1065, followed.

Yaramati Krishnayya v. *Chundru Papayya*, 20 M. 326, referred to.

Second appeal against the decree of the District Court of Tinnevelly in Appeal Suit No. 401 of 1910, preferred against that of the Additional District Munsif of Tinnevelly in Original Suit No. 342 of 1907.

Mr. *L. A. Govindaraghava Aiyar* (with him Messrs. *T. Natesa Aiyar* and *L. S. Veeraraghava Aiyar*, for the Appellant.

Mr. *T. R. Rama Chandra Aiyar*, for the Respondent.

JUDGMENT.

SADASIVA AIYAR, J.—The learned District Judge in arriving at his conclusions has practically set aside the oral evidence on both sides as of very little value. He has considered the documentary evidence at great length and has then come to the conclusion that the documents do not prove the plaintiff's case, that case being that the 2nd defendant's purchase under Exhibit B was made as the 1st defendant's *benamidar*. In arriving at this conclusion, the learned District Judge has laid (in our opinion) undue stress in very many places on the fact that the burden of proof lay on the plaintiffs. We think that when the whole evidence on both sides has been let in it is not legally sound to lay stress on the burden of proof, and that the Court should weigh the evidence let in and the probabilities as a whole and then arrive at its findings on the facts. Further, as pointed out in *Hall* v. *Venkatakrishna* (1) the burden of proof in most cases is not a burden "that goes on for ever resting on the shoulders of the person upon

(1) 13 M. 394 at p. 399.

whom it is first cast." These considerations (it seems to us) have not been properly kept in mind by the learned Judge of the Court below in construing the documentary evidence on the construction of which the case of *benami* rests. After reading over the principal letters, in Exhibit E series, and hearing many of them discussed at the Bar, we are of opinion that Exhibits E14 and E16 have not been properly construed by the learned District Judge, and that, on a proper construction of these letters, the finding ought to have been that the 2nd defendant was the 1st defendant's *benamidar* in the matter of the purchase of lands from Padmanabha Aiyar.

The question of construction of documents is a question of law—*Lala Fateh Chand* v. *Rani Kishen Kunwar* (2)—and as the finding of fact in this case in the lower Court has been based (as we have already stated) on the documentary evidence alone, we set aside the finding of the District Judge in the 2nd defendant's favour and decide the 2nd issue in the plaintiff's favour.

Before disposing finally of this second appeal we think it is desirable to obtain a finding from the District Court on the 7th issue, which has not been dealt with in the lower Appellate Court's judgment. The finding should be submitted within four weeks from the receipt of this order. Ten days will be allowed for filing objections.

TYABJI, J.—I agree.

In compliance with the order contained in the above judgment, the District Judge of Tinnevelly submitted the following

FINDING.—1. A finding has been called for on issue No. 7, whether plaintiffs are not entitled to the whole or their share of the plaint properties and are precluded from maintaining this action on account of 1st defendant's conduct, as alleged in paragraphs 5 and 6 of 2nd defendant's written statement.

Assuming that the *benami* transactions in question were entered into in order to defraud 1st defendant's creditors, the rule of law applicable is very clearly laid down by authority. It is this, that 2nd defendant—in order to retain the suit property—must allege and prove that the contemplated fraud was successfully carried into effect. This is the position taken up by the Privy Council in *Petherpermal Chetty* v. *Muniandy Servai* (3) and by the High Court of Madras in *Munisami Mudaliar* v. *Subbarayar* (4).

The first question, then, that arises is whether the present is a case to which the rule above stated is applicable. The second is whether—it being such a case—the contemplated fraud was effected. The third and last whether—if the fraud was effected and 1st defendant is unable to recover his share—2nd defendant is entitled to retain at any rate their shares as against plaintiffs.

2. The finding of the District Munsif on these points—as I understand it—is as follows:—

(*a*) that an acquisition of property *benami* in order to defraud creditors is not on the same footing as an alienation made with the same purpose;

(*b*) that there is not, in fact, sufficient evidence to show that any creditor was actually defrauded;

(*c*) that, consequently, even 1st defendant could have maintained the action;

(*d*) that in any event, plaintiffs could maintain it in order to recover their own shares in the suit property.

3. On the first point, I am unable to agree with the District Munsif's that there is any reality in the very clear-cut distinction he draws between *benami* acquisitions and *benami* alienations, so long as the object of both is to secrete a debtor's property from his creditors. Each case must, I imagine, be judged on its merits; and it would obviously make a vast difference in the circumstances we are now considering, if it were alleged and proved that the attachment and purchase of the suit property by Padmanabha Iyer were part of the contemplated fraud.

There appears to be authority both for and against the District Munsif's view. A case of such an acquisition is referred to in *Jadu Nath Poddar* v. *Rup Lal Poddar* (5) [*Konjee*

(2) 16 Ind. Cas. 67; 16 C. W. N. 1033; 23 M. L. J. 330; 12 M. L. T. 413; 10 A. L. J. 335; 14 Bom. L. R. 1090; 34 A. 579 (P. C.); 17 C. L. J. 1; (1912) M. W. N. 1065.

(3) 35 C. 551 (P. C.); 35 I. A. 98; 12 C. W. N. 562; 7 C. L. J. 528; 10 Bom. L. R. 590; 5 A. L. J. 290; 18 M. L. J. 277; 4 M. L. T. 12; 14 Bur. L. R. 108; 4 L. B. R. 266.

(4) 31 M. 97; 18 M. L. J. 151; 3 M. L. T. 243.

(5) 33 C. 967 at p. 973; 10 C.W.N. 650; 4 C.L.J. 22.

Singh v. *Jankee Singh* (6).] In that case, the majority of the Court decided against the plaintiff, who sued to recover property bought by him in the defendant's name with a view to secure it from his creditors. The minority rested it's decision on, *inter alia*, the ground that, if the plaintiff succeeded, the creditors would be benefited. All the circumstances of the case are not to be found in the quotation in *Jadu Nath Poddar* v. *Rup Lal Poddar* (5), but it seems to me that if the minority was right, it was certainly not on the ground stated. In this, as in every similar case, it is difficult to see how creditors, who have been induced to let their claims lapse, could get any benefit from either party. And if their claims were still alive, they could, I imagine, pursue the property equally in the hands of the owner and of the *benamidar*. For, when once the purchase has been found to have been *benami* and in fraud of them, it is invalid against their claims unless the property has, in the interval, passed into the possession of a *bona fide* purchaser for value.

A case to the contrary effect is cited by Mayne in paragraph 447 of his Hindu Law, 7th Edition [*Suboodra* v. *Bikramadit* (7)]. There a man made a purchase in another person's name with the object of preventing the property from being seized by his creditors. The Court held that he could enforce his rights against the *benamidar*, opining that he was merely suing "to have a legal right enforced, an act legal in itself though.... .... done with a motive of keeping the property out of the reach of his creditors."

The whole circumstances of the case are not given, but they seem to me on the face of them to be not very different from those now in question. When the present suit properties were attached, brought to sale and purchased by a creditor, they passed once and for all out of the reach of the other creditors. The latter were in no way prejudiced (they might conceivably even have been benefited) by the re-acquisition and it is impossible to see how it was illegal for 1st defendant to re-acquire the property, even if he did so *benami* in order to screen it from them. The case, as I have already indicated, would be very different if the attachment and purchase by Padmanabha Iyer had been part of the whole scheme of fraud, but this is neither alleged nor proved.

4. I would, therefore, hold that this is not a case to which the rule laid down in *Petherpermal Chetty* v. *Muniandy Sarvai* (3) is applicable and that there is nothing to prevent 1st defendant and *a fortiori* plaintiffs from recovering the suit properties from 2nd defendant. On this finding, it is not strictly necessary to proceed any further, but as the other points have been raised, I will briefly consider them.

Before doing so, I must indicate one other ground on which, I imagine, 2nd defendant must fail. Mayne in paragraph 446 cites an English case, *Haigh* v. *Kaye* (8), which lays down a further rule that "in order to enable the grantee to retain the property, he must expressly set up the illegality of the object and admit that he is holding for a different purpose from that for which he took the property." This, of course, is what 2nd defendant has never done. Throughout a protracted litigation, of which the present suit is only a part, he has steadily maintained in various Courts that the transactions were *bona fide*, with his own funds and on his own account. And it was only in the alternative that he fell back on the plea that plaintiffs, on their own showing, were disentitled to succeed. Neither explicitly nor by implication has he ever admitted the real purpose of his holding or set up its illegality and he can hardly, I think, be allowed to put them forward merely as an argument in the last resort.

5. On the next point, there is, of course, no room for doubt as to the object of the transaction. It is plainly to be seen from paragraph 14 in the plaint and from the letters, Exhibit E series, that passed between the parties. Exhibit E14, which is dated after Padmanaba Iyer's sale, closes with the significant remark, "hereafter there can (not) be the least fear about the (suit) properties."

As to the success with which the fraud was carried out, the evidence is more than ordinarily lacking in precision. On one side is that of 27th defendant's witness and on

(6) (1852) Beng. S. D. A. 888.
(7) S. D. of 1858.
(8) (1872) 7 Ch. App. 433; 41 L. J. Ch. 537; 26 L.T. 675; 20 W. R. 597.

the other that of 1st defendant. The latter merely succeeds in conveying the impression that no creditor was paid more than a part of his dues, and most of them nothing at all, but it is all exasperatingly lacking in details as to dates and figures. And, as plaintiff's Pleader points out, we are only concerned with creditors who may have given up their claims after October 1900.

6. Twenty-seventh defendant's witness speaks about litigation referred to in Exhibit E7, which apparently ended in a decree against 1st defendant and others in December 1899.

It was about a chit conducted by 1st defendant and his brother. The chit broke down and 27th defendant's witness and other subscribers who had not drawn prizes sued the prize-winners and the stake-holders and got a decree. Of the amount decreed, it is perfectly clear from 27th defendant's witness' evidence and 1st defendant's admissions that the plaintiffs recovered no more than a percentage and that solely from the prize-winners. There is not the slightest reason to suppose that they got anything whatever out of 1st defendant and his brother and there is every reason to suppose that, if they had known the nature of the suit transactions, they would have proceeded against the properties acquired in 2nd defendant's name. Twenty-seventh defendant's witness says in this connection:—"I never took any steps to recover the balance, I did not because I thought it was hopeless to recover anything from Ayyavier and Vythilingam Iyer. I thought so because several of the creditors came to grief and could not recover the amounts due to them. I made no special inquiries as to whether they had any property because it was believed by myself and other creditors that they were worth nothing..... I met Ayyavier in Andu 1078 (1903). He explained to me with tears in his eyes that he had parted with all his properties and could not, therefore, pay me my debts.....I believe that my claim against Ayyavier was not barred."

On this the District Munsif comes to the conclusion that the decree was not alive on the date of the conversation referred to. If it was not, Ayyavier's representation was altogether superfluous and inexplicable. Under the circumstances, I see no reason why 27th defendant's witness should not be believed when he says that, as far as he knew, his claim was then alive. If it was, it is obvious that he was induced not to press it by the representation, which he believed, that the debtors had no property he could proceed against. The suggestion that his claim was met by the sale of a house to him is obviously futile, as the sale was several years before the litigation about the chit.

First defendant's evidence as 10th plaintiff's witness it is impossible to read with any degree of patience and without a strong prejudice. His very evident object throughout has been to protect his property by a systematic course of fraud. He first overloaded it with a number of fictitious encumbrances in order to deter creditors by the prospect of endless litigation from proceeding against it. And when a creditor did attach and buy it, he re-purchased it in another's name. The impression that his evidence leaves on my mind is that he paid no one anything if he could help it. He professes to have satisfied all his creditors but two or three within six months of his release from Jail, but has no acquittances or accounts and cannot say how much he paid, to whom, on what dates and from what source. In the absence of all this detail, it is obviously impossible to say which of his creditors, except perhaps 27th defendant's witness and another, gave up their claims subsequent to October 1900. It is quite clear from his evidence that he never paid 27th defendant's witness a penny. In the case of one Ponnu Ammal he admits a debt of Rs. 4,600 on a pro-note, which he says was compounded eventually for Rs. 2,000 some years after the *benami* acquisitions. The inference is, I think, justifiable that Ponnammal would not have given up so much had she known that 1st defendant still had some property.

I need refer to only one other debt and that is the decree debt in Original Suit No. 86 of 1072. It was owing by 1st defendant and his brother to one Sangu Iyer. At about exactly the same time as the *benami* sale to 2nd defendant, his brothers took an assignment of this decree. They were, I may remark, on extremely bad terms with him and their sole object appears

to have been to expose the dishonest dealings between him and 1st defendant and his brother. In pursuance of this object, they got the decree transferred to Tinnevelly for execution and attached the properties comprised in Exhibit B. Second defendant put in a claim petition, which was allowed.

Thereupon his brothers filed a suit against him and 1st defendant and his brother, which he alone defended. The suit was dismissed in the Court of first instance, but the District Court reversed its decision and found 2nd defendant's purchase to have been *benami* for 1st defendant and his brother. There was a second appeal to the High Court which was dismissed. Ultimately it would appear from Exhibits U & U1 that 1st defendant and his brothers themselves satisfied the decree.

On the lines laid down in *Muthuraman Chetty* v. *Krishna Pillai* (9) there would seem in this instance to have been "part performance of a substantial character" of the fraudulent agreement. The Privy Council, however, in *Pethorperumal Chetty* v. *Muniandy Servai* (3) took a different view of a somewhat analogous litigation. They held it to be sufficient that the creditor had been successful and had been paid his debt together with the costs of the litigation, adding that "if his interests were prejudiced at all, it was only to the extent that he was obliged to take proceedings which, had the deed never been executed, he might possibly never have been obliged to take." This view I am bound to follow, but I do so with some reluctance. No doubt, 2nd defendant's brothers took the assignment with their eyes open, but it is difficult to see how ultimate payment *plus* taxed costs can be held to be a sufficient compensation for several years of litigation and delay forced on them by a *benami* purchase.

7. On the second point, then, I find that two creditors, at least, were defeated and that, therefore, the contemplated fraud was effected. On this finding, 2nd defendant can, of course, retain the property as against 1st defendant. The last question is whether he can retain, at any rate, their shares as against plaintiffs.

On this point I can find, and have been shown, no authority. A case is reported in *Rangammal* v. *Venkatachari* (10), but being concerned with a widow, it is hardly parallel to the present suit which is by coparceners.

It is argued that the decision in that case turned on the benefit presumed to have been derived by the widow from her husband's fraud and that similarly, in this case, plaintiffs should be non-suited as having profited by their father's dishonesty. There are, no doubt, sentences in the judgment which are capable of such a construction, but it is perfectly clear that the Court of 1st instance non-suited the then plaintiff on the ground that she stood in the shoes of her deceased husband who could not, if alive, have succeeded on the rule of equal delinquency.

It seems to me obvious that in cases of this nature the question of benefit or profit is quite irrelevant. A fraudulent confederate can retain the property of his partner in guilt on one ground only, and that is by proof that the person who sues him is "*in pari delicto*." As between confederates who have combined to cheat others, the law will not interfere to evict the one in possession. And even if such a question be material it is not easy to see how the widow in the previous, or plaintiffs in this case, can properly be said to have profited or benefited by the fraud. To my mind it is clear that the only person who benefited prior to the litigation was the dishonest confederate. It may be that some creditors have relinquished part of their claims, but how, it may well be asked, are plaintiffs or 1st defendant now any better off on that account than if their creditors had attached and sold their property and thereby satisfied their claims? They would then have lost their property and, so far, they have lost it now, as effectively as if it had been attached and sold in satisfaction of the decrees against them.

8. It is, of course, the case that plaintiffs, if successful, will take back their shares of the joint property relieved by their father's fraud of the burden of paying their father's debts, which they were indubitably liable to

(9) 29 M. 72; 15 M. L. J. 478.

(10) 20 M. 323; 6 M. L. J. 64.

pay. But is this, again, a material consideration? I think, not at any rate as between them and 2nd defendant. He is allowed, as Mayne puts it, to cheat their fathers because he and they jointly succeeded, in cheating others. As against co-parceners who were minors and are not asserted to have had any knowledge of or part in the fraud, I am quite unable to see how his plea of "*inpari delicto*" can be entertained. He has no rights in the matter at all, but is allowed, solely on grounds of public policy, to retain his fraudulently acquired property against his equally fraudulent confederate. Plaintiffs are obviously in a very different position from 1st defendant and there is no apparent ground in reason or in law why 2nd defendant should be permitted to cheat them, they not having been confederate with him in his successful fraud.

A doubt of this kind was suggested (*vide* page 593 of Mayne's 7th Edition) by Lord Eldon, who questioned whether the rule would be enforced in the case of persons claiming under the settlor, but themselves not parties to the fraud. On page 386 of the 18 Madras ruling, [*Rangammal* v. *Venkatachari* (11)], on the other hand, it is laid down distinctly that no such relaxation can be allowed. But that case may be distinguished on the ground that it was there sought to set aside a collusive decree. The 20 Madras decision may also be distinguished if it need be distinguished at all—on the ground that it dealt with a widow and not with co-parceners, who can hardly be said to stand in any one's shoes as regards their own shares in the joint property.

9. I must, therefore, find that the rule is not applicable to plaintiffs. They are co-parceners innocent of the fraud and 2nd defendant cannot be allowed to retain their shares of the joint property.

To sum up, I hold

I. That the rule is not applicable to the facts of this case at all.

II. That 2nd defendant must, in any case, fail as he has never admitted the fraud.

III. That, if the rule be held applicable, there has been a successful fraud.

IV. That, however, plaintiffs can maintain a suit to recover at any rate their shares.

This second appeal coming on again for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, on Friday the 1st day of May 1914, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

SADASIVA AIYAR, J.—The 1st plaintiff died issueless pending the litigation and the 2nd plaintiff is the sole plaintiff on record now. The suit was brought

(1) for a declaration that the sale-deeds B and C executed in favour of the 2nd defendant nominally were really intended for the benefit of the 1st defendant who is the plaintiff's undivided father, and for the possession of the properties purchased under those deeds, (except a house in the 1st defendant's and in the plaintiff's possession) ejecting the 2nd defendant therefrom:

(2) (in the alternative) for the partition of the properties and for the possession of the plaintiff's share therein, leaving the 2nd defendant to enjoy the 1st defendant's share if the Court was inclined to take the view that the plaintiff cannot recover the 1st defendant's share also.

By the judgment, dated 14th July 1913, pronounced by us at the former hearing in this case and by the findings submitted at our instance by the District Court (which findings, so far as they are findings of fact, we accept), the following facts are established:—

(*a*) the plaint properties were purchased with funds which came into the hands of the 1st defendant (the plaintiff's father) as the head of his undivided family, but the sale-deeds were taken in the name of the 1st defendant's legal adviser (the 2nd defendant) in order to defraud, defeat and delay the numerous creditors of the 1st defendant.

(*b*) Two at least of these numerous creditors were defeated and defrauded of their claims owing to the properties having been purchased in the 2nd defendant's name and

(11) 18 M. 378 at p. 386.

the consequent concealment of the 1st defendant's title from his creditors.

The plaintiff (appellant) contends on these facts that he is entitled to the possession of all the plaint properties on behalf of his family (consisting of himself and the 1st defendant). The 2nd defendant's widow (and legal representative) contends on the other side that the plaintiff's suit ought to be wholly dismissed as the 1st defendant has defrauded his creditors by purchasing the properties in the 2nd defendant's name and the Court ought not to assist the 1st defendant's undivided son (the plaintiff) to recover the property from the *benamidar* and should allow the possession of the properties to continue to remain where it has fallen. In the alternative, the 2nd defendant's widow contends that the 1st defendant's share, at least, should remain with her as the 1st defendant cannot be allowed to recover back his share through the plaintiff's instrumentality.

The plaintiff (appellant) urges in reply:

(*a*) that the principle of law disabling a fraudulent debtor who has succeeded in his fraud from recovering (as plaintiff) properties nominally alienated by him to the defendant, does not apply to a case where the successful fraud consisted, not in alienating the plaintiff's properties nominally to the defendant, but in purchasing the properties fraudulently in the defendant's name and putting the defendant in possession of those properties to conceal the real title from creditors;

(*b*) that, as the plaintiff is not suing to recover 1st defendant's share of the properties on behalf of the 1st defendant but on behalf of the undivided family consisting of the plaintiff and the 1st defendant, the plaintiff ought to be given a decree for the possession of the whole;

(*c*) that the principle of law by which the 1st defendant is precluded from recovering his share and by which the 2nd defendant is allowed to retain what does not really belong to him but to the 1st defendant, becomes inapplicable where the 1st defendant belongs to an undivided Hindu family and the plaintiff as a member of the undivided family sues on behalf of the family, in other words, that the rule of law by which a person, not really the owner, is allowed to retain what is not his can and ought to be restricted and got over, if possible, by the application of other legal principles;

(*d*) that as the 2nd defendant did not clearly admit in his written statement his participation in the fraud committed by the 1st defendant against the 1st defendant's creditors, he (2nd defendant) and his legal representative cannot be allowed to invoke the benefit of the rule, *In pari delicto* etc;

(*e*) that even if the 1st defendant is not entitled to get back the properties from the 2nd defendant by reason of a maxim of public policy, no greater effect should be given to that fact in the 2nd defendant's favour than if the 1st defendant had made a gift of the properties to the 2nd defendant and such a gift could be wholly set aside by the undivided son of the 1st defendant; and lastly

(*f*) that even if as much effect be given to the rule as would follow from a conveyance for valuable consideration to the 2nd defendant by the 1st defendant, the 2nd defendant should be relegated to a general suit for partition of the properties of the plaintiff and of the 1st defendant to enforce the equities which a purchaser for valuable consideration from a Hindu co-parcener can invoke and should not be allowed to retain the 1st defendant's share and to have a partition effected in the present suit itself.

After giving my best consideration to the arguments on both sides, I have come to the following conclusions: I do not think that the distinction sought to be made between the fraud which consists in a dishonest debtor alienating his properties nominally to the defendant and the fraud by which he purchases properties in the name of the defendant can be supported on principle. Mr. Govindaraghava Aiyar and the learned District Judge (Mr. Waller) rely on the case of *Subhodra* v. *Bikramadit* (7) for the contrary position. With great respect, I am unable to see the distinction sought to be made in that case. I find great difficulty in holding that while a debtor who alienates his property nominally to the defendant and puts the property in the defendant's possession and succeeds thereby in cheating his creditors is admitedly guilty

of legal fraud, the same debtor if he purchases properties in the name of the defendant and puts the purchased property in the defendant's possession and succeeds thereby in cheating his creditors is guilty only of moral fraud and can escape the penalty of the rule, *In pari delicto* etc.

If a person who is a member of a joint Hindu family can indirectly recover his share of the family properties which he has successfully concealed from his cheated creditors by setting up another member of the family to recover the former's share also, the above maxim based on public policy will practically cease to exist in such cases and I am not prepared to so destroy that wholesome maxim in favour of fraudulent debtors, simply because what I may call the rights by which sons acquire interest by mere birth and by which the interests of a co-parcener pass on his death by survivorship to his co-parceners obtain by custom (recognised by commentators) in the *Mitakshara* system followed in these parts, these customary laws being inconsistent with the progress of the community and with the rule of the more ancient and authoritative *Shastras*. Nor am I inclined to allow the above wholesome rule of public policy to be nullified by the equally artificial rules relating to the distinctions between alienations by way of gift and alienations for consideration. The rule of public policy is not based on the assumption (by a sort of legal fiction) of a real transfer of title in the defendant's favour. The introduction of the idea of a real alienation and the further introduction of the refined distinction between the effect of a transfer by way of gift and a transfer for valuable consideration (though such a distinction seems to be established by most of the Madras decisions) merely confuses the issue as to whether the rule of public policy should be given effect to in all cases falling within its principle or should be allowed to be successfully evaded.

As regards the rule laid down in the English case of *Haigh* v. *Kaye* (8) (a rule relied on by the learned District Judge and by Mr. Govindaraghava Aiyar), that in order to enable the defendant "to retain the property, he must expressly set up the illegality of the object" with which the title and possession of the properties were falsely made to appear to be vested in him, in other words, that the defendant should clearly admit and plead his "scoundrelism" (this strong word is taken by me from the judgment in the English case) in order to succeed in his plea, I think that where the pleadings in Indian Courts raise an issue with reasonable clearness, the fact that the party does not put the plea forward in a particular form is immaterial. The 2nd defendant's contentions in paragraphs 5 and 6 of his written statement were evidently treated by the Munsif and by the legal practitioners who appeared on both sides before the District Munsif as raising the question whether if the 1st defendant had successfully cheated his creditors by the purchase in the 2nd defendant's name, the plaintiff could be allowed to recover the properties or his share therein. For the learned District Munsif in paragraph 88 of his judgment deals elaborately with this question and considers the decisions cited on either side on that question, which question (the learned District Munsif says) *was* "seriously pressed" before him (by the 2nd defendant).

The 2nd defendant's contention that the plaintiff is not entitled to recover even his share cannot be sustained as the plaintiff does not claim his share under his father (the 1st defendant) and the decision in *Yaramati Krisknayya* v. *Chundru Papayya* (12) which prevents not only the fraudulent debtor but also his heir from recovering possession is not, therefore, applicable.

In the result, the decrees of the lower Courts will be discharged and instead there will be a decree for the plaintiff for partition of the plaint properties (except the house admittedly in the plaintiff's and the 1st defendant's possession) and for recovery of the plaintiff's half share therein. The usual commission for partition will be issued by the Court of first instance and final decree will be passed. The parties will bear their respective costs throughout.

TYABJI, J.—My learned brother has stated the facts and the reasons for the conclusion at which he arrived, and I agree.

The principle referred to in *Haigh* v. *Kaye*(8), for the purpose of applying it in India, cannot, it seems to me, be so interpreted as to imply that in this one matter there is some magic

(12) 20 M. 326.

in special words of pleading. The question must in each case be whether the Court and the other parties understand what is sought by the party pleading to be submitted for adjudication; if it is the "scoundrelism" of the party that is sought to be adjudicated upon, and if the defendant makes it clear that his "scoundrelism" is the subject-matter of the issue that has to be tried, I am unable to see on what principle the Court can refuse to adjudicate upon it, notwithstanding that the defendant's case has been indicated with sufficient clearness to all parties concerned. Nor am I able to see why the introduction in the pleading of that or any other specified expression should have the effect of changing the rights of the parties. I do not by any means imply that the Court should by permitting a strained construction of the pleadings assist a party to set up his own fraud, or that euphemism when it has the effect of misleading either the Court or any party concerned, or has the effect of obscuring the issue, should be tolerated in such matter.

It, therefore, seems to me that the effect upon the rights of the parties, of the fraud referred to in the fifth and sixth paragraphs of the 2nd defendant's written statement, must be considered by us.

For this purpose, and in reference to the facts of the present case, I am entirely with my learned brother in being unable to see any ground for distinction between a fraudulent alienation and what has been called before us a fraudulent acquisition: the fraud in each case consists of a dishonest mode of dealing with property. The subject of such dishonest dealing consists in the one case of the property which is purported to be alienated, in the other of the consideration which is transmuted into the property that is acquired in the name of a third party. The dealing is a dishonest act because it has the effect of deceiving creditors into thinking that their debtor has no right over effects out of which the creditors desire to have their claims satisfied—whereas in truth the debtor continues to be the real owner of the effects in question, and they ought to be available for his creditors. The deception is effective, because in the case of a fraudulent alienation the property purported to be alienated is nominally re-placed by consideration of a kind which is incapable of being traced by the creditors, and in the case of a fraudulent acquisition, the consideration is transformed into the shape of the property acquired so as to permit of its being kept in the possession of a third party who is its ostensible purchaser and owner. Where the question is, therefore, whether a disposition of property vitiated for such reasons ought to be considered legally operative, can it make any difference that the medium through which the fraud is effected consists of money or of property of some other kind, moveable or immoveable? The fraud inheres not in the subject of the fraud, nor in the ostensible act, but in what is really done: in delaying or defeating creditors. The ostensible act itself is of the same nature in its essence and in regard to its legal effect,—though its features may be such as to make "alienation" the more apt expression for referring to it in some cases, and "acquisition" in others; for the act consists of an ostensible parting with the ownership of property for some pretended consideration, whereas in truth the consideration is non-existent and the property is not intended to be subjected to any change of ownership.

I agree, therefore, in the order proposed by my learned brother.

Decree discharged.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 45 OF 1914.

July 17, 1914.

Present:—Mr. Justice Sunder Lal.

FIRM SWARATH RAM AND ANOTHER THROUGH JAGMOHAN RAM—PLAINTIFFS—APPELLANTS

versus

SARUP LAL RAM—DEFENDANT—RESPONDENT.

Civil Procedure Code Act (V of 1908), O. XXX, r. 1—Suit in name of firm—Firm must consist of two or more persons—Plaint, whether can be signed and verified by one partner.

Where under Order XXX, rule 1, of the Civil Procedure Code a suit is brought in the name of a firm

there must be two or more persons carrying on business in that name. One single person carrying on business in the name of a firm cannot sue in the name of the firm.

In suits brought in the name of firms each partner can sign and verify plaints for himself and as agent for other co-partners. It is not necessary that all the partners or even two partners should sign and verify the plaint.

Revision against the decree of the Small Cause Court Judge of Agra, dated 29th January 1914.

Messrs. *Mangal Prasad Bhargava* and *Mohan Lal Sandal*, for the Appellants.

JUDGMENT.—This was a suit brought by a firm carrying on business in the name of Swarath Ram-Ram Saran Ram for the recovery of a sum of money said to be due to them. It is not denied that two or more persons are partners carrying on business under the said name. Under Order XXX, rule 1, two or more persons interested in bringing a suit in their own name are permitted to bring a suit in the name of the firm itself. All that this portion of the section requires is that there must be two or more persons carrying on bussiness in that name. It excludes the case of one single owner carrying on business in the name of the firm [see *Mason & Son* v. *Mogridge* (1)]. The suit, therefore, was properly instituted under this rule.

The next question is, who should sign or verify the plaint in such cases? Under the law each partner is an agent for the other partners and he can sign the plaint for himself and as agent for the other co-partners. The plaint in this case is signed by one of them, Jagmohan. Under clause 2 of this rule it is sufficient if the pleading is signed or verified "by any one of such persons". It is not necessary that all the partners or even two partners should sign or verify the plaint. The Court below is of opinion that at least two persons should have signed the plaint. The section consists of two portions which refer to two different matters. The first portion enacts when may such suits in the name of a firm be brought. It lays down as a necessary qualification that the firm must consist of two or more persons. The second portion provides who can sign and verify the plaint. The objects of these two portions are quite distinct. I think the signature and verification by Jagmohan was sufficient and the plaint was properly signed and verified. I set aside the decree of the Court below, remand the case under rule 23 of Order XLI of the Code and direct that Court to restore the case to its list of pending cases and to hear and dispose of it according to law. Costs of this application will be costs in the cause.

Case remanded.

(1) (1892) 8 T. L. R. 805.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 69 OF 1914.

July 17, 1914.

Present:—Mr. Justice Sunder Lal.

Messrs. MANGALI PRASAD AND Co.—DEFENDANTS—APPELLANTS

versus

Babu RAKHPAT SAHAI—PLAINTIFF—RESPONDENT.

Suit for claim either from agent or principal—Decree against one—Plaintiff, whether entitled to claim decree against other.

The plaintiff sued to recover moneys due to him for the printing of certain papers which he had printed on an order given by one *C* for or on behalf of one *M* and asked for a decree against one or other only of these two persons. The first Court decreed the suit against *C*. The plaintiff appealed against *M* and got a decree against him. *M* applied in revision:

Held, that the decree obtained against *C* exhausted the plaintiff's claim under the relief and that he could not get a decree against *M*.

Civil revision against the decree of the Subordinate Judge of Saharanpur, dated 28th February 1911.

Mr. *Muhammad Ishaq*, for the Appellants.

Mr. *Nihal Chand*, for the Respondent.

JUDGMENT.—This was a suit by the plaintiff to recover moneys due to him for the printing of certain papers which the plaintiff had printed on an order given by one Chatterji for and on behalf of Mangali Prasad and Co. The plaintiff could have recovered the amount in the first instance from Mangali Prasad and Co. failing which, if Chatterji was not an agent of Mangali Prasad and Co., from Chatterji himself. Only one of these two persons was liable. If the firm of Mangali Prasad was the principal, Chatterji as agent incurred no personal responsibility and if the agency had not been made out, Chatterji himself was alone responsible. The plaintiff asked for a decree against one

or other only of these two persons. He was quite content with a decree against any one of them. He does not ask for a decree against Mangali Prasad and Co. and failed to get it against Chatterji. The Court below found that Chatterji's agency had ceased, that the Company was not liable and gave a decree against Chatterji. The plaintiff thus got what he wanted in the plaint. He does not, however, seem to have been satisfied and he appealed against Mangali Prasad and Co. The Court below has decreed the claim against the Company. I think on the plaint the decree obtained against Chatterji exhausted the plaintiff's claim under the relief. The prayer in the plaint was misconceived no doubt, but he could only get what he claimed in the plaint. I allow the application, set aside the decree of the Court below and restore that of the first Court. But I make no order as to costs.

Application allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1700 OF 1912.

July 24, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

TALARI KAVOLI NAGADU—DEFENDANT—APPELLANT

versus

VISWANATHAM PEDDA GOVINDAPPA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code Act (V of 1908), s. 11—Transfer of Property Act (IV of 1882), s. 52—Former suit for mesne profits—Alienation made while that suit pending—Suit decided against alienor—Title of alienee—Res judicata.

In a suit for mesne profits or crops of land an issue as to right to that land was directly and specifically raised and decided against the plaintiff in that suit. While that suit was still pending the plaintiff in that suit sold the land to another person who brought a suit for recovery of the land from the same defendant:

Held, that the second suit was barred by the rule of *res judicata*.

Per *Sadasiva Aiyar, J.*—Although section 52 of the Transfer of Property Act applies only to immoveable property, yet the principle underlying it might appropriately be applied to moveables as well in cases where the alienee of the moveables is proved to have had notice of the pending litigation at the time of the alienation.

Govind Baba Gujar v. *Jijibai Saheb*, 13 Ind. Cas. 849; 14 Bom. L. R. 9; 36 B. 189, *Niaz-ullah Khan* v. *Nazir Bejam*, 15 A. 108; A. W. N. (1892) 246, distinguished.

Wigram v. *Buckley*, (1894) 3 Ch. 483; 63 L. J. Ch. 689; 7 R. 463; 71 L. T. 287; 43 W. R. 147, *Doe dem Foster* v. *The Earl of Derby*, (1834) 1 Ad. & E. 783 at p. 799; 3 N. & M. 782; 3 L. J. (N. S.) K. B. 191; 40 R. R. 423; 110 E. R. 1496, *Brimsmead* v. *Harrison*, (1871) L. R. 6 C. P. 584; 40 L. J. C. P. 281; 24 L. T. 798; 19 W. R. 956; *Brimsmead* v. *Harrison*, (1872) 7 C. P. 547; 41 L. J. C. P. 190; 27 L. T. 99; 20 W. R. 784, referred to.

Second appeal against the decree of the Court of the Subordinate Judge of Kurnool, in Appeal Suit No. 107 of 1911, preferred against that of the District Munsif of Nandyal, in Original Suit No. 450 of 1910.

Dr. *S. Swaminadhan*, for the Appellant.

Mr. *S. Ranganadha Aiyar*, for the Respondents

JUDGMENT.

SADASIVA AIYAR, J.—In the case of *Govind Baba Gujar* v. *Jijibai Saheb* (1), quoted for the respondents, the question was whether a former decree adjudging the right to moveables in *A*'s favour against *B* was *res judicata* in the second suit by *A* against *C* who got a pledge of the moveables from *B* during the pendency of the first litigation; and it was held that the question was not *res judicata*. The reasons given for this decision are (*a*) the doctrine of *lis pendens* does not apply to moveables (compare section 52 of the Transfer of Property Act), (*b*) section 11, Civil Procedure Code, does not apply because the final determination of the first suit was after the pledge, and *C*, though he claimed under *A*, claimed under a title created before the determination of the first suit though after it was instituted (and had probably become contentious).

In the present case the property in dispute is immoveable property and it was alienated pending a suit about its profits between the present plaintiff's vendor and the 2nd defendant in which suit the title to the property was "directly and specifically in question", the question having been the subject of a direct issue in the first suit as well as in the second suit. *Govind Baba Gujar* v. *Jijibai Saheb* (1) might thus be distinguished. I might, however, be permitted to say that the fact that section 52 of the

(1) 13 Ind. Cas. 849; 14 Bom. R. L. 9; 36 B. 189.

Transfer of Property Act relates only to immoveable property should not make us blind to the consideration that the legal principle underlying it might appropriately be applied to moveables also in cases where the alienee of the moveables is proved to have had notice of the pending litigation at the time of the alienation. It is not unconditionally extended to moveables because (among other reasons) it is considered that, while a pending litigation as regards immoveables might very well be presumed to be inquired into by intending purchasers *pendente lite*, the same cannot be presumed as regards pending litigation about moveables, which usually pass from hand to hand and the litigation about which does not usually end in a decree for the return of specific moveables but in the award of pecuniary damages and compensation, either as the only relief or an adequate alternative relief. Reliance is further placed on the case of *Niaz-ullah Khan* v. *Nazir Begam* (2) by the respondents' learned Vakil. In that case, the first litigation related to a house, and the second related to another distinct immoveable property which was sold *pendente lite* by the party in the first suit who was unsuccessful. Though a question was raised in the first case which involved the title of the unsuccessful party to the house and to all other properties (which she claimed as heir of a deceased person), the immoveable property in question in the second suit was not specifically mentioned and was not the subject of an issue which "directly and specifically" raised the title to it in the first suit, and in that view that case might also be distinguished. In the present case, the issue in the first suit directly and specifically raised the question of title *to the very same immoveable property* which is in dispute in this second suit, though the subject-matter of the first suit was only the crops raised on that property. I might be permitted to finally remark (with great deference) that some of the English cases which unduly whittle down the beneficient principles which underlie the doctrines of *lis pendens* and *res judicata* by the rather subtle refinements need not be too much relied on by Indian Courts.

In the result, I would hold that the decision in the former suit between the plaintiff's vendor and the 2nd defendant that the plaintiff's vendor had no title to plaint land and that the 2nd defendant is the owner thereof, is *res judicata* against the plaintiff and in favour of the 2nd defendant in this case; and reversing the decree of the lower Courts I would dismiss the suit with costs throughout to be paid by the plaintiff to the 2nd defendant (appellant).

TYABJI, J.—The question involved in this appeal is whether the suit out of which it arises is barred by the doctrine of *res judicata* (section 11 of the Civil Procedure Code.)

The facts are as follows:—There was a previous suit in which the question at issue was as to the right to mesne profits accrued due on the land, that is, the subject-matter of the present suit. The present suit is for recovery of the same land. The first suit was dismissed, it having been held that the person in possession (the 2nd defendant in the present proceedings) had title to the land, and was not liable to account for its profits to the then plaintiff. It is admitted that the plaintiff cannot succeed in the present suit unless it is decided that the 2nd defendant has no title to the land, in opposition to the decision in the first suit.

The provisions of section 11, Civil Procedure Code, seem to be satisfied and *prima facie* it would seem that the suit is barred.

It is argued, however, that there are two cases which support the view of the lower Courts that the present suit is maintainable.

The respondent's argument will be best considered on examination of those cases and the grounds (if any) on which the present case can be distinguished from them.

The first of the cases relied upon is *Govind Baba Gujar* v. *Jijibai Saheb* (1). The reasoning on which that decision proceeded I understand to be as follows: The question was whether or not a previous decision declaring an adoption to be invalid was binding as *res judicata* on the defendant. It was held that the decision was not binding, inasmuch as the decision was pronounced after the defendant derived his title to the property in question (consisting of certain ornaments), and that though the said decision was pronounced in a suit which had already been instituted at the date when the defend-

(2) 15 A. 108; A. W. N. (1892) 246.

ant's title arose, yet the actual decision being after the said date the decision could not be made to relate back to the time when the suit was instituted and could not thus be made to affect the title of the defendant, because the doctrine of *lis pendens* (section 52 of the Transfer of Property Act) was inapplicable to cases in which the property involved is moveable. The authorities cited for the inapplicability of the doctrine of *lis pendens* were *Wigram* v. *Buckley* (3) and other English decisions. The Court in *Govind Baba Gujar* v. *Jijibai Saheb* (1) evidently considered that by this distinction a person who purchases moveable property *pendente lite* is placed in the same position as a stranger. He is not privy to the action and is not bound by what transpires in it. The case of *Doe dem Foster* v. *Earl of Derby* (4) is referred to. There two persons *A* and *B* were owners of two different closes (though originally *A* was owner of both). *A* and *B* each instituted suits in ejectment against *C* in regard to the two closes. In the suit *B* v. *C* evidence of *B*'s title was given, and the suit decreed against *C*. On that *C* consented to a decree against himself in the other suit (*A* v. *C*). It was held that in the absence of proof that there was any agreement between *A* and *C* that the evidence in the suit between *B* and *C* should be evidence in the suit between *A* and *C*., that evidence could not be considered to have been part of the proceedings in the suit of *A* v. *C*. The Court in *Govind Baba Gujar* v. *Jijibai Saheb* (1) considered that the inapplicability of the doctrine of *lis pendens* to moveable property rendered the person through whom the party to the 2nd suit was claiming, a person in position similar to that existing between *A* and *B* in *Doe dem Foster* v. *Earl of Derby* (4) It may, therefore, be stated shortly that the decision in *Govind Baba Gujar* v. *Jijibai Saheb* (1) is that if *A* derives his title to moveable property from *B* at a time when a suit is pending against *B* in which *B*'s title is questioned (and in which the decision is ultimately against *B*'s title), then *A*'s predecessor-in-title is *B* of the dubious title, and not *B* of the title as destroyed by adverse adjudication.

The decisions in *Brinsmead* v. *Harrison* (5) and *Brinsmead* v. *Harrison* (6) also cited in *Govind Baba Gujar* v. *Jijibai Saheb* (1) refer to the doctrine that when there are two joint tort-feasors a judgment (though unsatisfied) against one of them is a bar to a subsequent suit against the other, the reason being thus stated by Lord Blackburn in *Brinsmead* v. *Harrison* (6). "The question raised upon this record is whether the claim of the plaintiff against two joint wrong-doers is put an end to by a judgment recovered in an action against one of them without shewing that that judgment has been satisfied. I apprehend that it is, on the ground that transit in *rem judicatam*, or upon the general principle of convenience which is expressed in the maxim *interest reipublicæ ut sit finis litium*. Is it for the general interest that, having once established and made certain his right by having obtained a judgment against one of several joint wrong-doers, a plaintiff should be allowed to bring a multiplicity of actions in respect of the same wrong? I apprehend it is not; and that, having established his right against one, the recovery in that action is a bar to any further proceedings against the others."

There seem to be very clear grounds, therefore, for holding that the decision in *Govind Baba Gujar* v. *Jijibai Saheb* (1) does not apply to the present case. Here the first suit was for mesne profits. It seems to me to be clear from the judgment in the first suit that there the right to immoveable property was directly and specifically in question within the terms of section 52 of the Transfer of Property Act so that here the doctrine of *lis pendens* applies and the plaintiff cannot say: "I purchased from him whose title was under adjudication and not from him whose title has been adjudicated upon against him, from him whose title was dubious and not from him whose title is set at rest."

The decision in *Niaz-ullah Khan* v. *Nazir Begam* (2) is the second case relied upon by the respondent. There the facts were as follows:—The previous adjudication was

(3) (1804) 3 Ch. 483; 63 L. J. Ch. 699; 7 R. 463; 71 L. T. 287; 43 W. R. 147.

(4) (1834) 1 Ad. and E. 783 at p. 799; 3 N. and M. 782; 3 L. J. (N. S.) K. B. 191; 40 R. R. 423; 110 E. R. 1406.

(5) (1871) L. R. 6 C. P. 584; 40 L. J. C. P. 281; 24 L. T. 798; 19 W. R. 956.

(6) (1872) L. R. 7 C. P. 547 at p. 553; 41 L. J. C. P. 190; 27 L. T. 99; 20 W. R. 784.

pending when the plaintiff in the latter suit derived his title. It had reference to immoveable property but it was property other than the property which was the subject-matter of the latter suit. The Court in effect held that the matter directly and substantially in issue in the former suit was title to property other than that which was the subject of the latter suit, and that, therefore, section 11 (then section 13) of the Civil Procedure Code was no bar to the second suit. The decision in *Niaz-ullah Khan* v. *Nazir Begam* (2) is also, therefore, inapplicable to the present case. For these reasons section 11 seems to me to be directly applicable.

The suit should, therefore, have been dismissed with costs.

The appeal will consequently be allowed with costs throughout.

Appeal allowed.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 69 OF 1912.

February 12, 1914.

Present:—Mr. Justice Ormond and Mr. Justice Parlett.

P. R. N. PALANIAPPA CHETTY—

DEFENDANT—APPELLANT

versus

P. M. R. M. FIRM BY ONE OF THE PARTNERS A. R. P. PALANIAPPA CHETTY—

PLAINTIFFS—RESPONDENTS.

Principal and agent—Suit by principal against agent for neglect or misconduct—Limitation Act (IX of 1908), Sch. I, Arts. 89, 90—Starting of limitation from time misconduct of agent became known to principal—Knowledge—Presumption—Books of account—Recognised agent, power of.

In a suit by a principal against his agent for damages for misconduct and neglect, knowledge of the acts of agent's misconduct can be fully obtained only when the principal gets back his books of account from the agent.

Where after the termination of an agency, the agent first handed over the books of account to a *Punchayat* from whom the principal secured them after sometime:

Held, that the period of limitation under Article 90, Schedule I, of the Limitation Act for the principal's suit against the agent for his misconduct would run from the day on which he got the books of account from the *Punchayat*.

An agent authorized to enter appearance in suits can sign the amended plaint when once the suit has been instituted with the approval of the plaintiff.

Mr. *S. N. Sen*, for the Appellant.

Mr. *J. R. Das*, for the Respondents.

JUDGMENT.—On the 1st April 1911, the plaintiffs-respondents P. M. R. M., a Chetty firm consisting of four partners mentioned by name in the plaint, sued their agent, the defendant, for an account alleging mismanagement, neglect, fraud, etc., and assessed the amount due to them at Rs. 7,500 stating that the cause of action arose on the 5th May 1908, when the agency was terminated. They also estimated the value of the documents and securities etc., to be recovered at Rs. 500 making a total of Rs. 8,000. The defendant was originally appointed agent from November 1902 for a period of three years. In the plaint the plaintiffs stated that at the expiration of the three years owing to the mismanagement and neglect of defendant, large amounts were found outstanding and with a view to their realization the period of his services was extended on the same terms as originally agreed upon as regards rate of salary, that finding defendant unable to realize the said outstandings, the plaintiffs sent another agent for his relief and directed him (presumably the defendant) to render an account of all his dealings with the firm's money and to make over all the firm's properties, *viz.*, cash, books of account, etc., to the said new agent. The defendant in his written statement denies that the new agent was sent out.

Narayanan, the son of one of the partners of the plaintiffs' firm, came to Rangoon in 1906 and from his evidence it appears that the defendant refused to make over the books of account, that the books of account were made over by the defendant to a *Punchayat* in November 1907 and only obtained by the plaintiff or his agent from the *Punchayat* in May 1908. The learned District Judge held that the claim for an account was barred under Article 89 of the Limitation Act inasmuch as the agency must have been terminated before the 27th November 1907 when the books were handed over to the *Punchayat* and the suit was instituted more than three years after that date. The plaintiff then applied to amend his plaint by asking for damages for the debt, etc., alleging certain specific acts mentioned

in the said schedule to the amended plaint. In that amended plaint the cause of action is said to have arisen on the 5th May 1908. The amendment was opposed by the defendant's Advocate, but was allowed on 7th March 1912. Under Article 90, a suit by a principal against an agent for neglect or misconduct could be brought within a period of three years from the time such neglect or misconduct became known to the plaintiff. The knowledge of these acts of misconduct could only be known to the plaintiff from the books and the evidence shows that he did not get these books until May 1908, which would be within three years from the date of institution of the suit but would be more than three years from the time when the amendment was allowed. In one sense the amendment altered the cause of action. The plaintiff originally asked for an account only. By his amendment he asked for damages for negligence, but both cases would involve liability of the defendant for damages for these acts of negligence, and as pointed out the original plaint alleges misconduct though it does not specify the specific acts. The onus is more heavily on the plaintiff in the amended plaint than in the original plaint. It is contended for the defendant that the amendment should not have been allowed and that if it was allowed, the period of limitation should have been reckoned up to the date of the amendment. But if it is treated as an amendment, the time will run up to the date of the original plaint. Very wide powers are granted to the Court for allowing amendments to pleadings, and we think the amendment was properly allowed. It is then contended for the defendant that under Article 90, limitation would run from the time when the plaintiff should have known of defendant's misconduct, that he had knowledge of some misconduct on the part of the defendant at the end of 1905, and that, therefore, his claim under Article 90 for damages should be held to be barred. We are not prepared to hold that in Article 90 after the words "becomes known" we should read the words, "or might have become" or "should have become known" to the plaintiff. Moreover, as pointed out above, the plaintiff could have no sufficient knowledge of negligence upon which he could bring a suit for damages as long as he was not in possession of the books.

The original plaint was signed by the managing partner of the plaintiffs; subsequently one of the four partners (the managing partner) died and an agent who has been appointed under a general power by that managing partner, signed the amended plaint. It is contested that the amended plaint, therefore, was not duly signed and the agent was never authorized to sign it because the firm ceased to exist upon the death of one of their partners and the authority for the agent would thereby also cease. But the amended plaint states that the agent was carrying on the business for the surviving partners of the plaintiff's firm in their names and they were all resident outside the jurisdiction of the Court. That fact has not been challenged. He would, therefore, be a recognised agent within the meaning of Order III, rule 2, by whom appeals, applications and certain acts in the suit may be done. We were referred to the case of *M. E. Mootala and Co.*, v. *Poonusawmy* (1). There it was held that an agent carrying on business in the name of his absent principal could not sign a plaint unless he was authorized to do so either expressly or impliedly. One of the reasons in that judgment was that otherwise the principal would be subjected to the risk of being involved in litigation without his knowledge at the instance of an agent whom he had appointed merely for the purpose of carrying on the business and had not expressly authorized to institute suits. That reasoning would not apply to the case of an agent, even though not authorized to institute suits, being authorized or impliedly authorised to amend the plaint. Amendments vary in degree and it would be extremely inconvenient if the recognized agent who can enter an appearance should be incapable of agreeing to an amendment, however small, on behalf of his absent principal. We think such an agent would have the power to sign an amended plaint when once the suit has been instituted with the approval of the plaintiff.

As to the facts of the case the defendant did not appear at the hearing: the evidence therefore, is all *ex parte* and the acts of negligence have been, we think, sufficiently proved. They consist of lending money on mortgage-bonds which were not registered, of which registration was compulsory and

(1) 3 L. B. R. 4]

which, therefore, were no security and the money could not be collected from the debtors. In one instance the defendant had collected the money but had not entered it in his books. The other item is for monies overdrawn by the defendant.

We dismiss the appeal with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 382 OF 1911.

February 13, 1914.

Present:—Mr. Lindsay, A. J. C.

SITA RAM—PLAINTIFF—APPELLANT

versus

HAIDAR KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Burden of proof, acceptance of—Second appeal—Plea of having no duty to call evidence—Estoppel.

Where the plaintiff accepted the burden of proof put upon him by the Court below and produced certain witnesses in order to prove execution of the deed:

Held, that he was not entitled in second appeal, because the evidence of the witnesses he put forward had been disbelieved, to turn round and say that it was not his duty to call evidence at all and to ask the Court to disregard the evidence which he had given.

Makund v. *Bihori Lal*, 3 A. 824; A. W. N. (1881) 86; 6 Ind. Jur. 321, referred to.

Second appeal against the decree of the District Judge, Sitapur, dated 29th June 1911, upholding that of the Subordinate Judge, Tahsil Biswan at Sitapur, dated 8th August 1911.

Mr. *Mumtaz Husain*, for the Appellant.

Mr. *Ali Mohammad* holding brief of Mr. *Wazir Hasan*, for Respondents Nos. 2 to 4.

JUDGMENT—This was a suit brought by the plaintiff-appellant, Sita Ram, for the recovery of a sum of Rs. 1,100 alleged by him to be due on a mortgage executed on the 13th of June 1879. Various persons were impleaded in the suit, the first of them defendant No. 1 being Ghulami Khan, the mortgagor who did not contest the suit. The defendants Nos. 2 and 3 *Musammat* Ilahi Begam and Ikbal Begam were impleaded as transferees of a portion of the mortgaged property, but as the plaintiff eventually gave up all claim to the items of property in possession of these defendants, their appearance on the record was really a matter of form. The fourth defendant was *Musammat* Nabi Begam and she admitted that she was in possession and claimed to be owner of three plots Nos. 169, 245 and 246 which were comprised in the mortgage set up by the plaintiff and which he asked the Court to bring to sale in case of failure to pay the amount claimed by him. The real contest, therefore, lay between *Musammat* Nabi Begam, defendant No. 4, and the plaintiff Sita Ram. Nabi Begam in the first paragraph of her written statement denied the mortgage set up by the plaintiff. She admitted that she had acquired these plots as the heir of her father, Karam Ali Khan, and her case was that Karam Ali Khan had bought these plots from the mortgagor, Ghulami Khan, in the year 1883 and that he had then paid off a mortgage in favour of the plaintiff bearing date November, 1879. This deed of November, 1879, was described by the plaintiff as being a deed of further charge and there can be no doubt that it contained a reference to a registered deed of mortgage executed by Ghulami Khan in favour of the plaintiff on the 13th of June. With regard to this statement contained in the mortgage-deed *Musammat* Nabi Begam admitted that her father had redeemed. In paragraph 14 of her written statement she admitted that the deed of November 1879 did contain a reference to an earlier deed, but she put forward the argument in her pleadings that if this earlier deed had been outstanding the plaintiff's father who was then alive would have claimed payment of it. Paragraph 16 of her written statement further contained a plea that Ghulami Khan, the mortgagor, himself had actually paid off the earlier deed out of money which had been paid to him by one Ibrar Husain. There was an allegation that for the purposes of this suit the deed put forward by the plaintiff had been obtained collusively from Ghulami Khan at the instigation of one Makhan Lal *Patwari* and that the claim was a false one. The Court of first instance framed various issues on the pleadings and the first of these was, "Is the deed in suit genuine and was it executed for consideration?" The burden of proving this issue was

laid upon the plaintiff and he appears to have accepted it. He produced certain evidence to prove execution of the deed—evidence which both the Courts below have rejected as unreliable. The consequence has been a finding that the plaintiff has failed to prove execution of the deed sued upon and his suit has, therefore, been dismissed. These findings are findings of fact which cannot be challenged in second appeal. It cannot be said that they are unsupported by evidence, but the case as put up on behalf of the plaintiff-appellant here is that the burden of proving execution of this document was wrongly laid upon the plaintiff in view of the admission contained in the pleadings of the defendant No. 4. I have already indicated the nature of the defence set up by this lady and it might perhaps be argued that the statements contained in paragraphs 14 and 16 of her written statement do amount in a way to an admission that there was at one time in existence a deed of the nature described in the plaint. At the same time notice must be taken of the fact that Nabi Begam, although she put forward this case, has also denied the mortgage and put the plaintiff to proof of it by the pleas contained in the first paragraph of her written statement. Whether or not, however, the pleas taken in Nabi Begam's written statement can be construed as an admission of the execution of the deed and as a plea of payment, the fact remains that the plaintiff accepted the burden of proof which was put upon him by the Court below and produced certain witnesses in order to prove execution of the deed, and this being so I do not think the plaintiff is entitled now in second appeal, because the evidence of the witnesses he put forward has been disbelieved, to turn round and say that it was not his duty to call evidence at all and to ask the Court to disregard the evidence which he has given. A case similar to this was before their Lordships of the Allahabad High Court in the case reported as *Makund* v. *Bahori Lal* (1). In that case the plaintiff on the pleadings ought not to have begun. But he did so and his evidence failed to prove the payment of consideration under a bond upon which he was suing. The High Court held that although the burden was wrongly laid in the first instance, a new case had been opened and the burden shifted on to the plaintiff, and they further held that it was impossible to ignore the facts as they appeared on the record and that the Appellate Court had to deal with the case in the shape it came to it. It seems to me, therefore, that it is too late in the day now for the plaintiff to argue before this Court that the evidence led by him on the issue of execution should be ignored and that the case should be dealt with on the footing of the admission made by the fourth defendant in her written statement. The plaintiff chose to put forward evidence to prove execution and that evidence has failed in the opinion of the Courts below to establish the fact it was intended to prove. In this state of affairs it appears to me that there is no use in discussing any of the other grounds of appeal, for it is not the function of a second Appellate Court to go into the evidence and weigh it in order to determine whether the evidence is true or not. The question as to whether the evidence is to be believed or disbelieved is a question for the lower Court.

A word may be said about the point raised in ground No. 5 of the memorandum of appeal. It would seem that in the Court of first instance the plaintiff asked the Judge to presume the genuineness of the deed with reference to the provisions of section 90 of the Indian Evidence Act. In my opinion the Judge very rightly refused to allow this presumption to be raised. He pointed out that there was no case for presumption after the plaintiff had produced evidence which was found to be unreliable and unconvincing.

In my opinion this appeal must fail. I, therefore, direct that it be dismissed with costs.

Appeal dismissed.

(1) 3 A. 824; A. W. N. (1881) 86; 6 Ind. Jur. 321.

P. L. K. PALANEAPPA CHETTY *v.* R. M. A. R. ARUNACHELLAM CHETTY.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 156 OF 1911.

February 6, 1914.

Present:—Mr. Justice Twomey and Mr. Justice Robinson.

P. L. K. PALANEAPPA CHETTY—DEFENDANT—APPELLANT

versus

R. M. A. R. ARUNACHELLAM CHETTY—PLAINTIFF—RESPONDENT.

Power-of-attorney—Construction—Power of agent appointed to carry on business of money-lending partnership to sue for dissolution of partnership—Amendment of plaint—Formal defect—Civil Procedure Code (Act V of 1908), O. VI, r. 14.

A power enabling an agent to carry on the business of a firm shall not entitle him to sue for a dissolution of the firm. The proper course for the Court is to allow amendment of the plaint by requiring the principal himself to sign the plaint, since the defect does not go to the root of the case but is a mere irregularity which does not affect the merits and which would not justify the reversal of a decree on appeal.

Appeal against the judgment and decree of the District Judge of Pegu, dated 29th May 1911, in Civil Regular No. 21 of 1908.

Mr. *Dantra*, for the Appellant.

Mr. *Bilimoria*, for the Respondent.

JUDGMENT.

TWOMEY. J.—The Chetty Firm of R. M. A. R. consisted of two partners, Arunachellam Chetty who was senior partner with a 6/7th share in the business and Palaneappa Chetty with a 1/7th share. The latter was also the agent of the firm at Tawa. Arunachellam gave his son Valliappa Chetty a power-of-attorney investing him with the usual powers of Chetty agents and also empowering him to dismiss other agents and take over the business from them and to sue them for an account. Under this power Valliappa filed a suit against Palaneappa alleging that the latter had refused to make over charge and to make over the monies in his hands. He asked for an account to be taken and there was also a prayer that in the event of the Court holding that Palaneappa was a partner, the partnership should be dissolved and a Receiver appointed. In the defendant Palaneappa's written statement it was contended that such a suit could not be maintained by Valliappa. The District Court dealt with the preliminary point in a separate order and held that as Palaneappa was one of the agents of the firm it was clearly the intention of Arunachellam in granting the power-of-attorney that Valliappa should, if necessary, sue for a dissolution of partnership. The suit then went on and as there was no dispute as to the facts, a preliminary decree was granted declaring the shares of the two partners, ordering the dissolution of the partnership and the appointment of a Receiver to get in outstandings and ordering also the appointment of a Commissioner to take accounts.

The second ground of appeal is that the judgment is against law and the weight of evidence has been abandoned, and the appeal has been argued only on the ground that the District Court erred in holding that Valliappa Chetty had authority to file the suit.

It is clear that the power granted to Valliappa does not authorize a suit for dissolution. It is a power enabling him to carry on the business of the firm, but the carrying on of the business cannot be regarded as including the winding-up of the business. The power authorized Valliappa to bring suits of various kinds against Palaneappa in his capacity as an agent, but the relief asked for—dissolution of partnership—is not relief which could be granted against him *qua* agent. I would, therefore, hold that the decision of the District Court on the preliminary point is erroneous. The question, however, remains whether the suit should, therefore, have been dismissed or whether the proper course in the circumstances was to allow time for the principal Arunachellam to sign the plaint himself or to give Valliappa the necessary power for signing it. In *Mootala & Co.* v. *Poonasawmy* (1) one of the two learned Judges (Mr. Justice Fox) composing the Bench said that when a plaint has not been signed by a plaintiff himself, a Court must reject it unless it has been signed by an agent authorized by a power-of-attorney, either expressly or impliedly, to sign a plaint on behalf of the plaintiff. The question referred to the Bench in that case was whether persons carrying on business for and in the names of parties not resident within the local limits of the jurisdiction of the Court could sign and verify a plaint on behalf of those parties without being expressly authorised to do so and the answer to the reference was in the negative. Mr.

(1) 2 L. B. R. 41.

Justice Fox's opinion that the Court must reject the plaint outright appears to go beyond the terms of the reference. There was, no doubt, good reason in that case for holding that the plaint must be rejected for there was apparently no power-of-attorney at all, and as Mr. Justice Irwin pointed out it would be hard to subject a principal to the risk of being involved in litigation without his knowledge at the instance of an agent whom he has appointed merely for the purpose of carrying on a business and has not expressly authorized to institute suits. The circumstances of the present case are different. Valliappa had a power-of-attorney authorizing him to bring suits of various kinds against Palaneappa and from the circumstances of this case it seems very probable that Arunachellam did intend Valliappa to bring the suit which he actually brought. Arunachellam gave evidence fully avowing his agent's action in filing this particular suit. The right of the senior partner Arunachellam to sue Palaneappa for dissolution and an account of the partnership is not disputed. Order VI, rule 14, requires a plaint to be signed by the plaintiff or by a duly authorized person. As Valliappa's power-of-attorney was defective in not authorizing him to file a suit for dissolution he was not duly authorized by the plaintiff for the purpose of bringing such a suit and the plaint was, therefore, not signed as required by Order VI, rule 14. But it does not appear to follow that the plaint must be rejected. Order VII, rule 11, does not require a plaint to be rejected for such a defect and it appears to me that the Court has to decide in each case whether the failure to comply with Order VI, rule 14, is a defect which goes to the root of the case or whether it is a mere irregularity which does not affect the merits and which would not justify the reversal of a decree on appeal (section 99 of the Civil Procedure Code). This view is in accordance with that taken by the Allahabad High Court in *Basdeo* v. *John Smidt* (2) and by the Calcutta High Court in *Rakhal Chandra Tewary* v. *Secretary of State for India in Council* (3). I think that in the present instance the defect in the plaint may properly be regarded as one of form only and that we would not interfere with the decree of the Court.

At the same time, I think that when the defendant raised this objection the plaintiff-respondent should have asked leave to amend the plaint instead of persisting in his suit on the defective plaint. On this ground I would make no order as to costs of this appeal.

ROBINSON, J.—I concur.

(2) 22 A. 55; A. W. N. (1899) 172.
(3) 10 C. W. N. 841.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1085 OF 1913.

June 29, 1914.

Present:—Mr. Justice Sunder Lal.

PANDOHI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SHEO BHAROS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 24—Case remanded to District Judge for disposal—Power of District Judge to transfer it to his subordinate Court.

Under section 24 of the new Civil Procedure Code, a District Court's power of transferring cases is much wider than under the old law.

Therefore, a case remanded to a District Judge can be transferred to a subordinate Court.

Protap Chandra Roy v. *Judhister Das*, 23 Ind. Cas. 69; 19 C. L. J. 408; *Singamusetti Venkatiah* v. *Boppella Chinranna*, 23 Ind. Cas. 425; 15 M. L. T. 304; (1914) M. W. N. 317, referred to.

Second appeal from a decree of the Sessions and Subordinate Judge, Jaunpur, dated May 31st, 1913, reversing that of the City Munsif of Jaunpur.

FACTS.—This was a suit for a declaration that the plaintiffs are the occupancy tenants of certain plots. The Court of first instance dismissed the suit on the ground that the matter was *res judicata*. The lower Appellate Court confirmed the decree but on second appeal to the High Court, the decree was reversed and the case was remanded to the Court of the District Judge of Jaunpur. He transferred it to the Court of the Sessions and Subordinate Judge of Jaunpur, who decreed the suit. The defendants appealed.

Mr. *A. H. C. Hamilton*, for the Appellants.

—The District Judge could not transfer the suit to the Court of the Sessions and Subordinate Judge of Jaunpur as the suit was remanded for trial on the merits to his Court.

PANDOHI *v.* SHEO BHAROS.

I rely on *Sita Ram* v. *Nauni Dulaiya* (1), *Amir Begam* v. *Prahlad Das* (2) and *Ramcharittar Ray* v. *Bidhata Ray* (3).

Mr. *Kena Ram Mukerji* (for Dr. *Satish Chandra Banerjee*) for the Respondents.—The case was governed by the new Code of Civil Procedure of 1908. Under the old Code the powers of transfer were not so wide but under the new Code, general powers of transfer and withdrawal are much larger. The words "at any stage" and "transfer any suit, appeal or other proceeding" in section 24, Civil Procedure Code, are very significant. They show that the District Judge can transfer the appeal even after a case has been remanded to him.

I rely on *Singamusetti Venkatiah* v. *Boppella Chirranna* (4).

[SUNDER LAL, J., referred to *Protap Chandra Roy* v. *Judhister Das* (5)].

The cases cited by the other side have no application.

JUDGMENT.—This is a suit arising out of proceedings taken in the Revenue Court by the respondents for the ejectment of the appellant as their *shikmi* (sub-tenants). The appellants resisted the suit on the ground that they were not the *shikmi* or sub-tenants of the land but the tenants of the *zemindars*. The Revenue Court found against them and gave a decree for ejectment. Sheo Bharos and others then brought a suit for declaration that they were occupancy-tenants of the land and that the defendants had no concern or connection with it. The claim originally was dismissed as barred by the rule of *res judicata*. The case came up before this Court in appeal as *Sheo Bharose* v. *Pandohi Ahir* (6) before the Hon'ble Mr. Justice Chamier who, on January 17th, 1913, held following certain rulings of this Court that the matter in controversy was not *res judicata* and remanded the case to the lower Appellate Court for disposal on the merits. The case had been disposed of originally by the District Judge of Jaunpur and under this order the case went back against his file for disposal. The record was received in the Court below on March 8th, 1912, and on March 31st 1912, Mr. Marshall, the District Judge of Jaunpur, made an order transferring the case to the Subordinate Judge of Jaunpur for disposal. On the day following, *i. e.*, on April 1st, 1913, the Greeven Scheme came into force. The Office of the District Judge of Jaunpur ceased to exist. Jaunpur became part of the Benares District and Mr. Mehta was appointed Sessions and Subordinate Judge of Jaunpur. The case came up before him for hearing and he has held in favour of the plaintiffs and decreed the appeal. This appeal has been filed by the defendants. So far as the main question of fact raised in this case is concerned, the findings of fact conclude the appeal. Mr. Mehta has found that the appellants were the occupancy-tenants of the land and he has decreed the plaintiffs' claim. In second appeal I am bound to accept the finding of fact and to act upon it.

But Mr. Hamilton has raised a further point that Mr. Marshall, District Judge of Jaunpur, had no power to transfer the case to the Subordinate Judge. The order of remand made by this Court made it necessary for him to hear and dispose of the case himself and that the case ought to have been heard and disposed of by the District Judge now sitting at Benares who is the District Judge of Benares and Jaunpur. In support of this contention he relied upon a ruling of this Court reported in *Sita Ram* v. *Nauni Dulaiya* (1) and certain other cases reported as *Ramcharittar Ray* v. *Bidhata Ray* (3), *Sakharam* v. *Gangaram* (7), *Amir Begam* v. *Prahlad Das* (2), *Nandan Prasad* v. *W. C. Kenney* (8). He also relied upon a case reported as *Lahore Bank, Ltd.* v. *Lakhi Ram* (9). The last case is not quite in point as the order of remand in that case was made under rule 25 of Order XLI. The other cases would support the contention but for the change of law which has taken place under the new Code. Under section 22 of the Bengal Civil Courts Act of 1887 the Court of the Subordinate Judge is a Court under the administrative control of the District Judge and the latter is authorized to transfer any appeal pending before him from decrees

(1) 21 A. 230; A. W. N. (1899) 38.
(2) 24 A. 304; A. W. N. (1902) 66.
(3) 10 C. W. N. 902.
(4) 23 Ind. Cas. 425; 15 M. L. T. 304; (1914) M. W. N. 317.
(5) 23 Ind. Cas. 69; 19 C. L. J. 408.
(6) 18 Ind. Cas. 220.
(7) 13 B. 654.
(8) 24 A. 356; A. W. N. (1902) 92.
(9) 19 Ind. Cas. 970; 242 P. L. R. 1913; 105 P. R. 1913; 215 P. W. R. 1913.

or orders of Munsifs to the Subordinate Judge for disposal. The Court of the District Judge is competent as also that of the Subordinate Judge on such transfer to hear such an appeal. Under section 24 of the Code of Civil Procedure of 1908, the District Court may at any stage transfer any suit, appeal or other proceeding pending before it for a trial for disposal to any Court subordinate to it and competent to try it. Under this section, therefore, the District Judge was perfectly competent to transfer the case. The question was recently considered by the Calcutta High Court in the case of *Protap Chandra Roy* v. *Judhister Das* (5). Mr. Justice Mookerjee observes as follows:—"The order of remand made by this Court is capable of one of two interpretations, neither of which is of any assistance to the defendant-appellant. In the first place, if the order be interpreted to mean that it was the intention of this Court that the suit should go back to the District Judge with liberty to make such order as he was competent to pass under the law, it is plain that under section 24 of the Code of 1908 the District Judge could re-transfer the suit to the file of the Subordinate Judge. The terms of section 24 are comprehensive enough to cover a case of this description, inasmuch as it provides that the District Court may, at any stage, transfer any suit pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or to withdraw any suit pending in any Court subordinate to it and try or dispose of the same, or transfer the same for trial or disposal to any Subordinate Court competent to try or dispose of the same or re-transfer the same for trial or disposal to the Court from which it was withdrawn. An order of this description could be made at any stage and it was immaterial in this case that the suit had to be tried on the evidence recorded by the District Judge who heard the case in the first instance."

In another case which came up before the Madras High Court recently the same point arose before a Bench presided over by Justices Sadasiva Iyer and Spencer. The case is reported in *Singamsetti Venkatiah* v. *Beppella Chirranna* (4). At page 318 their Lordships dispose of this contention as follows:—

"The contention most strongly pressed by the appellants' learned Counsel was that the Subordinate Judge who heard the appeal had no jurisdiction to hear it as the High Court remanded the appeal for hearing by the District Court and the District Court had no power to transfer such a remanded appeal for disposal to the Subordinate Judge. We might here state that the appellants raised no objection either before the District Court or before the Subordinate Judge's Court to the validity of the order of transfer. Under those circumstances we hold on the authority of the case in *Gurdeo Singh* v. *Chandrikah Singh* and *Chandika Singh* v. *Rash Behary Singh* (10) that the Subordinate Judge's inherent jurisdiction was (putting it at the worst) merely exercised irregularly and that the irregularity has not affected the merits (section 99, Civil Procedure Code). We might add that considering the more comprehensive language of section 24 of the new Civil Procedure Code (corresponding to section 25 of the old Code) the District Court's powers of transfer are much wider than under the old law. We refer to the addition of the words 'at any stage' and of the words 'appeal or other proceeding' in the new Code, as well as the new clause (1) (*b*) (*iii*) and the new clause (2)."

I think the change in the law made since the case relied upon by Mr. Hamilton was decided is conclusive upon the point. The case was properly transferred to Mr. Mehta, the Subordinate Judge of Jaunpur, and has been disposed of by him according to law. I hold accordingly and accepting the findings of the lower Appellate Court dismiss the appeal with costs.

Appeal dismissed.

(10) 1 Ind. Cas. 913; 36 C. 193 at p. 201; 5 C. L. J. 611.

ADAIKKA MAISTRY *v.* MUTHUSAMI AMBALAGARAN.

MADRAS HIGH COURT.

SECOND APPEALS NOS. 211 TO 214 OF 1912.

April 13, 1914.

Present:—Mr. Justice Wallis and Mr. Justice Oldfield.

ADAIKKA MAISTRY—PLAINTIFF—APPELLANT

versus

MUTHUSAMI AMBALAGARAN AND OTHERS—RESPONDENTS.

Hindu Law—Alienation by widow of whole estate—Consent of next reversioner—Validity.

A Hindu widow can alienate the whole estate with the consent of the next reversioner.

Debi Prosad Chowdhry v. *Golap Bhagat*, 19 Ind. Cas 273; 17 C. W. N. 701; 17 C. L J. 499; 40 C. 721; *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerji*, 23 Ind. Cas 162; 12 A. L. J. 711; 19 C. L J. 620; 16 Bom. L. R. 425; 16 M. L. T. 68; 27 M. L. J. 123; 1 L. W. 533; 18 C. W. N. 673 (P. C.), distinguished.

Second appeals from the decrees of the District Court of Trichinopoly, in Appeal Suits Nos. 93, 94, 97 and 98 of 1911, preferred against that of the Court of the District Munsif of Srirangam, in Original Suit Nos. 317, 319, 216 and 350 of 1909, respectively.

Mr. *T. V. Muthukrishna Aiyar*, for the Appellant.

Mr. *C. S. Venkatachariar*, for the Respondents.

JUDGMENT.—The finding is that the widow has alienated the whole estate and that the next reversioner has consented to the alienation. The rule that the widow may alienate the whole estate with the consent of the next reversioner is not affected by the recent decision of the Calcutta Full Bench *Debi Prosad Chowdhry* v. *Golap Bhagat* (1) or by the recent decision of the Privy Council *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerji* (2) which only deals with partial alienations. The decrees were right and the second appeals are dismissed with costs.

Appeals dismissed.

(1) 19 Ind. Cas. 273; 17 C. W. N. 701; 17 C. L. J. 499; 40 C. 721.

(2) 23 Ind. Cas. 162; 12 A. L. J. 711; 19 C. L. J. 620; 16 Bom. L. R. 425; 16 M. L. T. 68; 27 M. L. J. 123; 1 L. W. 533; 18 C. W. N. 673 (P. C.).

CHANDA SINGH *v.* WASAWA SINGH.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 554 OF 1913.

February 21, 1914.

Present:—Mr. Justice Chevis.

CHANDA SINGH—PLAINTIFF—APPELLANT

versus

WASAWA SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Admission—Creditor admitting payment before transferring his debt to third person—Evidence Act (I of 1872), s. 18—Power of High Court to decide case on merits in second appeal—Civil Procedure Code (Act V of 1908), O. XLI, r. 24; O. XLII, r. 1.

An admission made by a creditor after transferring his debt to a third person to the effect that the debt had been paid to him in part or whole before he had sold the claim, is not binding upon the vendee under section 18 of Act I of 1872.

Where the judgment of a lower Appellate Court is reversed on a point of law in second appeal, the High Court is competent under the joint force of rule 24 of Order XLI and rule 1 of Order XLII to decide the case on the merits if the inquiry is completed.

Second appeal from the decree of the Divisional Judge of the Amritsar Division, dated the 13th of March 1913, reversing that of the Munsif, 1st class, Batala, District Gurdaspur, dated the 26th of June, 1912, decreeing plaintiff's claim against defendant No. 1.

Lala *Rama Nand*, for the Appellant.

Mr. *Badr-ud-Din Kureshi*, for the Respondents.

JUDGMENT.—On 6th December 1905, Wasawa Singh wrote a bond for Rs. 300 with interest at Rs. 1-8 per cent. per mensem in favour of Pilu. On 21st November 1911, Pilu sold this bond to Chanda Singh for Rs. 300 by a sale-deed. Chanda Singh now sues for Rs. 600 principal and interest. The interest calculated up to date of institution of suit comes to a little more than Rs. 300. Wasawa Singh and Pilu have both been impleaded as defendants.

The execution of the bond is admitted and so is the execution of the sale-deed; but Wasawa Singh pleads that he has paid off this by payment to Pilu, while Pilu pleads that he received no consideration for the sale-deed and that plaintiff promised to realize the debt due on the bond from Wasawa Singh and to hand over the proceeds to him (Pilu)—keeping Rs. 50 as his (plaintiff's) commission.

The first Court held the defence to be

false, and gave plaintiff a decree for Rs. 600 and costs against Wasawa Singh, leaving Pilu to bear his own costs.

Wasawa Singh appealed to the Divisional Judge, who dismissed the suit, holding that as Pilu admitted having received payment of the bond-debt and as plaintiff stood in the shoes of Pilu, plaintiff could have no claim against Wasawa Singh. The learned Divisional Judge added that plaintiff might have a claim for the recovery of what he had paid Pilu, though as Pilu is defendant in the present case I find it hard to see how any second suit could be brought against Pilu. The Divisional Judge winds up by saying that the fact that plaintiff only paid Rs. 300 for a claim to Rs. 600 would appear to show that there was something wrong in connection with the claim. No doubt, there is something in this last remark, but considering what a stupid old man Pilu seems to be, I see no improbability in Pilu's passing on his claim to a person who was prepared to pay the principal sum advanced and to take his chance of getting both principal and interest out of Wasawa Singh.

Plaintiff appeals to this Court.

I think the Divisional Judge is wrong in holding that Pilu's admission of having received payment from Wasawa Singh is binding on plaintiff. Wasawa Singh's Counsel quotes section 18 of the Evidence Act, but Pilu's admission was not made while his interest existed; his admission, made after the transfer of the debt to plaintiff, cannot be binding on the plaintiff. It would lead to all sorts of fraud to hold that a creditor might sell a claim to a third person and then, in collusion with the debtor, defeat the transferee's claim by saying that he had himself collected the debt from the debtor.

The Divisional Judge's judgment cannot be upheld. I see no necessity to remand the case to the Divisional Judge, as the enquiry is complete and there is no reason why I should not decide the case. I have full power to pass a decision on the merits: *vide* Order XLI, rule 24, and Order XLII, rule 1. In fact even if I were to remand the case to the Divisional Court, I could follow up the order of remand by another order transferring the appeal from the Divisional Court to the Chief Court.

The first question is whether the sale to plaintiff was for consideration. On this question, after only considering the evidence on the record, I have no hesitation in agreeing with the first Court. The scribe and the two witnesses to the sale-deed testify that plaintiff gave Pilu Rs. 300 in cash, and I decline to rely on the oral evidence of witnesses who never witnessed the sale-deed and were very possibly not present at its execution.

The next question is whether Wasawa Singh paid off Pilu. If he paid him off before Pilu sold his claim to plaintiff, then undoubtedly Wasawa Singh is not liable. If he paid him off after Pilu had sold his claim to plaintiff, then too, I think, Wasawa Singh is not liable provided that the payment was made without knowledge of Pilu's transfer to plaintiff, though if plaintiff purchased without knowledge of Wasawa Singh having paid off Pilu, or before Wasawa Singh had paid off Pilu, plaintiff would appear to have a good claim against Pilu.

But it is unnecessary to discuss all the possible cases, for the simple reason that I do not believe for a moment that Wasawa Singh has paid off Pilu.

There is some shaky oral evidence to the effect that Wasawa Singh executed a deed of some sort in Pilu's favour, mortgaging same land for Rs. 300 and paying Rs. 100 in cash, a she-buffalo for Rs. 100 and a bullock for Rs. 100. Pilu at first supported this story, but apparently he denied it in the course of arguments before the first Court. I have myself examined Pilu, and he says that while this suit was pending a deed was written about the mortgage of certain land. He cannot state the area of the land. The deed has never been produced in Court. Pilu says he has left it at home. Wasawa Singh's Counsel tells me it is an unregistered deed, so that Pilu would not be able to sue Wasawa Singh for the possession of the mortgaged land. Wasawa Singh would only have to deny the mortgage and Pilu would be unable to tender the mortgage-deed in evidence as it would be inadmissible for want of registration. And Pilu, when exmined by me, flatly denies having received a bullock or a buffalo or any sum of Rs. 100 in cash. Probably Pilu distrusts Wasawa Singh and

fears that if he admits receipts of cash or cattle Wasawa Singh might bring a suit against him, and so recover from him what he has to pay to plaintiff. It is further to be noted that Wasawa Singh and Pilu are nephew and uncle; also it is to be especially noted that according to Pilu's statement made before me the mortgage-deed was written *while this suit was pending.*

I have not the least doubt that both defendants have colluded to defeat the plaintiff's claim. In addition to what I have already written I may add that if Pilu really wanted to employ plaintiff to realize the debt due from Wasawa Singh, his simple course was to give plaintiff a power-of-attorney to sue Wasawa Singh. He could also give a bond binding himself to pay plaintiff Rs. 50 in the event of plaintiff succeeding in getting the money out of Wasawa Singh. There would be no need whatever to write a fictitious sale-deed.

I hold that Pilu's sale to plaintiff was for consideration, and that the story of Wasawa Singh having paid anything to Pilu is a fabrication.

I accept the appeal and reversing the decision of the Divisional Judge I restore the decree of the first Court. Pilu seems to have been a tool in the hands of Wasawa Singh and I give plaintiff costs against Wasawa Singh in all Courts.

Appeal accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 153 OF 1911.
March 24, 1914.

Present:—Mr. Stuart, A. J. C., and Mr. Kanhaiya Lal, A. J. C.

Musammat MERHA—DEFENDANT—APPELLANT

versus

KUNDAN LAL AND ANOHTER—PLAINTIFFS AND BHIKHARI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 23—Lease for farm and sale of drugs—Agreement by lessee to transfer portion of profits or losses resulting from lease—Civil Procedure Code (Act V of 1908), O. XX, r. 15—Preliminary decree, discretion of Court in passing.

Where the parties had agreed to start a business in partnership and to contribute capital therefor and to divide the profits and losses in fixed shares and a lease for the farm and sale of drugs was acquired in the name of the plaintiff after that agreement had been made:

Held, that the agreement was not illegal.

The rules on the subject which have the force of law lay down no more than that the Government refuses to recognize any person for the purposes of management of the realization of the Government demand other than the person or persons named as lessees. There is nothing in the rules to prevent a lessee agreeing to transfer a portion of the profits or losses resulting from the lease to a third party.

Marudamuthu Pillay v. Rangaswami Moopan, 24 M. 401, *Natla Bapiraju v. Puran Achutha Rajajee*, 5 Ind Cas. 456; 7 M. L. T 176, 20 M. L J. 337, referred to.

Under Order XX, rule 15, Civil Procedure Code, it is within the discretion of a Court either to pass or not to pass a preliminary decree and a Court makes an improper use of this discretion if it passes a preliminary decree for the determination of points on which the parties had already agreed

Appeal against the decree of the Subordinate Judge, Barabanki, dated 29th August 1911.

Pandit *Jagmohan Nath Chak*, for the Appellant.

Pandit *Jagat Narain*, for Respondents Nos. 1 and 2.

JUDGMENT.—Kundan Lal and Narain Das brought a suit against Chainu Lal and Lalu Ram on 23rd April 1909 for the recovery of Rs. 12,840-11-6 alleged to be due under the terms of an agreement stated to have been made on 13th August 1906. The conditions of this agreement were stated to be as follows:—That a lease for the farm and sale of drugs in the Barabanki District should be obtained from Government in the names of the plaintiffs only, that the plaintiffs should manage the drug business, and that the profits and losses from the management of the contract should be divided into two shares—a share of three-eighths to go to the plaintiffs and a share of five-eighths to go to the defendants, that the expenses of management should be divided in the same proportion, and that if a party contributed more than his share towards the expenses of management he should be entitled to 9 per cent. interest a year upon the excess. In accordance with the terms of this agreement the lease for the farm and sale of drugs in the Barabanki District was acquired from Government in the names of the plaintiffs for Rs. 92,000 from the 1st October 1906 to

31st March 1909. The agreement continued until the lease came to an end. The contract being alleged to have resulted in a loss the plaintiffs claimed their share of the alleged loss against the defendants. The plaintiffs' suit was decreed by the learned Subordinate Judge of Barabanki. The present appeal was preferred by Lalu Ram only. Chainu Lal did not appeal. Lalu Ram has died since the institution of the appeal and is now represented by his widow. The learned Counsel for the appellant has withdrawn the 5th, 6th, 8th and 12th grounds of appeal, so no reference need be made to the points raised therein.

The first point raised in appeal is that the accounts produced by the plaintiffs were not properly kept and that they were inaccurate, that they did not truly represent the income and the expenditure, that unauthorized items of expenditure have been found in them and that the entries disclose breaches of the partnership agreement. With regard to this first point we find that the accounts in question were kept regularly and properly. The entries in the same have been proved fully by the persons who made them. In addition the plaintiffs produced registers and accounts showing that the entries with regard to the purchase of drugs made in their accounts were correct. Evidence was produced, which the learned Subordinate Judge rightly found credible, to show that not only were the entries correct as to the quantities of drugs purchased, but that the rates at which those drugs were purchased were according to the statements made in the books of account. The learned Subordinate Judge did not base his decision only upon the evidence produced to prove the entries. By the consent of the parties a Commissioner was appointed to examine and report as to the entries in the books of account. This Commissioner, who is proved to have had full knowledge as to the system of book-keeping adopted, made a full and complete report which is in effect an audit of the accounts for the period in question. This report was accepted as satisfactory by both sides and no objection was taken to it. Where the Commissioner has found that the amount claimed by the plaintiffs was liable to reduction owing to items being unsupported, the learned Subordinate Judge has refused to award the amounts claimed under those heads, and the plaintiffs have in all doubtful cases withdrawn the claim to recover what they had been unable to prove. No attempt was made by the defendants to produce evidence to rebut the evidence led on behalf of the plaintiffs. Nothing was produced by them to establish that the entries in the accounts were inaccurate. Lalu Ram who instituted the present appeal did not take an active part in the defence of the case although he was represented therein. We decide that the entries in the accounts are accurate, and that the evidence satisfactorily proves that both the receipts and charges given in these accounts have been correctly stated. We see no reason to suppose that receipts have been concealed or that charges have been exaggerated. It was urged by the learned Counsel for the appellant that the plaintiffs are proved to have broken a portion of the original agreement by selling *charas* at a rate lower than the rate at which they had agreed to sell it, and that by this act they caused a substantial loss for which the defendants cannot be held to be liable. His contentions are based upon an averment in paragraph 12 (*i*) of the written statement filed by Lalu Ram. The 11th issue was based upon this averment The burden of proof was rightly placed upon the defendants. The defendants led no evidence in support of the allegation. Their learned Counsel relies to establish his contention upon a statement made under cross-examination by the plaintiff Kundan Lal. The allegation was that in July, 1906, the plaintiffs agreed that *charas* should not be sold either in the Barabanki or the Rae Bareli District (the parties were also interested in the lease for the sale of drugs in the latter district) during the period of the aforesaid lease for less than Rs. 25 per seer, and that if any party sold *charas* for less than that rate he would be liable to make good the loss caused by his action to the remaining parties. The portion of the deposition of the plaintiff Kundan Lal upon which the appellant relies is as follows:—"It was in December, 1906, or in January next that Chainu Lal talked to me as to the management of the shops. Bishambhar Nath" (holder of the lease for the sale of drugs in the Lucknow District during the same period) "was also present. It was settled that *charas* should be sold at Rs. 25 I accepted the terms." It is clear that this

portion of Kundan Lal's deposition does not support the allegation made in the written statement, for the allegation in the written statement is that in July, 1906, it was settled between the parties as a condition of the contract that in no circumstances should *charas* be sold for less than Rs. 25 per seer. Kundan Lal's deposition goes to show that nothing was said on the subject till the following December or January. Further Kundan Lal never admitted that he agreed that, if *charas* were sold for less than Rs. 25 a seer, he would take the responsibility for any loss to the firm resulting from its sale at a lower rate. There is nothing in his deposition to support the suggestion that there was a clause in the contract to such an effect. He merely stated that during December or January it was agreed between the lessees of the drug contracts in the three adjoining Districts of Lucknow, Rae Bareli and Barabanki that the price of *charas* should be Rs. 25 a seer. It would be inadvisable ordinarily for any lessee to bind himself to accept a minimum rate for sale. If the demand for this particular drug became high there would be a tendency to raise the price, but if the demand slackened there would be a tendency for a prudent business man to lower the price, and it is difficult to see why an experienced drug contractor would hamper his future activities by an agreement not to sell except at a minimum rate. Kundan Lal is shown to be a drug contractor of experience and a man of business capacity. Bishambhar Nath and Chainu Lal had also considerable experience in the business. The appellant has been unable to establish this allegation in any way. There is on the record evidence to show that the allegation is unfounded. We find that this agreement was admittedly made in July, 1906, that the lease for the Barabanki District was obtained from Government in the following August, and that it commenced in October. Before December, 1906, the plaintiffs who were managing the contract in the Barabanki District issued notices with regard to the sub-leases for the authorised shops, and in those notices they agreed to sell *charas* to sub-leases at Rs. 25 a seer for the first quantity taken and at Rs. 18 or less for quantities subsequently taken. Thus from the very beginning it is seen that there was no attempt to fix a minimum rate of Rs. 25 a seer. Apparently as the demand for *charas* fell off in December or January, the rate was reduced from Rs. 26 to Rs. 25. But, so far from the evidence showing that Kundan Lal agreed not to sell *charas* for less than Rs. 25 a seer, it shows that he had first been selling it for Rs. 26 a seer and after consultation with Bishambhar Nath and Chainu Lal agreed to lower the rate to Rs. 25 a seer. We are unable to discover any evidence justifying the conclusion that the plaintiffs committed breaches of the agreement of partnership.

The next point raised is with regard to unauthorised expenditure. The position is proved to have been as follows:—Kundan Lal managed the Barabanki business entirely. It was open to the defendants to check his accounts, to protest with regard to unauthorised expenditure, and to discuss the rates that should be paid to servants and the objects and the amounts of the expenses of management. It is proved by evidence which we find to be reliable that the defendants at first kept a qualified clerk by the name of Rama Kant (who has been called as a witness in the case) to watch their interests in the management of the lease, but that they withdrew this clerk after a short period when they found that the transaction was not likely to be profitable. From this and other evidence we have formed the conclusion that Kundan Lal was given a free hand in the management of the lease, subject to the fact that the defendants had full opportunity of checking his expenditure. At first they availed themselves of this opportunity. Subsequently they deliberately preferred to remain in ignorance of what he was doing. When such an arrangement had been made, it would be unreasonable to expect exact proof by the production of receipts and evidence with regard to every item of expenditure. For example, in the course of the conduct of such a business there would be many small items of expenditure the total of which might be considerable, for such charges as the payment of casual labour and various sundries. It is unpractical to require proof of the payment of petty charges and a Court deciding their reasonableness or unreasonableness would be guided by the proportion that they bore to

the total expenditure and proof as to the amount of such charges in businesses of a similar character. The plaintiffs put their accounts in evidence and supported the items by *prima facie* credible evidence. It was for the appellant after this had been done to establish that any particular item was unjustifiable. No attempt has been made to take the latter course. The learned Subordinate Judge has excluded every item which appeared on the face of it not to be reasonable and, in our opinion, has safeguarded the appellant's interests sufficiently by his judgment in the case.

Another point that was taken under this head by the learned Counsel for the appellant was with respect to unrealised demands. It appears that at the close of the period covered by the lease a sum of Rs. 2,455 was due from sub-lessees and others. The demand for Rs. 563 out of this amount was subsequently withdrawn by the plaintiffs leaving a balance of Rs. 1,892. The appellant's contention is that the plaintiffs showed gross negligence in not collecting these amounts, and that credit should be given them in respect of the amounts left unrealised. It is impossible to come to an *a priori* conclusion that an omission to collect such amounts due shows negligence. A most careful manager may enter into contracts with persons who subsequently fail to keep them, without having acted in an imprudent or unbusinesslike manner. When amounts due are not paid it is not always advisable to sue for their collection. Unless the debtors have realizable assets further loss is likely to be entailed from the expenses of litigation, and the mere fact that an amount of Rs. 1,892 has remained uncollected does not in itself afford grounds for the assumption that the plaintiffs neglected their duty in not suing for recovery of this sum. The sum bears a very small proportion to the total income derived from the lease. Kundan Lal has given an explanation why this amount has not been recovered. It was for the appellant to show that the explanation is unsatisfactory. He failed to do this. Kundan Lal was not cross-examined in detail to elicit why he had not taken particular action against a particular debtor or to show that he had been guilty of want of due diligence in not taking steps to recover the amounts. The appellant led no evidence to prove negligence. In the circumstances we are unable to find that the failure to recover this amount affords justification for placing the liability under this head upon the plaintiffs. The loss must be debited to the partnership account.

This concludes the points raised in the first three grounds of appeal.

The point raised in the fourth ground of appeal is that the contract of partnership was opposed to law and public policy and unenforceable. The contention is that the lease for the farm and sale of drugs could only be given under the rules in force at the time that this lease was made to the persons whose names appear on the lease, and that anything which reduces the interest of such persons is opposed to the rules which have the force of law and would render a contract sub-dividing the interest bad in law. The words of the rule upon which the appellant relies are as follows:—"All excise licenses and leases are personal to the licensee or lessee in whose favour they are granted, and lapse on his death, if that event takes place before the expiration of the term of the license or lease. In the case of an excise licensee or lessee dying before the end of the term of the contract, the Collector will exercise his own discretion as to the disposal of the license or lease for the remainder of its original term. He may either offer to continue it on the same terms to the representative of the deceased, or may dispose of it afresh, subject to the rules for the re-sale of licenses during the currency of a settlement. It should be clearly understood that sub-lessees or farmer's agents only hold their licenses conditionally on the maintenance of the farm from which they derive their rights. If the licensee or lessee is in arrears at the time of his death, the amount of arrears should be recovered from his security deposit, so far as such deposit meets the arrears due. If the arrears exceed the amount of the deposit, the case should be referred for orders." We do not place the same interpretation upon this rule as the interpretation put forward by the learned Counsel for the appellant. This rule appears to us to lay down no more than that the Government as one of

the contracting parties refuses to recognize any person for the purpose of management or the realization of the Government demand other than the person or persons named as lessees. But there appears to be nothing in this rule to prevent a lessee agreeing to transfer a portion of the profits or losses resulting from the lease to a third party. Further there was no subsequent transfer in this case. The parties agreed to form a syndicate for the acquisition of certain leases of which the Barabanki lease was one. At the time of the agreement none of the leases had been acquired and there was no certainty that any lease would be acquired. But it was agreed that if the leases were acquired one should be given to certain parties, another to other parties and that the profits and losses on all the leases should be divided in fixed shares. The lease in Rae Bareli was given to other parties, the present plaintiffs having a share in the profits and losses. We are unable to find that there was any illegality in this agreement.

It was held in *Marudamuthu Pillay* v. *Rangasawmi Moopan* (1) that where a rule framed under the Madras Abkari Act prohibited a person having a license for the sale of toddy from being interested in the sale of *arrack*, or a person having a license for the sale of *arrack* from being interested in the sale of toddy, an agreement by a person holding a license for the sale of toddy with a person holding a license for the sale of *arrack* that the profits and losses under both licenses should be shared, was void as opposed to public policy. In that case the agreement was in direct contravention of the rule having the force of the law and this decision does not assist the appellant. In a subsequent case in *Natla Bapiraju* v. *Puran Achutha Rajajee* (2) it was held by a Bench of the Madars High Court (distinguishing the above ruling) that a person having no license was not prohibited from holding an interest in the manufacture or vend of liquor jointly with a licensed manufacturer or vendor. The situation in the latter case closely resembles the situation in the case now before us. The position of the plaintiffs is strengthened by the fact that no transfer took place, for the partnership was prior to the obtaining of the lease. The parties had agreed to start a business in partnership and to contribute capital therefor and the lease was acquired after that agreement was made. We do not go so far as to say that under rules having the force of law a transfer which does not affect the liability of the lessee to pay the Government demand and to be responsible for legal management is necessarily illegal. It is not necessary to decide that point as in the present case no transfer took place.

The next point is raised in the seventh ground of appeal to the effect that the accounts produced by the plaintiffs show illegalities and that, therefore, the whole transaction is null and void. This plea owes its origin to the fact that in the accounts a comparatively small sum is entered in respect of gratuities paid to Government servants, and that further certain loans are recorded as due from Government servants. The plaintiffs, however, abandoned their claim with regard to these items and we are not called upon to decide whether, as a matter of fact, these gratuities were paid or these loans were made. There is no evidence to justify a conclusion upon the subject. But the appellant in spite of the fact that nothing has been decreed with regard to these items argues that the circumstance that the plaintiffs originally alleged, that they had given gratuities to Government servants and lent money to other Government servants, taints the whole agreement with immorality and renders it void. It is difficult to see how this plea can be reconciled with the averment in paragraph 12 (*g*) of the written statement filed by Lalu Ram, which is to the effect that it was agreed originally that illegal gratuities should be given to Government servants but that they were not to exceed Rs. 25 in any year. In view of the circumstance that the allegations as to these gratuities and loans have been withdrawn entirely by the plaintiffs, we find it impossible to assent to the proposition of the appellant's learned Counsel that the circumstance that these allegations were originally made taints the whole transaction with immorality.

(1) 24 M. 401.
(2) 5 Ind. Cas. 456; 7 M. L. T. 176; 20 M. L. J. 337.

The ninth ground of appeal raises the plea that no suit could lie without a prayer for winding-up the partnership. It was admitted by the defendants that the partnership existed, that it came into being in July 1906, and that as far as the Barabanki lease was concerned the business for which the partnership had been created terminated on 31st March 1909. After that date all partnership business was concluded except the collection of outstanding arrears. The form of plaint for a suit of this nature is given in No. 49 in the first Schedule, Act V of 1908. The form of claim is given in the fifth paragraph:—(1) for the dissolution of the partnership, (2) that accounts should be taken, (3) that a Receiver should be appointed; and the note states that in suits for winding-up of a partnership the claim for dissolution should be omitted and a paragraph should be inserted in its place stating the fact that the partnership has been dissolved. In the third paragraph of the plaint it was stated that the partnership was dissolved on 31st March 1909, and in the ninth paragraph of the plaint it was asked that the accounts of the dissolved partnership be ordered to be prepared, that a decree should be passed upon the basis of such accounts, and that, if necessary, a Receiver should be appointed. The form of the suit is correct in law and there is no substance in the allegation contained in the ninth ground of appeal.

The tenth ground of appeal is to the effect that the learned Subordinate Judge did not follow the correct procedure in relation to a suit for accounts and that in particular he should not have decreed the claim without passing a preliminary decree for accounts. The main objection is that a preliminary decree for accounts should have been passed in spite of the facts that the plaintiffs were themselves in possession of the accounts, that they produced the accounts, that the accounts were proved, checked, and found to be correct, and that the decree was passed upon the basis of the aforesaid accounts. The procedure is governed by the provisions of Order XX, rule 15, of Act V of 1908, which states, where a suit is for the dissolution of a partnership, or the taking of partnership accounts, the Court, before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved, and directing such accounts to be taken, and other acts to be done, as it thinks fit. On our interpretation of this rule it is within the discretion of a Court either to pass or not to pass a preliminary decree in respect of these matters, and a Court would make an improper use of this discretion if it passed a preliminary decree for the determination of points on which the parties were already agreed. Here both sides were in agreement with regard to the proportionate shares. Both sides agreed that the partnership had been dissolved. Both sides agreed as to the day on which the partnership had been dissolved and the accounts had already been produced. In these circumstances it was obviously supererogatory to pass a preliminary decree, and we can find no justification for the contention that the Court exercised its discretion improperly in omitting to prepare such a decree. In cases in which the plaintiff has claimed rendition of accounts, the best procedure is to pass a preliminary decree for their production, but in cases in which the accounts are in the possession of the plaintiffs, when they have been produced and proved and the suit is for contribution, the passing of a preliminary decree for rendition of accounts appears to be totally unnecessary.

The eleventh ground of appeal asserts that the decree does not agree with the judgment and is, moreover, not a decree proper to a case of partnership accounts. We are unable to find any force in this objection.

We now take up the fourteenth ground of appeal which is to the effect that the burden of proof on the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 10th and 12th issues was improperly laid upon the defendants. In so far as the grounds taken have not already been abandoned by the appellant, we find against the appellant on these points.

The thirteenth ground of appeal challenges the learned Subordinate Judge's decision on the first part of the 8th and on the 9th,

10th, 11th and 12th issues. We find that these issues have been correctly determined.

The last ground to be decided is the fifteenth. This is an extraordinary ground. The appellant here suggests that although he was represented he failed to defend his case properly because he relied on the fact that his co-defendant would represent the interests of both, that the co-defendant failed to do so and he, therefore, suggests that he should be now allowed to lead witnesses in support of his defence. The learned Counsel for the appellant has been unable to show why this Court should permit the appellant to adopt this unusual course. Every opportunity was given in the Court below for a proper presentation of the defence and for the calling of evidence and nothing is suggested now to show why concessions should be made at this stage.

This concludes all the grounds raised before us. We find against the appellant on all points and direct that the appeal be dismissed, and that the appellant pay his own costs of the appeal and those of the contesting respondents.

We note that a sum of Rs. 15,081-15-0 is held in Court towards the satisfaction of the decree. This amount will now be made over to the plaintiffs-respondents who will also be entitled to recover additional interest up to the date of full realization in addition to the costs of this appeal.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 118 OF 1914.

July 18, 1914.

Present:—Mr. Justice Sunder Lal.

RAM SARUP AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

JAGAN NATH—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 21—Transfer of trees planted on waste land of village—Tenant's right of sale.

A tenant who has planted trees on the waste land of a village, which is not his occupancy holding, has no right to sell the trees and, therefore, the auction-sale of such trees does not transfer the ownership of the trees to the purchaser

Jugdip Narain Singh v. *Jokhan Ahir*, 5 Ind. Cas. 256, followed.

Second appeal from the decision of the Subordinate Judge of Farrukhabad, dated the 14th November 1913.

Mr. *Haribans Sahai* and the Hon'ble Mr. *Gokul Prasad*, for the Appellants.

Mr. *Gulzari Lal*, for the Respondent.

JUDGMENT.—This is a suit relating to certain trees which once belonged to one Ram Prasad an occupancy tenant in the plaintiffs' village. Ram Prasad had planted certain trees in the occupancy holding and he had also planted some trees in the village waste land. Ram Prasad's rights in these trees were sold in execution of a decree of July 6th, 1908, and purchased by the present defendant. Ram Prasad then left the village and had no longer any connection with it. The plaintiff in this case as *zemindar* sues for possession of these trees. The Court of first instance decreed the claim. The lower Appellate Court in appeal has modified the decree of the Court below by upholding it in so far as the trees on the occupancy holding are concerned. But it has dismissed the suit in respect of trees standing on the waste land. The ground upon which it has differentiated the claim as to the trees situated in the waste land and on the occupancy holding is that the sale of trees in the occupancy holding was bad under the Tenancy Act, section 21 of which prohibits a tenant from transferring a tenancy. It has, however, held that as to trees in the waste land he had greater rights of transfer. The question was concluded in Letters Patent Appeal No. 23 of 1909 decided on January 17th, 1910, in the case *Jugdip Narain Singh* v. *Jokhan Ahir* (1). In that case the tenant had planted trees with the permission of the *zemindar*. Those trees were not in his occupancy holding. The tenant sold the trees and the *zemindar* brought a suit for possession of the trees on the ground that the tenant had no right to sell them. The defendant in that case pleaded that under the village custom the tenant was entitled to sell the trees not situated in the occupancy holding. The Court found that no such custom had been proved and holding that the *zemindar* must be deemed to be the owner of those trees and in the absence of

(1) 5 Ind. Cas. 256.

custom to the contrary the tenant had no right to sell them, it dismissed the claim for possession but declared that the sale was invalid. The case is on all fours with the present case and I am bound to follow it. I must hold that the tenant had no right to sell the trees and the auction-sale, therefore, did not transfer the ownership of the trees to the purchaser. The claim of the plaintiffs must be decreed, the decree of the Court below set aside and the decree of the Court of first instance restored. I allow the appeal with costs and order accordingly.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL SUIT No. 117 OF 1912.

March 18, 1914.

Present:—Mr. Justice Sankaran Nair.

K. TANIKACHALA MUDALIAR—

PLAINTIFF--APPELLANT

versus

C. ALAMELU AMMAL AND OTHERS—

DEFENDANTS RESPONDENTS.

Hindu Law—Widow Suit to restrain waste—Receiver—Power to carry on business—Immoveable property vested in administrator—Handing of keys, whether divestment—Property purchased in name of wife and son—Benami *purchase—Presumption.*

One *A* died leaving him surviving *B*, his widow, and *C*, his son, and considerable property which comprised also a share in a partnership firm. *C* died two months thereafter leaving *D*, his widow, as his heir. At the instance of *B* the Administrator-General was ordered by Court to take possession of, and obtain Letters of Administration to, the estate of *A*. He did accordingly and instituted a suit against the surviving partner of the firm in which *A* was a partner to realise *A*'s share therein. A Commissioner was appointed in the course of the proceedings to sell certain assets of the firm between the parties to the suit, one of which was the good-will of the business. The Administrator-General bid for and purchased the same. In the final decree in the suit it was ordered and declared that the Administrator-General do retain as and for his share the good-will of the business. *D* then entered into a partnership under the said firm's name with three persons under a deed of partnership, gave them a three-annas share and threw the good-will into the common stock. The Administrator-General gave her Rs. 12,000 and handed to her the keys of the business premises which also fell to his share in the final decree. In a suit brought by the next presumptive male reversioner to restrain *D* from committing waste it was found that the partners were not persons whose services it was necessary for her to secure to carry on the business, that she exercised no real supervision and had no control over the same, that everything was done by her partners and two other persons to whom she delegated the power of supervision, that the account books of the firm were not kept in the course of the business and they were written up pending trial:

Held, that a proper case for the appointment of a Receiver was made out and the Court was bound to appoint one in the interests of the reversioners, that her conduct in taking three persons as partners was *prima facie* an act detrimental to the reversion and that the alienation of 9/16ths share of the good-will to them was quite unnecessary in the interest of the business;

that as the final decree passed in the suit for dissolution of partnership contemplated the carrying on of business for the benefit of the estate, it was not an act of waste on the part of the widow;

that by the handing over of the keys of the business premises, the Administrator-General did not part with his interest therein.

Where a person purchased certain immoveable property in the name of his wife and minor son and after his son attained majority, took a release from him and then he and his wife effected a mortgage over the same:

Held, that in the absence of some explanation to account for his taking the property in the name of his wife and son, *prima facie* the presumption was that he intended it for both.

Messrs. *C. P. Ramaswami Aiyar* and *P. Venkataramana Rao*, for the Plaintiff.

Mr. *M. D. Devadoss*, instructed by Messrs. *Short Bewes & Co.*, for 1st Defendant.

Mr. *D. Chamier*, instructed by Messrs. *Grant and Greatorex*, for 4th Defendant.

Mr. *K. Ramanatha Sahai*, instructed by Mr. *P. Kandasami*, for 5th Defendant.

Mr. *C. P. Ramaswami Aiyar*, for the Plaintiff:—This is a suit to restrain waste by a Hindu widow. Whenever the estate is in danger the Courts have in several cases removed a widow from management and appointed a Receiver. I refer to *Guruva Chetty* v. *Ragammal* (1), *Raghava Chetty* v. *Thoyammal* (2). Actual waste is not necessary. Apprehension of waste is enough and especially if the property is immoveable: *Durga Nath Pramanik* v. *Chintamoni Dassi* (3), Sircar's Hindu Law, page 440, Sirvayya's Women's Estate, page 324, *Muthu Lakshmi*

(1) 7 Ind. Cas. 534; (1910) M. W. N. 347; 8 M. L. T. 189.

(2) 10 Ind. Cas. 670; 9 M. L. T. 296.

(3) 31 C. 214; 8 C. W. N. 11.

Ammal v. *Narayana Pattar* (4). The purchase of the mere good-will for a heavy price of Rs. 20,000 is an act of waste. It is only valuable to a surviving partner who wishes to carry on the business; and if a partnership is dissolved the retiring partner is not prevented from doing the same business in the immediate vicinity: Lindley on Partnership, page 476.

On Somu Mudali's death the partnership became dissolved and the business now carried on under the same name is a new business: *Cf. Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar* (5). A widow has no power under the Hindu Law to carry on a new business: *Sham Sundar Lal* v. *Achhan Kunwar* (6). A manager of a joint Hindu family was held to have no authority to carry on a new business: Trevelyan's Hindu Law, page 264, *Makhan Lall Dutt* v. *Ram Lall Shaw* (7), *McLaren Morrison* v. *S. Verschoyle* (8). Her plea is that the business is a prosperous one. The fact that an investment would bring a benefit is no answer if it is risky. A widow has no power to alienate property for improving or developing the estate: *Bhogaraju Venkatarama* v. *Adapalli Seshayya* (9); *Ganap* v. *Subbi* Kom *Sanna Subu Hegde* (10). Her entering into partnership with persons who are men of no means is clearly detrimental to the reversion. She has thrown the good-will into the common stock, and thus alienated 9/16ths of the good-will. The fact that the property is moveable does not enhance her power: *Buchi Ramayya* v. *Jagapathi* (11). She has no control over the business and by her carrying on the business she is every day imperilling the estate and other persons are custodians of her moneys and the estate must be safeguarded: *Kissen Kaminee Dassee* v. *Ram Chunder Mitter* (12); *Narayana Kutti* v. *Pechiammal* (13), *Sakari Datta* v. *Sheikh Ainuddy* (14).

(4) 7 M. L. J. 216.
(5) 28 M. 344.
(6) 21 A. 71 (P. C.); 2 C. W. N. 729; 25 I. A. 183; 7 Sar. P. C. J. 417.
(7) 3 C. W. N. 134.
(8) 6 C. W. N. 429.
(9) 12 Ind. Cas. 123; 10 M. L. T. 179; 35 M. 560
(10) 32 B. 577; 10 Bom. L. R. 927.
(11) 8 M. 304.
(12) 12 W. R. A. C. J. 13.
(13) 15 Ind. Cas. 206; (1912) M. W. N. 353; 22 M. L. J. 364; 36 M. 426; 11 M. L. T. 174 at p. 184.
(14) 6 Ind. Cas. 336; 14 C. W. N. 1001.

So far as the Administrator-General is concerned it is rather difficult to understand his position. At one time he says he has nothing to do with the business, but in some of his letters he says he is carrying on the firm and he takes an active part in getting licenses for the business. The position of an Administrator-General is no better than an ordinary administrator. *Administrator-General of Madras* v. *F. N. Hawkins*(15); *Arthur M. Ritchie* v. *W. Stokes* (16). The order of Court does not justify him to purchase the good-will. He must be deemed to have been authorised to do what is consistent with his position. He cannot carry on business: Section 10 of the Administrator-Generals Act, Williams on Executors, 14th Edition, page 1430, Perry on Trusts, S. 1454, 18 Am. Cy. 241. If the administration has come to an end he becomes a trustee. See *In re Timmis*; *Nixon* v. *Smith* (17); *George Attenborough and Son* v. *Solomon* (18).

So far as the business premises is concerned, I contend that it is still vested in him. The mere handing over of the keys is not enough. A conveyance is necessary. See section 113 of the Probate and Administration Act.

Mr. *M. D. Devadoss* for the 1st Defendant.—When the estate was divided what actually came to Somu Mudali's share was the good-will, Rs. 29,000, and the business-premises, Rs. 24,000, and what was realised in Ratnavelu Chetti's suit. Subsequent to Sambandam's death all the profits belong to 1st defendant, *viz.*, Rs. 17,000 odd that was realised as interest from 28th November 1908 and Rs. 12,000 realised in Ratnavelu Chetti's suit: *Saodamini Dasi* v. *The Administrator-General of Bengal*(19); *Akkamma* v. *Venkayya* (20). There is no waste of Somu Mudali's estate. It is the Administrator-General that is reponsible for the purchase of the good-will and not myself.

[SANKARAN NAIR, J.—How are the partners legally there? If the Administrator-General is the legal owner and the business is his, he

(15) 1 M. 267; 1 Ind Jur. 367; 1 M. L. R. 343.
(16) 2 M. H. C. R. 255 at p. 264.
(17) (1902) 1 Ch. 176; 71 L. J. Ch. 118; 50 W. R. 164, 85 L. T. 672.
(18) (1913) A. C. 76; 82 L. J. Ch. 178; 107 L. T. 833; 57 S. J. 76; 29 T. L. R. 79.
(19) 20 C. 433 (P. C.); 20 I. A. 12.
(20) 25 M. 351; 12 M. L. J. 5.

is legally accountable to the beneficiary and the beneficiary is not only the widow, the 1st defendant, but the 2nd defendant and the ultimate reversioner, whoever he be].

The business carried on is Somu Mudali's business. It is a lucrative one. It is not an investment calculated to endanger the estate. The persons taken as partners were persons able to carry on business and were working when Somu Mudali was carrying it on. The sales amount to 3 lakhs and the profits are considerable.

The order of 8th November 1910 practically authorised the business to be carried on.

Mr. *D. Chamier*, for the Administrator-General.—There was no purchase of the good-will. The sale was only a mode of ascertaining its value and in the distribution of assets it was allotted to me. In any event I am protected by order of Court. I have parted with the business-premises to the widow by handing over the key and I have no concern with the business.

[SANKARAN NAIR, J.—The decree vested the business and property in you. If you are the legal owner how do the partners get it? If you say the business does not vest, the whole thing goes. If you say it is vested in you, you are to account for the profits of good-will and house. How do you divest yourself of possession]?

I can transfer title.

[SANKARAN NAIR, J.—What about the intervening things?]

Mr. *C. P. Ramasami Iyer* in reply.—So far as the argument as to income is concerned it is a new case. Nowhere is it raised in the pleadings nor an issue taken on the point, but the facts in this case conclusively point out that the whole thing was treated as an accretion to the estate and dealt with as such. The Administrator-General's accounts clearly prove it.

JUDGMENT.—The plaintiff as expectant reversioner sues the 1st and 2nd defendants, the widows of Sambandam Mudali and his father, Somu Mudali, respectively, substantially to restrain them from dealing with the property of the last male owners on the ground that the first defendant has been committing various acts of waste.

Somu Mudali and Dasai Goundan carried on the business of Somu Mudali and Co. Somu Mudali died on 22nd November 1908. His son Sambandam succeeded him and died on 20th January 1909. On the application of Somu Mudali's widow, 2nd defendant, this Court passed an order in April 1909, directing the Administrator-General of Madras to apply for Letters of Administration to take possession of the property and effects of Somu Mudali. He made an application which was granted on 23rd February 1910. In Civil Suit No. 164 of 1910, he sued Somu Mudali's partner, Dasai Goundan, for a declaration of the dissolution of partnership from the 22nd November 1908, the date of Somu Mudali's death, and for consequential relief (Exhibit D). There was a preliminary decree (Exhibit H) on the 15th April 1910 and an order was passed on 8th November 1910 (Exhibit J), the construction of which is in dispute between the parties. That order directed the Commissioner appointed under the decree to sell the properties which included the business and the shop premises where the business is now carried on "*between the parties thereto.*"

Mr. Chamier for the Administrator-General contends that under this clause he was bound to bid for and entitled to purchase the properties, and a later clause in the same order, that the parties shall be at liberty to bid at such sales and to have credit for the purchase amount, does not make it optional with the parties to purchase. Then on 21st November 1910, 1st and 2nd defendants, *i. e.*, the widows of Somu Mudali and Sambandam, requested the Administrator-General to purchase the good-will. It was put up between the parties and the last bid was for Rs. 29,000 by the Administrator-General. The shop premises also were purchased for Rs. 24,000 by him. The final decree was passed on 3rd January 1911 by which the Administrator-General was to retain and enjoy for his share the shop premises for Rs. 24,000 and the good-will of Somu Mudali's business for Rs. 29,000. Dasai Goundan was also directed to pay to the plaintiff therein the sum of Rs. 28,114-15-0 which was reduced in appeal to Rs. 24,268-0-0. Shortly afterwards, *i.e.*,

on 4th February 1911, a partnership was entered into between Alamelu, the 1st defendant, and three persons who are not parties to the suit for carrying on the business. The three others were awarded 3/16th share each. In order to carry on the business Alamelu obtained from the Administrator-General (Exhibit O) a sum of Rs. 12,000. She also raised by mortgage (Exhibit P) from one Srinivasa Rao another sum of Rs. 12,000 and the evidence in the case is that Rs. 9,000 only out of this mortgage amount of Rs. 12,000 was put into the business. Since that time Somu Mudali's business was continued to be carried on by Alamelu and the three persons who were admitted into partnership by her under Exhibit N. She aslo raised certain other debts. The suit is now brought by the plaintiff to declare that mortgage to Srinivasa Rao and certain other alienations which are referred to in the plaint are not binding on them, for the appointment of a Receiver to take possession of Somu Mudali's estate and manage the same and for an injunction to restrain the 1st defendant from receiving any money or property from the Administrator-General or from otherwise realizing the assets of the estate.

The 1st issue has reference to the purchase of the suit business on behalf of 1st defendant. It is contended by Mr. Chamier that the suit business was not really purchased by him, but according to him the Court only directed that the properties should be put up to auction between the parties only for the purpose of ascertaining the value so that the same might be set apart for the share of that partner who was the higher bidder. Mr. Ramaswami Aiyar contends that this was not so but that there was really sale to the Administrator-General. As a fact it appears that there was no sale, no sale certificate issued, but there was a direction by the decree (Exhibit M) that the properties should be treated as having been set apart to the Administrator-General for his share. But there was undoubtedly a transfer of interest effected by the decree or otherwise. For the purposes of this suit it is unnecessary to decide whether there was a real sale, because there can be little doubt that the decree certainly contemplated that the business was to be carried on for the benefit of the estate. If it was intended otherwise, appropriate directions might have been given in the decree. I am not prepared to say, therefore, that the carrying on of the business was an act of waste on the part of the 1st defendant, the widow. She was entitled to rely upon the Administrator-General who was the legal owner of the property acting under statutory authority and under the decree of the Court.

We then come to her conduct in taking three other persons as partners. Now, this is *prima facie* an act detrimental to the reversion. The Rs. 29,000 which was represented by the good-will formed the property of the deceased male-owner which would go to his heirs after the death of the widow. Exhibit N, the deed of partnership, undoubtedly alienated 9/16ths share of it to three other persons. Nor can I hold that such alienation was necessary in the interests of the business. The three new partners were clerks getting Rs. 13, 15 and 17, respectively, in the same business before. Their present remuneration would come to about Rs. 150 a month. Two of them, Parasuvama Chetti and Raghavachari, are witnesses in the case, and I am satisfied that they are not persons whose services it was necessary for the 1st defendant to secure to carry on the business. If eventually it turns out that the 1st defendant's share in the business (7/16ths) alone is worth Rs. 29,000 on account of the increased value of the good-will, it may well be that the reversioners have no just ground of complaint. On that question, however, I give no opinion because the evidence in the case does not enable me to decide whether the business now has prospered to that extent as would make her share alone represent that value. Therefore, I must hold that this was certainly an act detrimental to the reversion.

Then the next question is whether she has been carrying on the business in a way which will not be prejudicial to the interests of the reversioners. Now it is conceded that when the deed of partnership was entered into it was intended that the business should be supervised on behalf of the 1st defendant by two persons, one Rajavelu and one Rangaswami. All that she is alleged to have done

was to receive the letters and the money orders in her houses. Everything was done by the partners and by these two persons, Rajavelu and Rangaswami. There was no real supervision by her. The fact that she felt herself under the necessity of appointing two persons to look after her interests in the business is proof of her own incapacity or disinclination, and from the way in which the business was being carried on, according to Raghavachari, it is clear that she had no control over it. This will appear from the way in which the accounts were kept.

Mr. Ramaswami Aiyar objected to the reception of the accounts in evidence on the ground that they were not disclosed in the affidavit. There is no doubt that they should have been. It also appears that inspection was not allowed. The reason given by Counsel was that these documents were not in the possession or power of 1st defendant as there were other partners in the case. But this reason is shown to be unfounded by the admission of Raghavachari who produced them. He admitted that it was he who gave instructions for the preparation of the written statement and there is no doubt whatever that these accounts could and should have been produced early for the inspection of the other side and I have little doubt that the accounts were kept back because they were being written up. Raghavachari admits that the old ledger was entirely unreliable and he, therefore, began to prepare these accounts in January 1912, *i. e.*, shortly before the suit was brought, and they were completed only after the suit was filed. They are not in accordance with the old accounts. In those accounts the entries stood in the names of persons whose names are now omitted and those items are entered under other names. He admits that he is the only man who knows the accounts. This alone is enough to justify the plaintiff's prayer for the appointment of a Receiver. Even Raghavachari was not able to trace many entries which he says must have been made. Interest has been paid on debts, but there is no head of interest and it is impossible to find out from the accounts when it was paid and what amount was paid. Many entries have been shown to be misleading, *e. g.*, a certain sum of Rs. 600 is entered in the accounts as having been drawn on 28th February 1911, but as a fact there was no such amount drawn by the 1st defendant. And after a long and confused statement by Raghavachari, I have not been able even now to understand his explanation if there was one. There are some entries which are also false. I shall refer at present to only one. The capital amount in the name of Alamelu is entered as Rs. 24,000. This is intended obviously to show that she put the Rs. 12,000 received from the Administrator-General and the Rs. 12,000 received from Srinivasa Rao into the business. But in the letter which was written in reply to the notice it is said that the capital was only Rs. 21,000 and it is now conceded that, as a fact, only Rs. 21,000 was paid by her. The accounts now produced were prepared after the despatch of that letter and the old account showing a capital of Rs. 21,000 is suppressed. I, therefore, reject these accounts as not having been proved kept in the ordinary course of the business and unreliable.

After my finding on these questions, I am bound to appoint a Receiver in the interests of the reversion. It was contended by Mr. Devadoss that there is no proof in the case that the business is being carried on at a loss and that the defendants would be prejudiced. But if there are no proper accounts kept of the business there is no guarantee that it is honestly carried on.

Two other questions have been raised in the case, whether the shop premises and the business are still vested in the Administrator-General. With reference to the business Exhibits D, N, W, AA and S show clearly that he maintained and that he himself is the owner of the business. The date of Exhibit S is 10th April 1911. On 9th May 1911, however, he said, "I have nothing to do with the business." Mr. Chamier now states that from the latter date he must be taken to have handed it over entirely to 1st defendant and that he was in no way interested in it from that date. The question does not now arise for determination. It may become necessary possibly to decide it if the business proves a losing concern and the plaintiff is prejudiced thereby, because even if Raghavachari and his colleagues are not in law partners on account of the business being vested in

the Administrator-General they are partners in the interest which undoubtedly belongs to Alamelu Ammal and I do not propose, therefore, to give any opinion on this question. There is also the further question raised whether the shop premises is still vested in the Administrator-General. I am inclined to think that he has not parted with his interest in this.

It is also unnecessary now to decide whether Srinivasa Rao's debt is binding on the reversioners or not. A portion of the debt, it is said, has already been discharged and if the rest of the debt is paid off out of the income of the property which would belong to 1st defendant, the reversioners will not be prejudiced. It was also argued before me that the amount paid by the Administrator-General to the 1st defendant was her separate property as it represented the income which accrued due after the death of Somu Mudali. I do not feel called upon to decide this question either, which will only arise if it is found that, either on the dissolution of partnership or on the 1st defendant's death when the reversioners become entitled to the property, the business is worth less than the sum of Rs. 29,000.

Another question that has been argued before me is whether item No. 3 house belongs to the 2nd defendant or to the estate of Somu Mudali. There is no doubt that the purchase-money was advanced by Somu Mudali. He afterwards took a deed of release from his son (Exhibit 26) and it was mortgaged by him and his wife. If the property were taken in the name of the son alone the presumption might be that it was a *benami* purchase. But in the absence of some explanation to account for his taking it in the names of his wife and his son I am unable to hold that his wife had no interest in the property. *Prima facie* he intended it for both of them and I accordingly hold that the 2nd defendant and afterwards her representative, the 5th defendant, is entitled to a moiety.

The plaintiff's costs including the costs he has to pay to the 5th defendant will be paid by the Receiver out of the estate. The Administrator-General will be paid costs, Rs. 1,000, out of the funds in his hands. The plaintiff will pay the costs of the 5th defendant.

I appoint Mr. Somasundram Pillai as Receiver and manager of the estate of the 1st defendant and Somu Mudali. I direct payment of Rs. 200 to the 1st defendant. The Receiver may appoint a manager pending the submission of the report before the vacation about the business and mode of carrying it on when further orders will be passed. Receiver's remuneration and security reserved. The Receiver to enter upon his duties at once.

ALLAHABAD HIGH COURT.

LETTERS PATENT CIVIL APPEAL NO. 94 OF 1913.

February 27, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Banerji.

JAMNA DAS AND OTHERS—DEFENDANTS—APPELLANTS

versus

UMA SHANKER AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 41—Ostensible owner—Finding of fact—Second appeal

A manager on behalf of others cannot be treated as its ostensible owner within the meaning of section 41 of the Transfer of Property Act.

Appeal under section 10 of the Letters Patent from the following judgment of Mr. Justice Lyle, reversing a decree of the Second Additional Judge of Meerut, who modified a decree of the Second Additional Munsif.

JUDGMENT.—This is a suit on a simple mortgage executed on 13th November 1907 by Lal Muhammad. The suit is defended by the mortgagees under a second mortgage of the same property executed by Lal Muhammad and his wife, Zahuran, in February 1908. Money was left with the mortgagees under this deed to pay off the prior mortgage in suit, but the mortgagees did not pay it but brought a suit on their mortgage without impleading the plaintiff, the prior mortgagee.

The Court of first instance decreed the suit holding that Lal Muhammad was the *de facto* owner of the property and that even if he was not, section 41 of the Transfer of Property Act applied.

JAMNA DAS *v.* UMA SHANKER.

The lower Appellate Court reversed the decree on the ground that the real owners of the property were not Lal Muhammad but his father-in-law, Muhammad Bakhsh, and after him his wife, Zahuran, and that section 41 did not apply. The plaintiff comes here in second appeal. As regards the first point, *viz.*, who was the real owner of the property, I prefer the finding of the Court of first instance. Muhammad Bakhsh, Zahuran and Lal Muhammad had none of them originally any real title to the property. They were trespassers but acquired a right by more than twelve years' adverse possession. Muhammad Bakhsh held the property for many years, he took Zahuran, his daughter, and Lal Muhammad, her husband, to live with him and long after his death these two lived in the house. I think it might very fairly be argued that they were in adverse possession jointly after the death of Muhammad Bakhsh. I do not, however, think it is necessary to discuss the question, as, in my opinion, section 41 of the Transfer of Property Act clearly applies.

The lower Appellate Court is of opinion that in realizing rents, etc., Lal Muhammad did not act as owner of the house but merely acted as agent for his wife and that the least inquiry would have made the plaintiff aware of the real facts. I am unable to agree with this view.

The original rightful owner of the house sued Lal Muhammad for possession. I cannot find any of the papers relating to that suit in the record, but it is not denied that Lal Muhammad defended that suit and was found to be entitled to it owing to the adverse possession for more than twelve years. He may have raised the plea that his wife was the real owner, but it does not appear that he was exempted from the suit.

The fact that the rightful owner brought the suit against Lal Muhammad shows pretty clearly that he was regarded by the public as the ostensible owner.

Lal Muhammad alone executed the deed in suit and no sort of objection was raised by Zahuran. In the deed executed in favour of the respondent even she does not repudiate the loan but professes to leave money with the mortgagees for its satisfaction, though it seems very doubtful whether she ever intended that it should be satisfied.

I do not agree with the lower Appellate Court that plaintiff could have easily ascertained the true facts had he cared to inquire. Lal Muhammad was in possession of the house dealing with it as owner; he had been sued by the person originally entitled to it and had won the case. Was the plaintiff bound to push the inquiries as to what happened years before that and to ascertain whether it was Muhammad Bakhsh or Lal Muhammad who originally obtained adverse possession? I think not. It is not disputed that the respondents claim through Zahuran and that if she is bound by section 41 they are bound also.

In my opinion the plaintiff is entitled to a mortgage decree and, I, therefore, set aside the decree of the lower Appellate Court and restore that of the Court of first instance. The plaintiff does not now wish to put to sale more than one-third of the property and the decree will, therefore, relate to that share only.

The plaintiff will receive costs in all Courts. The appellant undertakes to make good the deficiency in Court-fees and that amount will be added to the costs.

Mr. *M. L. Agarwala*, for the Appellants.
Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit on foot of a mortgage executed by one Lal Muhammad on the 13th of November 1907. The suit was defended by persons who claimed under a mortgage made in 1908 by Lal Muhammad and his wife, Zahuran. They allege that Lal Muhammad had no interest in the property. The facts are practically admitted. One Muhammad Bakhsh entered into possession of the property adversely to the real owner. He had a daughter of the name of Zahuran, who married Lal Muhammad. These persons and probably other members of the family of Muhammad Bakhsh continued in possession of the property until Muhammad Bakhsh died. After his death Lal Muhammad and his wife, *Musammat* Zahuran, continued in possession. No doubt the property was managed by Lal Muhammad after the death of his father-in-law. In the mortgage in favour of the defendant it is stated that the property was inherited by *Musammat* Zahuran from her father. There is also a statement that the executant No. 2 was in pro-

prietary possession. Whether this was a mistake or not is not very clear, but the two statements are not consistent. The lower Appellate Court found that Lal Muhammad was only managing the property on behalf of his wife. Furthermore, that had the plaintiff made the least inquiry he would have found that Lal Muhammad had no title whatever. We may mention here one more fact connected with the mortgage in favour of the defendants. In the mortgage-deed the mortgage now sued upon was mentioned and it was also mentioned that money was left in the hands of the mortgagee to pay off the amount of that mortgage. The defendants-appellants who were subsequent mortgagees did not pay off the amount of the mortgage for the following reason. A suit was brought by a son of Muhammad Bakhsh, and he obtained a decree for two-thirds of the property. They considered that under these circumstances they were not bound to pay off the mortgages but gave credit for the amount against their own mortgage and sued to realise the balance which they had actually advanced. Under these circumstances the lower Appellate Court dismissed the suit as against the mortgaged property but gave a simple money-decree against Lal Muhammad. On appeal to this Court a learned Judge reversed the decree of the lower Appellate Court and restored the decree of the Court of first instance which had given a decree for the sale of the mortgaged property.

In our opinion the decree of the lower Appellate Court must be restored. We consider that under the circumstances of the present case the property must be deemed to have become the property of Muhammad Bakhsh and after his death passed to his heirs. Lal Muhammad had no title of any kind. The suggestion whether Lal Muhammad was the ostensible owner of the property with the consent, express or implied, of the heirs of Muhammad Bakhsh, and the further question whether the plaintiff in the present case *bona fide* took the transfer after taking reasonable care to ascertain the title of Lal Muhammad, were questions of fact to be decided by the lower Appellate Court. This Court is bound by the findings of fact of the lower Appellate Court in second appeal and cannot go behind them whether it approves of the finding or not. We must, therefore, take it that Lal Muhammad was not the ostensible owner within the meaning of section 41 of the Transfer of Property Act. We have already stated that, in our opinion, as a matter of law, he had acquired no interest in the property by reason of the fact that he had lived with his father-in-law, Muhammad Bakhsh. This being so, no interest of any kind passed to the plaintiff under the mortgage of the 13th of November 1907, and his suit so far as it sought a sale of the mortgaged property was rightly dismissed. We allow the appeal, set aside the decree of this Court and restore the decree of the lower Appellate Court with costs of both hearings in this Court.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 2 OF 1914.

March 16, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C.

GIRDHARI LAL—JUDGMENT-DEBTOR—APPELLANT

versus

DAMODAR DAS—DECREE-HOLDER—RESPONDENT.

Execution of decree—Application, suspension or postponement of, by an order—Application for continuation of suspended proceeding—Execution proceeding struck off by an order, effect of.

An application which is in substance an application made with the object of moving the Court in the matter of a former application which has been postponed, suspended or otherwise stayed by reason of some order, is an application to continue the suspended proceeding from the point where it was stayed and may be made at any time within three years from the date when the right to apply accrued, that is, when the order for postponement, suspension or stay was withdrawn or became inoperative, even though the execution proceeding may have been struck off by that order.

Qamaruddin Ahmad v. *Jawahir Lal*, 27 A. 334; 9 C. W. N. 691; 2 A. L. J. 397; 1 C. L. J. 381; 7 Bom. L. R. 433; 15 M. L. J. 258; 32 I. A. 102; *Chalaradi Kothah* v. *Pyloori Alimelammah*, 31 M. 71; 18 M. L. J. 46; 3 M. L. T. 329; *Subba Chariar* v. *Muthuveeran Pillai*, 14 Ind. Cas. 264; 24 M. L. J. 545; 36 M. 553; *Baij Nauth Prosad* v. *Ghanshyam Dass*, 8 C. W. N. 382, referred to.

Appeal against the order of the District Judge, Lucknow, dated 29th August 1913, upholding that of the Additional Munsif, Lucknow, dated 24th May 1913.

GIRDHARI LAL *v.* DAMODAR DAS.

Pandit *Tara Shankar*, for the Appellant.

Babus *Salig Ram* and *Ajit Prasad*, for the Respondent.

JUDGMENT.—The question for consideration in this appeal is whether the application for execution filed by the decree-holder-respondent on the 10th September 1912, for the attachment of certain moveable property of the judgment-debtor-respondent in further execution of his decree against the latter, was barred by limitation. The previous application for execution was made on the 31st August 1906, and asked for the sale of certain immoveable property. The sale took place on the 5th September 1907, and was confirmed on the 23rd October 1907. The decree-holder was himself the auction-purchaser. Two other persons, who held decrees against the same judgment-debtor, had meanwhile applied for a rateable distribution of the sale-proceeds to the Court in which the execution was proceeding. On the 23rd October 1907, immediately after the confirmation of the sale, the Court struck off the execution case from the file with a direction to the office to put up a report in regard to the rateable distribution of the sale-proceeds on the 14th November 1907. On that date the office submitted a report, which was ordered to be put up in the presence of the decree-holders, who had applied for rateable distribution, on the 3rd December 1907. The rateable distribution was, however, suspended on the 2nd December 1907 on an application of the present decree-holder respondent by the Court on the ground that *Musammat* Janki Bibi had got the property sold re-attached in execution of her decree against Gopal Das, a third party, and that the decree-holder-respondent had filed a regular suit to get it declared that the said property was not liable to sale in execution of her decree. That suit was instituted on the 2nd December 1907, and was dismissed by the Court of first instance but ultimately decreed by the District Judge of Lucknow on appeal on the 10th September 1909, whose decree was confirmed by this Court on the 4th August 1913 [vide *Janki Bibi* v. *Bisheshar Nath* (1)]. On the 25th February 1911, an application was made by the decree-holder-respondent for the resumption of the rateable distribution. The distribution was then effected on the 11th March 1911, and the amount allotted to the decree of the decree-holder-respondent was withdrawn by him by an application made on the 22nd February 1913.

The present application for execution is beyond time from the date of the previous application for execution and also from the date on which that application for execution was struck off without a rateable distribution of the sale-proceeds. But the proper course for the Court was to have made a rateable distribution of the sale-proceeds among the persons entitled to receive the same and to have declared the portion which was to be applied in satisfaction of the decree in execution of which the sale was held before striking the case off from the file. In *Qamar-ud-din Ahmad* v. *Jawahir Lal* (2) where an application was made for execution of a decree in 1888 which was granted and execution, was allowed to proceed, and in 1889 it was ordered that the case be struck off the file and the record transferred to the Court of the Collector for execution, but no papers were actually sent to him in consequence of the failure of the decree-holder to make a deposit of certain costs, it was held by their Lordships of the Privy Council that, as the order granting the application for execution was the subject of an appeal filed by the judgment-debtor, which was not finally decided till 1894, an application for execution made in 1897 within three years from the date of the final decision was one to revive and carry through the pending execution suspended by no act or default of the decree-holder, and not an application to initiate a new one, and was not, therefore, barred by limitation. It does not appear from the report that order for stay had been passed in that case. In *Chalavadi Kotiah* v. *Polomi Alimelammah* (3) Miller and Munro, JJ., held that where a bar to execution proceedings was removed by the order of a lower Court, the fact that an appeal was preferred against such order would not, when execution was not stayed in consequence of such appeal, prevent limitation from running against the execution-creditor until the disposal of the appeal At the same time they observed that the dismissal of an execution petition without notice to the parties and without

(1) 7 Ind. Cas. 614; 13 O. C. 265.

(2) 27 A. 334; 1 C. L. J. 381; 15 M. L. J. 258; 9 C. W. N. 601; 2 A. L. J. 397; 7 Bom. L. R. 433; 32 I. A. 102

(3) 31 M. 71; 18 M. L. J. 46; 3 M. L. T. 328.

removing the attachment made thereunder was a mere direction to the officers of the Court to remove the application from the pending file, that the execution proceedings were not closed thereby and must be considered pending and that the right of the decree-holder to apply for their continuance accrued from day to day and would not be barred till three years had elapsed after such proceedings ceased to be pending. The same principle was laid down in *Subba Chariar* v. *Muthuveeram Pillai* (4). In *Brij Nauth Prosad* v. *Ghanshyam Dass* (5) where on an application made by the decree-holder an order for rateable distribution was made without fixing the amounts due to the several decree-holders, and then on a later date one of the decree-holders applied for an order to withdraw the money to which he was entitled upon such distribution, it was held that such an application was one to take some step-in-aid of execution and saved limitation.

It is obvious from the order of the 23rd October 1907, that what was intended was a postponement of the proceedings in execution till the office had prepared a statement in regard to rateable distribution of the sale-proceeds and that there was no final disposal of the application for execution till the distribution of the sale-proceeds was made on the 11th March 1911. It is immaterial on whose application or on what grounds the distribution was suspended on the 25th February 1911. The decree-holder applied for the resumption of the proceedings. That application was to all intents and purposes made in a pending execution proceeding which was not finally disposed of and affords a fresh starting ground for the computation of time. The present application for execution was made within three years from that date. An application, which is in substance an application made with the object of moving the Court in the matter of a former application which has been postponed, suspended or otherwise stayed by reason of some order, is an application to continue the suspended proceeding from the point where it was stayed and may be made at any time within three years from the date when the right to apply accrued, that is, when the order for postponement, suspension or stay was withdrawn or became inoperative, even though the execution proceeding may have been struck off by that order. No question of limitation can arise where an execution case is pending or has been merely postponed. The order striking off the execution case in the present instance was ineffective in view of the fact that by the same order the office was directed to put up a report in regard to the allotment of the sale-proceeds and no allotment was actually made till the 11th March 1911, *qua* the allotment, which was an essential part of the execution. The case was till then undisposed of.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(4) 14 Ind. Cas. 261; 36 M. 553; 24 M. L. J. 45.
(5) 8 C. W. N. 382.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 194 OF 1913.

February 17, 1914.

Present:—Mr. Justice Ryves and Mr. Justice Piggott.

ABDUL RAHIM KHAN—PETITIONER—APPELLANT

versus

AHMAD KHAN—OPPOSITE PARTY—RESPONDENT.

U. P. Land Revenue Act (III of 1901), s. 32 (d)—Land held revenue-free, whether part of mahal *—Finding—Second appeal.*

Section 32 (*d*) of the Land Revenue Act shows that there may be in a *mahal* persons holding land revenue-free and the land so held yet forms part of the *mahal*. Where the Government holds a land revenue-free in a *mahal* the land thereby does not cease to be a part of the *mahal*.

The finding of the lower Appellate Court that as a plot of land was held revenue-free by the Government it ceased to be a part of the *mahal*, is a mixed finding of fact and law and can be interefered with in second appeal.

First appeal from an order of the District Judge of Saharanpur, dated 21st July 1913.

Mr. *B. E. O'Conor* (with him Mr. *Nihal Chand*), for the Appellant.

Mr. *Muhammad Ishaq* (with him the Hon'ble Dr. *Sundar Lal*), for the Respondent.

JUDGMENT.—This case was remanded by this Court for a decision of the issue as to whether the land in dispute formed part of the *Mahal* Raipur. The learned Munsif on

NGA NYUN *v.* NGA PO O.

the evidence before him came to the conclusion that it did. He found on the evidence of the *Patwari* that the plot in question was entered in the Record of Rights as a part of the *abadi* and that it had a particular number in the *khasra*. It also found that the Government had other portions of land in the same *mahal*. On appeal the learned Judge says:—"It is obvious that the Government when it was owner of the plot held it revenue-free. In other words this plot became Government property and it ceased to be a part of *Mahal* Raipur." It has been argued that this is a finding of fact which is binding on us. In our opinion it is not a finding of fact, but is a mixed finding of fact and law. We think that the learned Judge is not right in saying that the fact that the Government was owner of this plot at one time and held it revenue-free is the same thing as that the property ceased to be a part of the *mahal*. Section 32, clause (*d*), of the Land Revenue Act shows that there may be in the *mahal* persons holding land revenue-free and the land so held yet forms part of the *mahal*. In our opinion the finding of the District Judge is vitiated by his erroneous view of law. We allow this appeal, set aside the order of the learned District Judge and restore the decree of the Court of first instance with costs in all Courts.

Appeal allowed.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS CASE No. 28 OF 1913.

February 6, 1914.

Present:—Sir George W. Shaw, Kt., J. C.

NGA NYUN AND OTHERS—APPLICANTS

versus

NGA PO O—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. III, r. 2—Special Powers-of-Attorney—Evasion of law relating to appointment of Pleaders and Advocates—Upper Burma Civil Courts Regulation I of 1896, ss. 25, 26.

Where an ex-petition-writer and ex-apprentice clerk made a business of appearing for parties under cover of special powers-of-attorney and thus practically performed the functions of an Advocate and thereby evaded the provisions of the law relating to the appointment of Advocates and Pleaders:

Held, that he made himself liable to punishment under section 26 of the Upper Burma Civil Courts Regulation.

Held, further, that the provisions of Order III, rule 2, could not enable an unqualified person to practise as an Advocate in spite of the provisions of section 25 *seq.* Upper Burma Civil Courts Regulation.

Tussuluq Hosain v. *Girhar Narayan*, 14 C. 556, followed.

Mr. *S. Vasudevan*, for the Applicants.

Mr. *S. Mukerjee*, for the Respondent.

ORDER.—This is a case of an unusual character and of considerable importance. The applicants are Pleaders practising at Kawlin in the Katha District. They complained to the District Judge that the respondent, an ex-petition-writer and ex-apprentice clerk, under cover of special powers-of-attorney was appearing for parties in cases in the Township Court and practising as an Advocate. They stated that he sat at the Advocates' table and examined and cross-examined witnesses, and cited legal authorities to the Judge, and that the parties were not only resident in Kawlin but also present in Court. The District Judge refused to interfere on the ground that Order III, rule 2, no longer laid any restrictions on the appointment of Attorneys as recognised agents as section 37 of the Civil Procedure Code of 1882 had done.

The District Judge was, of course, perfectly right in saying that Order III, rule 2, no longer imposes any restrictions on the appointment of Attorneys to represent parties, but I think he overlooked the fact that Order III, rule 2, does not authorise a person to make a business of appearing as an Attorney for parties in cases and by means of special powers-of-attorney to evade the provisions of the law relating to the appointment of Advocates and Pleaders. I think that the allegations of the applicants called for inquiry. If the respondent was making a business of appearing as an Attorney for parties and in effect performing the functions of an Advocate, I think that he would be liable to punishment under section 25 of the Upper Burma Civil Courts Regulation. The case of *Tussuluq Hosain* v. *Girhar Narain* (1) which has been referred to on behalf of the applicants furnishes, I think, authority for this view. It was there held by a Full Bench

(1) 14 C. 556.

of the Calcutta High Court that "If any person other than a duly certificated and enrolled *muktear* constantly and as a means of livelihood performs any of the functions of a *muktear*, he practises as *muktear*, and is liable to a penalty under section 31, Legal Practitioners Act." It would be absurd if the provisions of Order III, rule 2, should enable an unqualified person to practise as an Advocate in spite of the provisions of section 25 *seqq.*, Upper Burma Civil Courts Regulation. It appears to me that the question to be determined is one of fact, whether the respondent is evading the provisions of the sections just cited by taking special powers-of-attorney under Order III, rule 2.

I direct that the District Judge instruct the Judge of the Township Court to inquire with reference to section 26 of the Upper Burma Civil Courts Regulation whether the respondent has been, under cover of special powers-of-attorney, appearing, pleading or acting in contravention of the foregoing provisions of Chapter IV of the Civil Courts Regulation or the rules made thereunder, and if he finds that the respondent has done so, to impose a fine under the provisions of the section.

The District Judge is requested to report the result of the further proceedings and to submit the records at the same time.

The respondent will pay the applicants' costs in this application, two gold *mohurs*.

Further Report ordered.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEALS NOS. 61, 62 AND 63 OF 1913.

March 16, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C.

Musammat AHMADI BEGAM AND OTHERS—OBJECTORS—APPELLANTS

versus

RAJA UDIT NARAIN SINGH—DECREE-HOLDER AND MOHAMMAD IBRAHIM—JUDGMENT-DEBTOR—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 53—Fraudulent transfer—Preference given to one creditor over another, effect of—Data for determining intention of parties and nature of interest sought to be created.

The mere fact that preference has been given to one creditor over the other does not in itself render the transaction in favour of the preferred creditor voidable under section 53 of the Transfer of Property Act, provided that the transferee is innocent of the fraud intended by his debtor.

Suba Bibi v. *Balyobind Dass*, 8 A. 178; *Hakim Lal* v. *Mooshahar Sahu*, 34 C. 909; 6 C. L. J. 410; 11 C. W. N. 889, *Chidambaram Chettiar* v. *Simy Iyer*, 30 M. 6; 16 M. L. J. 427; 1 M. L. T. 351 and *Hanifa Bibi* v. *Punnamma*, 17 M. L. J. 11, referred to.

The motive with which a *benami* purchase is entered into, the position of the parties to the transaction and their relation to one another, the possession of the property concerned and of the title-deeds relating thereto, the source and adequacy of the purchase-money and the previous and subsequent conduct of the parties to the transaction afford valuable *data* for determining the intention of the parties and the nature of the interest, if any, sought to be created.

Moulvie Sayyad Uzhur Ali v. *Musammat Bebee Ulfat Fatima*, 13 M.I.A. 232 at p. 247; 20 Eng. Rep., 538; 13 W. R. (P. C.) 1; 4 B. L. R. (P. C.) 1; 2 Sar. P. C. J. 522, referred to.

Appeal against the order of the Subordinate Judge, Bara Banki, dated 11th September 1913.

Messrs. *Samiulla Beg* and *Muhamad Wasim*, Appellant.

Mr. *A. P. Sen* and Babu *Bisheshwar Nath*, for the for the Respondent.

JUDGMENT.—Mohammad Ibrahim was the agent of Raja Udit Narayan Singh, *Talukdar* of Ram Nagar, who on the 31st August 1911 obtained a decree against him for certain items of account, alleged to have been wrongfully embezzled by him. In execution of that decree certain properties were attached, some of which are claimed by his sons, Mohammad Salim and Bande Hasan, his wife, *Musammat* Ahmadi, and his father-in-law, Raunaq Ali. Mohammad Salim and Bande Hasan claim to be the owners of the properties specified in their petition of objection by virtue of certain purchases and mortgages existing in their names, and a gift effected in respect of house No. 814 in their favour by Mohammad Ibrahim. *Musammat* Ahmadi claims certain properties under some purchases made by her from third persons and a gift made in her favour in regard to one of the properties in lieu of dower by her husband. Raunaq Ali similarly claims certain properties under a sale-deed executed in his favour by *Musammat* Phula Kunwar. All these claimants were parties to the suit filed by Raja Udit Narayan Singh against Mohammad Ibrahim. The claim was, however, dismissed against them at the time on the ground that the Raja had no

cause of action against them. One of the questions for consideration in these appeals is whether the decision in the previous suit operates as *res judicata* in the present proceedings. The other questions are whether Mohammad Ibrahim was the real and beneficial owner of the properties comprised in the said deeds of sale and mortgage, whether they were obtained by him in the names of the present claimants to defeat and delay his creditors, whether the consideration for the same was supplied by him or by the persons whose names were entered in the said deeds and whether the deeds of gift executed by him in favour of his sons and wife were fictitious and fraudulent and they were ever acted upon and enforced.

The learned Subordinate Judge found that Mohammad Ibrahim was the real and beneficial owner of the properties comprised in the deeds of sale and mortgage, that the deeds of gift executed by him in favour of his sons and wife were fictitious and fraudulent and that the claimants had no title to any of the properties attached.

It appears that Mohammad Ibrahim entered the service of Raja Udit Narayan Singh sometime in 1901 on a salary of Rs. 15 per mensem. The Raja subsequently gave an allowance of Rs. 5 for the education of his son, Mohammad Salim, who was then a minor. Mohammad Ibrahim was charged with the duty of collecting rents and receiving sums of money paid into Court in satisfaction of decrees obtained by the Ram Nagar Estate against tenants for arrears of rent. It is not clear from what date the misappropriation of moneys realized by Mohammad Ibrahim on account of the Raja commenced. The suit filed by the Raja related to items misppropriated as far back as the 16th September 1904, and the decree obtained by him covered embezzlements made between 1904 and 1910. On the 2nd February 1910, the Raja issued a *parwana* to Mohammad Ibrahim asking him to account for the compensation moneys received by him on account of some lands in *Mauzas* Karanpur and Suratganj, belonging to the Raja, which were acquired by the Government for Railway purposes. He sent no reply. On the 7th March 1910, the Raja issued a reminder, in reply to which Mohammad Ibrahim stated that Rs. 14,000 had already been given to Ram Narain. On the 17th May 1910, Mohammad Ibrahim served the Raja with a notice of his resignation, claiming at the same time that he had spent Rs. 5,071-7-6 from October 1909 to May 1910 on account of the Raja in excess of the receipts. On the 23rd May 1910, the Raja intimated his dismissal of Mohammad Ibrahim to the Deputy Commissioner of Barabanki. In the application made by him to the Deputy Commissioner he stated that his agent had embezzled moneys and that a separate action would be taken against him on that account afterwards.

The suit for the recovery of Rs. 19,809-8-3 on account of the items embezzled was filed on the 18th November 1910. Mohammad Ibrahim and his sons, Mohammad Salim and Bande Hasan, then minors, his wife, *Musammat* Ahmadi, and father-in-law, Raunaq Ali, were made defendants to that suit on the ground that certain items of immoveable property standing in the names of Mohammad Salim, Bande Hasan, *Musammat* Ahmadi and Raunaq Ali had been acquired by Mohammad Ibrahim in their names with funds belonging to the plaintiff. The relief asked in that case was that Mohammad Ibrahim should be called upon to render accounts of the items specified in the list annexed to the plaint and that a declaration should be granted that the conveyances standing in the names of Mohammad Salim, Bande Hasan, *Musammat* Ahmadi and Raunaq Ali had been obtained *ismfarzi* and that the sums paid for the properties under the conveyances in question were paid out of the money belonging to the plaintiff. The learned Subordinate Judge, who tried that case, held that there was no specific evidence on the record to prove that the properties standing in the names of the persons aforesaid had been acquired with funds belonging to the plaintiff, and, in the absence of evidences on that point, he was of opinion that the question whether the properties acquired by Mohammad Ibrahim either in his own name or in the names of his relations were liable to be taken in execution could not be determined in that suit. He decreed the claim accordingly against Mohammad Ibrahim for the recovery of the amount claimed and dismissed it against the other defendants, who now figure as appellants in these appeals.

The decision in the former suit does not obviously operate as *res judicata* in the present proceedings, because the question of title was not then decided. All that was decided was that the purchases were not made with the funds of the plaintiff. Whether they were made fraudulently to defeat the plaintiff with funds supplied by Mohammad Ibrahim, in the names of his relations, was then left undetermined. The attachment of properties standing in the names of the claimants has now brought that question to a head.

It is admitted by the parties that Mohammad Salim and Bande Hasan were minors when the deeds of sale and mortgage in issue were obtained in their names. The earliest transaction in question was a usufructuary mortgage-deed from Mendi Lal in favour of Bande Hasan on the 25th June 1906. Bande Hasan was then an infant. The mortgage was effected in lieu of Rs. 400 out of which Rs. 189 were paid before the Sub-Registrar by Mohammad Ibrahim and the balance was credited towards an earlier simple mortgage executed by Mendi Lal in favour of Bande Hasan. It is not shown that Bande Hasan had then any fund at his disposal from which the mortgage could have been obtained. It is suggested that Bande Hasan and his brother, Mohammad Salim, had inherited some money and ornaments from their mother and made some savings from the monthly allowance of Rs. 5, which the Raja was granting for the education of Mohammad Salim, but there is no satisfactory proof that the mother of Bande Hasan and Mohammad Salim had left any money or ornaments at the time of her death or that any ornaments were actually disposed of for that purpose. A deed of further charge in lieu of Rs. 50 was obtained from Mendi Lal in the name of Bande Hasan on the same date, the consideration of which was similarly paid by Mohammad Ibrahim before the Sub-Registrar. On the 25th June 1907, another usufructuary mortgage was obtained in the name of Bande Hasan from Ali Husain in lieu of Rs. 538-11 out of which Rs. 350 were left for payment to other creditors and Rs. 25 were stated to have been paid towards arrears of revenue and the remainder in advance. It is admitted that all cash payments were made by Mohammad Ibrahim and, in the absence of evidence to show that he had any funds belonging to his minor sons at his disposal, the title to the money so paid cannot but be attributed to him. On the 5th August 1907, a deed of further charge was similarly obtained in the name of Bande Hasan from Fida Ali in lieu of Rs. 61 out of which Rs. 10 were paid before the Sub-Registrar and Rs. 51 were stated to have been taken in advance. It was followed by a sale-deed of certain plots taken in the name of Bande Hasan on the 1st June 1909 in lieu of Rs. 400, the greater portion of which was credited towards some prior debts alleged to have been due by the vendor to Bande Hasan, and by two other deeds of sale taken similarly in the names of Mohammad Salim and Bande Hasan on the 5th July and 16th August 1910 in lieu of Rs. 1,920 and Rs. 900, respectively, the greater portion of which was similarly credited towards some prior debts due to the vendees. Mohammad Salim was, like Bande Hasan, a minor on the dates of these transactions, and I am not satisfied that the consideration of any of these sale-deeds was supplied by Bande Hasan or Mohammad Salim or that they were ever in possession of the properties comprised in those sales independently of Mohammad Ibrahim.

The deeds of sale obtained by *Musammat* Ahmadi and the conveyance standing in the name of her father, Raunaq Ali, are subsequent to the date on which the Raja wrote to Mohammad Ibrahim asking him to account for the moneys received by him as compensation from the Government on his behalf. The learned Counsel for the appellants admitted in the Court below that the transactions evidenced by the several sale-deeds on which the appellants relied were entered into by Mohammad Ibrahim because in some cases the beneficiaries under the deeds were minors and in other cases it was his own wife, a *pardanashin* lady, or her father, who was living in Hyderabad. There is no reliable evidence, however, that the considerations of those sale-deeds were paid by *Musammat* Ahmadi or Raunaq Ali. Raunaq Ali is a Pleader in Hyderabad and the statement of *Musammat* Ahmadi is that Raunaq Ali used to send her Rs. 25 per mensem from eight years

by way of a monthly allowance. It appears from the documentary evidence filed that Raunaq Ali himself mortgaged his property in favour of *Musammat* Ahmadi in lieu of Rs. 900 on the 11th April 1905, and that a suit was filed by Bhagwandin on the 25th April, 1910, for the recovery of some money due on a mortgage said to have been made by Raunaq Ali on the 4th January 1906. Raunq Ali was thus hardly in a position to grant a monthly allowance to his daughter or to purchase any property with his own money. Asghar Ali states that negotiations for the sale effected by him and his brother Nizam Ali and nephew Ghulam Dastgir in favour of *Musammat* Ahmadi on the 3rd February 1910, were made by Mohammad Ibrahim and that on his enquiring why he was getting the sale-deed executed in favour of his wife, Mohammad Ibrahim told him that it was to his advantage to do so. Ram Sahai similarly states that the mortgage-money left with *Musammat* Ahmadi by the vendors was paid to him by Mohammad Ibrahim, who told him that he had purchased the property from Ghulam Dastgir. Kanhji states that the consideration money was paid to the vendors by Mohammad Ibrahim and that it was Mohammad Ibrahim who had negotiated the sale. The other sale-deed in favour of *Musammat* Ahmadi was obtained on the 20th September 1910 from Haji Fazlu in lieu of Rs. 493, out of which Rs. 193 were paid before the Sub-Registrar and the balance was credited towards a prior possessory mortgage made by Haji Fazlu in favour of Mohammad Ibrahim. *Musammat* Ahmadi states that Mohammad Ibrahim had remitted that money in her favour and that she paid Rs. 193 to Haji Fazlu by pledging her ornaments, but there is no reliable evidence to corroborate her statement. The possession of the properties covered by these two sale-deeds is still held by Mohammad Ibrahim, who looks after the collections. There was a motive for Mohammad Ibrahim to get these sale-deeds effected in favour of his wife. Raunaq Ali has not come forward in the witness-box to state how he sent the money for the purchase made on his behalf by Mohammad Ibrahim on the 27th June 1910. The purchase was made in lieu of Rs. 3,000 out of which Rs. 1,400, left for a prior mortgagee, have admittedly not yet been paid and Rs. 1,093 were paid before the Sub-Registrar by Mohammad Ibrahim. It is stated on behalf of Raunaq Ali that that sum was paid partly from the compensation money received on account of lands acquired for railway purposes and partly from accumulated profits held by Sarfaraz Ahmad, who used to make realizations in Mauza Fatehpur on his behalf. But, considering the previous indebtedness of Raunaq Ali, it is hardly likely that any such accumulations could have really existed, and if they did exist there is no reason why Sarfaraz Ahmad did not go himself to the office of the Sub-Registrar to make the payment. Hazari Lal *Patwari* deposes that till November last Mohammad Ibrahim used to look after the property comprised in the sale-deed standing in the name of Raunaq Ali and that Mohammad Ibrahim used to demand accounts from the *lambardars* and asked him to prepare *goshwaras* to enable a suit to be filed for rendition of accounts. Dhondhe, a relation of *Musammat* Phula Kunwar, states that Har Dayal negotiated the sale on behalf of *Musammat* Phula Kunwar and that Mohammad Ibrahim said at the time of the execution of the sale-deed that he desired that the name of Raunaq Ali should be entered in the deed as he himself was in the service of the Raja and Raunaq Ali was his father-in-law.

I agree, therefore, with the Court below in holding that the deeds of sale and mortgage in question were obtained fictitiously and fraudulently by Momammad Ibrahim in the names of his sons, wife and father-in-law in the course of his employment to defeat the claim of his master whose moneys he was found to have been embezzling since at least 1904 and that the consideration of all those deeds was supplied by Mohammad Ibrahim himself.

There are, however, two deeds of gift relating to two adjoining houses belonging to Mohammad Ibrahim, one of which was executed by him in favour of his wife, *Musammat* Ahmadi, in lieu of dower on the 17th January 1909, and the other in favour of his sons on the 19th May 1910. It is proved by the evidence that a dower-debt of Rs. 1,000 was then due to *Musam-*

mat Ahmadi, who has been living in the house since the date of the gift. There is nothing to show that she was aware of the embezzlements said to have been made by her husband or of the decree which the Raja had obtained against him or was otherwise a party to the plot to defraud the Raja. In *Sheo Bibi* v. *Balgobind Das* (1) Straight and Brodhurst, JJ., held that a genuine sale made for good and valid consideration to one creditor, even if effected to delay and defeat another, apart from cases in which either insolvency or bankruptcy was involved, was not void, and that if a man owed another a real debt and in satisfaction thereof sold to his creditor an equivalent portion of his property, transferring it to the vendee and thereby extinguishing the debt, the transaction could not be assailed, though the effect of it was to give the selected creditor a preference. It is essential, however, that the transferee should be innocent of the fraud intended by his debtor, and if he is innocent the mere fact that preference has been given to one creditor over the other, does not in itself render the transaction in favour of the preferred creditor voidable under section 53 of the Transfer of Property Act [*Hanifa Bibi* v. *Punnamma* (2), *Hakim Lal* v. *Mooshahar Sahu* (3) and *Chidambaram Chettiar* v. *Sami Aiyar* (4).]

The protection afforded to *bona fide* transferees for value cannot, however, be extended to gratuitous transferees, who obtain property in fraud of the creditors. Section 53 of the Transfer of Property Act declares that where the effect of a transfer of immoveable property is to defraud, defeat or delay the creditors of the transferor and such transfer is made gratuitously the transfer is presumed to have been made with such intention as aforesaid. The deed of gift in favour of the sons was executed by Mohammad Ibrahim after his resignation or dismissal. The property comprised in the deed of gift is worth Rs. 1,000. The object of Mohammad Ibrahim in executing the deed of gift in favour of his minor sons obviously was to withdraw the property from the grip of his creditors.

It has been argued by the learned Counsel for the appellant that the object of Mohammad Ibrahim in getting sales and mortgages effected in favour of his sons in any event was to vest the beneficial interest in the same in his sons, but as observed by their Lordships of the Privy Council in *Moulvie Sayyud Uzhur Ali* v. *Mussumat Bebee Ulfat Fatima* (5), the criterion in such cases is to consider from what source the purchase-money came, and there is no presumption that a purchase made with the money of one person in the name of another was for the benefit of that other, or that from a purchase made by a father in the name of his son a presumption could be drawn that it was for the benefit of, or for the advancement of, that son. The motive with which a *benami* purchase is entered into, the position of the parties to the transaction and their relation to one another, the possession of the property concerned and of the title-deeds thereof, the source and adequacy of the purchase-money and the previous and subsequent conduct of the parties to the transaction afford valuable *data* for determining the intention of the parties and the nature of the interest, if any, sought to be created. The circumstances of this case and the evidence adduced clearly indicate a systematic attempt to invest all moneys, whether lawfully or unlawfully acquired, in the names of minor sons, wife and other relations so that in any event the property so acquired may be safe and beyond the reach of creditors, though the method by which the money may have been obtained may have carried with it a liability to account for the same. The learned Subordinate Judge was fully justified in treating the transactions other than the gift made in lieu of dower as fraudulent and collusive, the real purchaser or mortgagee in each case having been Mohammad Ibrahim himself.

The appeals of Mohammad Salim, Bande Hasan and Raunaq Ali are, therefore, dismissed with costs. The appeal of *Musammat* Ahmadi is also dismissed except in regard to the house conveyed by the deed of gift, dated the 17th January 1909, which will be exempted from the sale. *Musammat* Ahmadi will get her costs in proportion to her

(1) 8 A. 178; A. W. N. (1886) 51.
(2) 17 M. L. J. 11.
(3) 34 C. 909; 6 C. L. J. 410; 11 C. W. N. 889.
(4) 30 M. 6; 16 M. L. J. 427; 1 M. L. T. 351.

(5) 13 M. I. A. 232 p. 247; 13 W. R. (P. C.) 1; 4 B. L. R. (P. C). 1; 2 Sar. P. C. J. 522; 20 Eng. Rep. 538.

success from the respondent, who will get his costs from her according to the result.

Appeals dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1291 OF 1913.

July 2, 1914.

Present:—Mr. Justice Sunder Lal.

HABIBULLAH AND OTHERS—DEFENDANTS—APPELLANTS

versus

KALYAN DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 14, 22—Grove land—Agricultural purposes—Succession—Jurisdiction.

Land held as a grove is not held for agricultural purposes, and as such the provisions of the Agra Tenancy Act do not apply and section 22 of the Act does not govern succession to such land and the Civil Courts have jurisdiction to entertain a suit relating to it.

Second appeal from the decision of the District Judge of Aligarh, dated the 9th June 1913.

Dr. *S. N. Sen*, for the Appellants.

Mr. *Benoy Kumar Mukerjee*, for the Respondents.

JUDGMENT.—This suit arises under the following circumstances. The defendants are *zemindars* of the village. On July 27th, 1877, their ancestors gave a plot of land, 5 *bighas* 13 *biswas* in area, to Devi Das and Man Singh for the purpose of planting a grove. The condition was that the vendees were to remain in possession of these plots, plant a grove and pay half the income by way of rent to the *zemindars*. Devi Das and Man Singh accordingly proceeded to plant the grove in question. They constructed a *pucca* well and a *piyaoo* (place where water for drinking is kept and supplied) and built a boundary-wall, and remained in possession of the land during their life-time. Some of the *zemindars* transferred a portion of their *zemindari* right in this plot by way of two mortgages to Devi Das and Man Singh. Devi Das and Man Singh, therefore, are now mortgagees of a portion of this grove. Devi Das died eleven years ago and Man Singh died about nine years before the suit. They were succeeded by their widows, both of whom are said to have died two years before the institution of the suit. Disputes arose as to mutation of names after the death of the widows. The plaintiffs, who are the nephews of Devi Das and Man Singh, claim possession by right of inheritance and the defendants *zemindars* claim that the grove in question passed over to them by reason of the widows having died without any heirs, and that, therefore, they were entitled to succeed under the Tenancy Act. The Revenue Courts maintained the plaintiffs in possession to the extent of the mortgagee interest of Devi Das and Man Singh and they maintained the *zemindars* in possession of the remainder. The plaintiffs have, therefore, now brought a suit for the recovery of possession of so much of the grove as is not in their possession and for Rs. 115 on account of damages for fruit and wood appropriated by the defendants. The defence to the suit is that it is not maintainable in the Civil Court, that Devi Das and Man Singh were agricultural tenants who had acquired rights of occupancy, that they have died without leaving any heir and the property, therefore, escheated to *zemindars*. There were also some minor defences as to the money portion of the claim. The Court below has decreed the claim for possession of the property and for Rs. 15 on account of damages. It has held that the claim was maintainable in the Civil Courts, that Devi Das and Man Singh were not agricultural tenants and that the plaintiffs were their heirs. Dr. Sen has urged that the grove held by Man Singh and Devi Das must be deemed to have been held by them for agricultural purposes and that, therefore, they were tenants within the meaning of that term as used in the Agra Tenancy Act and as the plaintiffs did not share in the cultivation of the holding at the time of the tenants' death, they were not entitled to succession under section 22 of the Tenancy Act. The first point, therefore, for consideration is whether Devi Das and Man Singh were agricultural tenants and whether they held the land for the purpose of agriculture within the meaning of the definition of that term in section 4 of the Agra Tenancy Act. Under that Act the term land means "land which is let or held for agricultural purposes." What is an agricultural purpose within the meaning of this definition has often been the subject of

controversy and the rulings of the Revenue Courts have, by no means, been uniform. In an American case the term "agriculture" is defined to be "the art or science of cultivating the ground specially in fields or large quantities including the preparation of the soil, the planting of seeds, the raising and harvesting of crops" [*Dillord* v. *Webb* (1)], and "using for an agricultural purpose" is defined in a recently published American Dictionary of Words and Phrases Judicially Defined as "the using of the soil for planting seeds and raising and harvesting of crops and the rearing, feeding and management of the life stock."

In this case it is clear that the land had not been given for the purpose of growing ordinary crops on the land. It had been given for the purpose of growing trees—both timber and fruit trees. The Board of Revenue in several cases has held that land given for the purpose of planting a grove was not granted for agricultural purposes. Those cases have been referred to in the judgment of the Court below. But in a more recent case the Board of Revenue has thrown doubt upon the point settled by the previous cases. In the Revenue Reports for the Provinces of Agra and Oudh, published by Munshi Banke Behary and Babu Nrit Behary Mathur, at page 70 of Part III, there is a judgment of Sir Leslie Porter and Mr. Darrah, holding that land on which stood a guava grove was land held for an agricultural purpose. In a more recent case decided by the Board of Revenue which is published in Part II of the same reports there is another decision of that tribunal distinguishing the case already cited by me. Mr. Reynolds at page 38 observes in that case as follows: "Now that ruling has given rise, I think, to a good deal of misconception and has been extended by the lower Courts beyond the original intention of the then members. It will be noticed that in that case a tenant of a guava grove was seeking to eject the sub-tenant to whom he had let it. A guava plantation is not a grove in the ordinary acceptation of the word, and the Board did not then and has not since fully considered the case when land is given to a tenant for the explicit purpose of planting a grove on it and the land maintains its character of grove land. Now the custom generally prevailing in these Provinces with regard to tenants' groves was laid down in Select Decision No. 1 of 1892 and it was then clearly decided that the grove-holder is a tenant paying rent. This decision was crystallized in the definition of rent and tenant given in section 4 (3) and (5) of the Tenancy Act. But groves are, in my opinion, equally clearly not 'land' as defined in section 4 (2). If they were 'land' within that definition, there would be no need to differentiate them from land (as the Act does) in the definition of 'rent' immediately following. The reason of this differentiation is, I think, clear when one recollects that, as a rule, under the custom of the country when a mango grove is cut down the land, on which it was, reverts to the *zemindar*. The grove-holder only owns the trees and has no rights as a rule in the lands after the trees have been cut, though so long as the trees exist he has a right of way over the land to get to his trees and a right to use the land for the purpose of gathering the fruits and tending the trees." Along with this view of the law expressed by the highest Revenue tribunal, I have to consider the recent decision of this Court on the point in the case of *Hadi Hasan Khan* v. *Pati Ram* (2). Griffin and Chamier, JJ., after considering the cases on the subject, came to the conclusion that land held as a grove whether on payment of rent or not is land held not for agricultural purposes, and the same view was given effect to by Knox, J., in a case which went up in appeal under the Letters Patent to their Lordships the Chief Justice and Mr. Justice Banerji. The case is that of *Muhammad Ismail Khan* v. *Mithu Lal* (3). The point arising in that case was whether the holder of a grove was competent to transfer his right to a third party. If land let for planting a grove be deemed to be let for agricultural purposes the holder of the grove becomes an occupancy tenant after the lapse of twelve years and he cannot have transferred his right. Both the Chief

(1) 55 Ala. 468.

(2) 13 Ind. Cas. 417; 11 A. L. J. 270; 35 A. 281.
(3) 17 Ind. Cas. 636; 11 A. L. J. 649.

Justice and Mr. Justice Knox were of opinion that the holder of a grove must be deemed to have a right to transfer the same. Mr. Justice Banerji was, however, unable to come to the same conclusion. But his judgment in a similar case in which he had come to the same conclusion was taken up in appeal under the Letters Patent before the Chief Justice and Mr. Justice Tudball and their Lordships overruled the contention that the rights of a grove-holder were not transferable. It is clear that the consensus of authority of cases decided in this Court as also those decided by the Board of Revenue is in favour of the view that land held as a grove is not held for "agricultural purposes." That being so, the provisions of the Agra Tenancy Act are not applicable. The Civil Court, therefore, had jurisdiction to entertain the case and the provisions of section 22 of the Agra Tenancy Act were inapplicable. The plaintiffs, as has been ruled by the Court below, are the heirs of Devi Das and Man Singh under the Hindu Law and their claim has been rightly decreed by the Court below. I dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1517 OF 1911.

January 21, 1914.

Present:—Justice Sir Asutosh Mookerji, KT., and Mr. Justice Beacheroft.

SASI BHUSAN DEY AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

UMAKANTO DEY AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 61, 62, Sch. III, Art. 2, cl. (a)—Deposit of rent—Suit for rent—Limitation—Contract, construction of—Terms plain—Oral evidence, whether admissible to vary terms—Bengal Tenancy Act (VIII of 1869), s. 46.

Where the terms of a contract are plain, the rights of the parties must clearly be determined upon the terms of the contract; oral evidence is not admissible to show that the parties really intended to enter into a contract different from that embodied in the instrument itself.

Afar alias *Godai Moral* v. *Surja Kumar Ghosh*, 7 Ind. Cas. 842; 12 C. L. J. 619; 15 C. W. N. 249, followed.

The provisions of sections 61 and 62 of the Bengal Tenancy Act, taken as a whole, support the view that the period of limitation prescribed by Article 2, clause (*a*), of Schedule III of the Act is applicable to a suit for rent wherever rent has been deposited under section 61, even though the allegation of the tenant that what he had deposited was the full amount due at the time may ultimately prove to be incorrect.

Sati Prasad Garga v. *Manmatha Nath Kar*, 18 Ind. Cas. 442; 18 C.W.N. 84, and *Sridhar Roy* v. *Rameswar Sing*, 15 C. 163, distinguished.

The omission from section 61, Bengal Tenancy Act, of the words "what he (the tenant) considers to be the full amount of rent due from him at the date of the tender" (section 46 of Act VIII of 1869 B. C.) and the substitution in lieu thereof of the words, "the full amount of the money then due," (section 61 of Bengal Tenancy Act, VIII of 1885) does not really indicate a change in the law, as the words omitted were superfluous.

Where the parties have agreed that upon failure to deliver the rent payable in kind a fixed sum would be paid in lieu thereof, the entire rent is payable in cash and the provisions of section 61, Bengal Tenancy Act, are applicable.

Quære.—Whether rent payable partly in cash and partly in kind where no money value is fixed can be deposited under section 61, Bengal Tenancy Act?

Appeal against the decree of the Sub-Judge, Khulna, dated 22nd March 1911, confirming that of the Munsif, Basirhat, dated 31st January 1910.

FACTS.—The material facts of the case will sufficiently appear from the judgment of the High Court.

The terms of the *kabuliat*, which is in *Bengali* and has been referred to in the judgment so far as they are relevant may be briefly given as follows.—

"* * * * rent is fixed at 3 *bis* 6 *cathis* of paddy and Rs. 9 in cash * * * * * We execute this *kabuliat* and agree to pay you year by year Rs. 9 in cash and a share of the produce *viz.*, 3 *bis* 6¼ *cathis* of paddy as the annual rent of the said land as per *kistbandi* mentioned below * * * * * in default of the paddy we shall pay Rs. 39 the price thereof, year by year, as per the said *kists* * * * * * * On or before (*lit* within) the 30th *Falgoon* we shall pay you the aforesaid paddy or in lieu thereof Rs. 39, the price of that paddy, and Rs. 9 rent in cash, in all Rs. 48 * * *."

The defendant in his defence raised two questions of law: (1) the plaintiff was not

entitled to the market value of the paddy undelivered but only to Rs. 39 as stated in the contract, (2) that the claim was barred in respect of the years 1312 to 1314 inasmuch as the suit was instituted on 14th April 1909 more than six months after the deposit was made under section 61 of Bengal Tenancy Act VIII of 1885 on 20th March 1908. Both the Courts below gave effect to these contentions of the defendant. In second appeal it was contended that the plaintiff was entitled to the market-value of the paddy and that the suit was not barred under Schedule III, Article 2, clause (*a*), of the Act which cannot be held to govern the present case as the deposit made under section 61 of the Act was not a valid deposit, not being the full amount due from the tenant and in this respect there has been a change in the law as it stood under section 46 of the old Act, VIII (B. C.) of 1869. This led to a construction of the sections 61 and 62 of the present Act in comparison with section 46 of the old Act.

Babu *Surendra Chandra Sen*, for the Appellants.

Babus *D. N. Chackravarti* and *Brojo Lal Chackravarti*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for recovery of arrears of rent for the years 1312 to 1315 (B. S.) on the basis of a contract of tenancy dated the 7th May 1877, under which the rent is payable partly in cash and partly in kind. The tenant undertook to pay Rs. 9 in cash and to deliver a specified quantity of paddy. The plaintiffs allege that rent has not been paid and seek to recover the cash rent as also the value of the paddy at the market rate thereof. The defendants resist the claim substantially on two grounds namely, *first*, that the plaintiffs were not entitled to the market-value of the paddy but only to Rs. 39 annually as stated in the contract of tenancy; and, *secondly*, that the claim was barred in respect of the years 1312 to 1314, inasmuch as the suit had been instituted on the 14th April 1909, more than six months after a deposit had been made in Court on the 20th March 1908 under section 61 of the Bengal Tenancy Act. The Courts below have given effect to these contentions of the defendants. On the present appeal, two points have been urged on behalf of the plaintiffs, namely, *first*, that they were entitled to the price of the paddy according to the market rate, and *secondly*, that the suit is not barred by limitation under Schedule III, Article 2, clause (*a*), of the Bengal Tenancy Act.

As regards the first point, the terms of the contract make it plain that there is no foundation for the contention of the appellants. The tenants agreed to pay Rs. 9 in cash and to deliver a specified quantity of paddy. The contract then provided that if the tenants did not deliver the paddy, they should, year by year, according to the instalments specified, pay Rs. 39 as the value of the paddy; in a subsequent part of the document it was stated that the tenants would pay Rs. 48 in all to the landlord namely, Rs. 9 in cash and Rs. 39 in lieu of the paddy, if it remained undelivered. It is plain that the parties contracted that if the paddy remained undelivered, the tenants would be liable to pay to the landlords a fixed sum of Rs. 39 as its value. Reference has been made to judicial decisions on this point, but the rights of the parties must clearly be determined upon the terms of the contract, and oral evidence is plainly not admissible to show that the parties really intended to enter into a contract different from what has been embodied in the instrument before us. The decisions to which reference has been made were all reviewed in the case of *Afar* alias *Godai Moral* v. *Surju Kumar Ghosh* (1) and that decision clearly is of no assistance to the appellants. The first point consequently fails.

As regards the second point, it has not been disputed that on the 20th March 1908 the tenants deposited in Court a sum of Rs. 249-10 under section 61 of the Bengal Tenancy Act, on the allegation that that was the full amount of money then due by them to the landlords. After this deposit had been made, a receipt was granted to them as provided in sub-section (1), section 62, and a notice was also served upon the landlords on the 2nd June 1908. The suit was not commenced till the 14th April 1909. The plaintiffs contend that as the amount of money deposited was less than the full amount of money actually due at the time, there was no valid deposit under section 61, and that, consequently, the period of limitation prescribed in Schedule III, Article 2, clause (*a*),

(1) 7 Ind. Cas. 842; 12 C. L. J. 649; 15 C. W. N. 249.

does not govern the case before us. In supporting this view, reliance has been placed upon the case of *Sati Prasad Garga* v. *Manmatha Nath Kar* (2). On behalf of the respondents, it has been argued that upon a true construction of section 61, it follows that notwithstanding the fact now established that the amount deposited was less than the full amount actually due, the period of limitation prescribed by Schedule III, Article 2, clause (*a*), is applicable. In support of this view, reliance has been placed upon the observation in the case of *Sridhar Roy* v. *Rameswar Sing* (3). The question raised is not free from difficulty, due mainly to the obscurity of the language of the legislative provisions on the subject.

Sub-section (1) of section 61 provides that in the four cases specified therein, the tenant may present to the Court having jurisdiction to entertain a suit for the rent of his tenure or holding an application in writing for permission to deposit in the Court the full amount of the money then due. Sub-section (2) provides that the application shall contain a statement of the grounds on which it is made and shall be signed and verified in the manner prescribed in Order IV, rule 13, of the Code of Civil Procedure. On behalf of the plaintiffs stress has been laid upon the words "the full amount of the money due" to support the argument that if it subsequently turns out that what has been deposited is less than the full amount due at the time of the deposit, the deposit, though made ostensibly under section 61, does not operate as a valid deposit. This view is supported to some extent by an observation in the case of *Sati Prasad Garga* v. *Manmatha Nath Kar* (2). In that case, the tenant had under section 61 deposited a sum which was ultimately proved to be much less than the amount really due. The landlord ignored the deposit and brought a suit for recovery of what he considered to be the whole amount due. The question, consequently, arose whether the tenant was liable to pay interest on the amount previously deposited, which the landlord had ignored and had not withdrawn from Court. This Court held that the landlord was entitled to claim interest upon this sum, on the ground that as the money was not all that was due and was not anything like what was due, the deposit was not a good deposit under section 61 of the Bengal Tenancy Act. As regards this statement, it must be observed, in the first place, that the point is assumed; and we have ascertained from the learned Vakil who argued that case on behalf of the appellant that the question of the true meaning of section 61 was not raised. In the second place, it cannot be overlooked that no reasons are assigned for the conclusion reached. In the third place, it is possible to hold, upon the special circumstances of that case, that there was no *bona fide* deposit under section 61 of the Bengal Tenancy Act, inasmuch as while a sum of more than Rs. 2,000 was actually due the tenant had deposited less than Rs. 1,000, and no suggestion appears to have been made that this was attributable to a *bona fide* dispute between the parties as to what was due at the time. In the fourth place, it is worthy of note that the earlier decision in *Sridhar Roy* v. *Rameswar Singh* (3) was not brought to the notice of the Court. Under these circumstances, we do not feel pressed by the observation in *Sati Prasad Gorga* v. *Manmatha Nath Kar* (2) upon which much reliance has been placed on behalf of the appellants. As regards the decision in *Sridhar Roy* v. *Rameswar Singh* (3) we may observe that although the observations contained therein assist the respondent, they must be regarded as *obiter dicta*. The question in controversy in that case was, whether the landlord was competent to intervene when an application had been made by a tenant for leave to make a deposit under section 61 of the Bengal Tenancy Act. The Court held that the Bengal Tenancy Act did not provide any machinery for the intervention of the landlord at that stage. This view was sufficient for the disposal of the case and it was not necessary to consider the effect of a deposit for a smaller amount than what was actually due. The position, consequently, is that the question raised before us must be treated as one of first impression and decided upon a construction of the language of the statutory provisions on the subject.

We have already referred to the words used in sub-section (1) of section 61, of which the most material are that "the full

(2) 18 Ind. Cas. 442: 18 C. W. N. 84.
(3) 15 C. 106.

amount of the money then due is to be deposited by the tenant." Had these words stood by themselves, the contention of the appellant would carry considerable weight. But the provisions of section 61 must be taken along with those of section 62. Sub-section 2 of section 62 provides that a receipt given under that section shall operate as an acquittance for the amount of rent payable by the tenant and deposited as aforesaid in the same manner and to the same extent as if the amount of rent had been received by the landlord or the person entitled to receive it. This provision has obviously an important bearing upon the question raised before us. The Legislature has provided that once a receipt has been given by the Court after a deposit has been made, the receipt operates as an acquittance, not for the whole amount due, but for the amount of rent payable by the tenant and deposited as aforesaid, in the same manner and to the same extent as if that amount of rent had been received by the landlord. The effect clearly is to make the amount deposited operate as a part payment of the sum actually due. Our attention has been drawn to section 43 of Act VIII of 1869 (B. C.), in which provision was made for the deposit of rent by tenants. It was laid down that a tenant might tender payment of what he considered to be the full amount of rent due from him on the date of the tender to his landlord, and if the tender was not accepted and a receipt in full not forthwith granted, the tenant was at liberty to deposit such amount in Court, that is, the amount which he considered to be the full amount due from him at the time. It has been suggested with some plausibility that the omission of the words, "what he considers to be the full amount of rent due" and the substitution, in lieu thereof, of the words, "the full amount of money then due," indicates an alteration in the law, and that the tenant who makes the deposit under section 61 does so at his peril; in other words, if in a suit brought by the landlord, it ultimately transpires that what has been deposited is less than the amount due, the tenant loses the benefit of section 62. In our opinion, this argument should not prevail and the apparent variation of language does not really indicate a change in the law. Under Act VIII of 1869, Schedule A, a tenant had to state on oath that he desired to pay in Court the full amount which he owed to the landlord and under section 61, sub-section (2), of the Bengal Tenancy Act he has to verify his application for leave to make the deposit. In fact the words omitted from section 51 are superfluous, and their omission does not consequently indicate that the law in this respect has been altered; this, indeed, was the view taken in *Sridhur Roy* v. *Rameswar Singh* (3). It has been strenuously urged, however, on behalf of the appellant that this view of the law will enable an unscrupulous tenant to avail himself of the provisions of section 61 to reduce the period of limitation ordinarily available to a landlord for the institution of a suit for rent by a deposit of a smaller amount than what is really due to him. This consequence, no doubt, follows from the interpretation we have placed upon section 61, but this is no disadvantage to the landlord. The tenant, who makes a short deposit under section 61 and thereby drives the landlord to a suit earlier than would otherwise be the case, may, on the other hand, find himself at a disadvantage. The Legislature may well have intended that when there is a dispute as to the amount of rent and a deposit has been made by the tenant, the controversy should be settled as speedily as practicable, and from this point of view may have assigned the comparatively brief period of limitation mentioned in Article 2, clause (*a*), of Schedule III of the Bengal Tenancy Act.

It has finally been urged that the effect of the view we take is to compel the landlord in a manner to accept part payment of rent, whereas he is not ordinarily bound to accept rent unless the whole amount due is tendered. This also may be a possible consequence of the interpretation we have adopted, if it be assumed that the landlord is not bound to accept part payment, as to which we express no opinion. But this, again, is not a disadvantage to the landlord. As soon as a deposit has been made under section 61 on the allegation that the amount deposited represents the whole amount due from the tenant to the landlord, and a notice has been served upon the latter, it is open to him to withdraw the money from Court and to institute a suit for the recovery of the balance which he considers to be due from the

tenant. On these grounds, we are of opinion that the provisions of sections 61 and 62, taken as a whole, support the view that the period of limitation prescribed in Article 2, clause (*a*), of Schedule III of the Bengal Tenancy Act is applicable to a suit for rent wherever rent has been deposited under section 61, even though the allegation of the tenant that what he had deposited was the full amount due at the time may ultimately prove to be incorrect.

It has finally been very forcibly argued on behalf of the respondents that if the view were not adopted, there would be no occasion for the application of the special period of limitation prescribed in Article 2, clause (*a*), of Schedule III of the Bengal Tenancy Act. For if the view be maintained that a deposit of a smaller amount than the full amount actually due is not a valid deposit under section 61 and does not attract the operation of the special period of limitation, a suit by the landlord instituted for the recovery of the sum claimed by him would be defeated, not because it was barred by limitation, but because there was no foundation for his claim. On the other hand, it is a reasonable view of the possible intention of the Legislature that when a deposit has been made under section 61, the landlord should come into Court within six months of the receipt of notice of the deposit. If he does so, the question of the amount, if any, still due to him would be determined by the Court. If he comes after the expiry of the prescribed period the question must be deemed as no longer open to controversy. In this view, the second contention of the appellants cannot be supported.

We may state that it was faintly suggested for the appellants at one stage of the argument that section 61 has no application to the present case, because rent was payable partly in cash and partly in kind. It may be conceded that no deposit can be made of rent in kind under section 61 of the Bengal Tenancy Act. But where, as here, the parties have agreed that upon failure to deliver the rent payable in kind a fixed sum is to be paid in lieu thereof, the entire rent is payable in cash, and in a case of this description the provisions of section 61 are clearly applicable.

The result is that the decree of the Subordinate Judge is affirmed and the appeal dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 135 OF 1913.

March 28, 1914.

Present:—Mr. Justice Rafique.

MANBHARI—DEFENDANT—APPLICANT

versus

SUMER CHAND—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Withdrawal of suit with permission to bring fresh one—Sufficient ground—Omission to include in plaint several inconsistent causes of action, effect of.

The omission by the plaintiff to include in his plaint all his causes of action, which are inconsistent with each other, cannot be said to constitute a formal defect in the suit and is not a sufficient ground to allow him to withdraw the suit with permission to bring a fresh one.

Where the plaintiff sues on the basis of adoption and the defendant denies the adoption, plaintiff cannot be allowed to withdraw the suit with permission to bring a fresh suit on the basis of a Will, as the dismissal of his suit on the basis of the adoption would not operate as a bar to his new suit on the basis of the Will.

Subrahmanyam Chetty v. *Authinarayanam*, 7 M. L. J. 288, referred to.

Civil revision from an order of the Munsif of Saharanpur.

Mr. *Pearay Lal Banerji*, for the Applicant.

Mr. *Agha Haider*, for the Opposite Party.

JUDGMENT.—The facts which have given rise to the present application for revision are as follows:—The plaintiff-respondent instituted a suit in the Court of the Munsif of Saharanpur for the recovery of certain property on the allegation that he was the adopted son of the last owner of the property, *viz.*, Niadar Mull. The allegation of adoption was denied on behalf of the defendant-applicant, who is the widow of the brother of Niadar Mull. Before the oral evidence was begun for the parties the plaintiff

filed an application in the Court of the Munsif under Order XXIII, rule 1, praying that he may be allowed to withdraw his suit with leave to bring a fresh one. In his application the plaintiff stated that he had a right to succeed to the property of Niadar Mull, not only on the ground of adoption but on other grounds also. But as he thought adoption to be the strongest reason for succession he mentioned that only in his suit; but finding that the question of adoption had been put in issue, it became necessary for him to withdraw the suit and mention all the grounds upon which he was entitled to succeed to the property of Niadar Mull, and in case he omitted to mention grounds other than adoption he was afraid that he would be debarred from seeking relief by another suit on their basis. The Pleader for the plaintiff, when pressed to mention other grounds entitling his client to succeed to the property of Niadar Mull, mentioned one only, *viz.*, that there was a Will in favour of his client. No mention was made of the name of the testator but presumably the plaintiff meant the testator to be Niadar Mull. The learned Munsif, inspite of the objection of the defendant-applicant, granted the application and allowed the plaintiff-respondent to withdraw his suit, permitting him to bring a fresh one. The defendant has come up in revision to this Court. It is contended on her behalf that the learned Munsif has erred in allowing the plaintiff to withdraw his suit with leave to bring a fresh one. The application, dated July 31st, 1913, made on behalf of the plaintiff-respondent does not disclose any of the reasons mentioned under Order XXIII, rule 1. The plaintiff had come into Court on the allegation that he was the adopted son of Niadar Mull and if that allegation was put in issue, he cannot make that as a grievance and ask the Court to allow him to withdraw his suit because the allegation which was the basis of his claim was put into issue. It is further argued that the statement in the application, that the other grounds upon which the plaintiff, according to him, is entitled to succeed to the property of Niadar Mull cannot form a basis of another suit in case of the dismissal of the suit based on the allegation of adoption, is incorrect. For the plaintiff-respondent it is strenuously urged that this Court could and should interfere only for reasons given under section 115 of Code of the Civil Procedure. In the present case the learned Munsif had jurisdiction to entertain the application made by the plaintiff and has not exercised his jurisdiction with illegality or with material irregularity. I think that the application of the defendant must prevail. There is no doubt that on the revision side this Court must see that the order complained of has been passed either without jurisdiction or by omitting to exercise jurisdiction which was vested in the Court passing the order or had been passed illegally or with material irregularity. In the present case the order of the learned Munsif is challenged on the ground that it does not fall under either of the two reasons given in Order XXIII, rule 1. The omission by the plaintiff to include in his plaint all his causes of action, which are inconsistent with each other, cannot be said to constitute a formal defect in the suit. The only ground upon which the order of the lower Court can be supported is the one given in clause (*b*) of Order XXIII, rule 1. Under the said clause a Court can allow the plaintiff to withdraw his suit with leave to bring a fresh one for sufficient grounds. In this case it does not appear to me that any sufficient ground was made out before the learned Munsif to enable him to permit the plaintiff to withdraw his suit. The omission of the mention of a Will said to have been executed by Niadar Mull in favour of the plaintiff could form the basis of a separate suit as the dismissal of the suit on the basis of adoption would not have operated as a bar. This is clear from the case of *Subramania Chetti* v. *Authinarayanan* (1). The application is, therefore, allowed with costs and the order of the Court below is set aside. The original suit of the plaintiff will proceed.

Application allowed.

(1) 7 M. L. J. 288.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

PETITION No. 5 OF 1912-13 OF KHERI DISTRICT.

August 13, 1913.

Present:—Mr. D. C. Baillie, S. M., and Mr. G. A. Tweedy, J. M.

HULAS SINGH—PLAINTIFF—APPELLANT

versus

JIT SINGH—DEFENDANT—RESPONDENT.

Landlord and tenant—Patwari's papers, entry in, interpretation of—Sub-tenant, nephew of sir-holder—Rent, non-payment of, effect of—Shikmi *entry, meaning of.*

Mere entry of one's name in the *Patwari's* papers as a sub-tenant of another does not prove that the relationship of landlord and tenant exists between them, if there are, apart from the entry, other things supporting inference to the contrary, *e.g.*, non-payment of rent and relationship between the parties. The entry in such cases simply means that the *Patwari* finding a person as cultivating the land of another put the former down in his papers as a sub-tenant of the latter.

Appeal from the decree of the Commissioner, Lucknow, dated 28th February 1913, reversing that of the Assistant Collector, Kheri, dated 4th June 1912.

FACTS.—The plaintiff was the nephew of the defendant. The former was entered in the *Patwari's* papers as a sub-tenant of the latter in respect of a certain *sir* land. The defendant issued a notice of ejectment against the plaintiff, who contested it on the ground that no relationship of landlord and tenant existed between them inasmuch as they were co-sharers in the said land. This fact was admitted in a previous mutation case between the parties. Further it was found that neither any rent was ever paid to the defendant by the plaintiff nor was it ever fixed by any Court or agreed upon between the parties. The Court of first instance cancelled the notice while the first Appellate Court upheld it.

Babu *Har Govind Das*, for the Appellants.

Babu *Ram Prasad*, for the Respondent.

JUDGMENT.

TWEEDY, J. M.—I do not agree with the Commissioner. The parties are uncle and nephew, and all the entry of *shikmi* means in the *Patwari's* paper is that the *Patwari* found the nephew cultivating these plots and put him down as sub-tenant. This was the inference he drew from the facts that he observed, but there is no evidence whatever to give any colour to the entry. Admittedly no rent was ever paid or ever fixed by any Court or even agreed upon by the parties.

What we have to decide in this case is, not whether respondent is the sole owner of the *sir* or whether appellant has (as was apparently admitted in the mutation case in 1898) any rights in it, but simply whether the relationship of landlord and tenant exists between the parties. The Assistant Commissioner, I think, rightly found that no privity of contract existed.

I would decree the appeal and restore the decision of the Assistant Collector with costs.

BAILLIE, S. M.—I concur.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 816 OF 1913.

July 18, 1914.

Present:—Mr. Justice Sunder Lal.

Thakur DHARAM SINGH—PLAINTIFF—APPELLANT

versus

RAM DIAL SINGH FULLER—DEFENDANT—RESPONDENT.

U. P. Land Revenue Act (III of 1901), s. 233 (k)—Partition—Land belonging to different mahals *partitioned—Suit for correction of mistake not barred.*

Under the U. P. Land Revenue Act the Revenue Courts are given exclusive jurisdiction to partition a *mahal*. In respect of each *mahal* separate proceedings for partition have to be instituted. If parties are co-sharers in more *mahals* than one it is not necessary for them to bring all the *mahals* into Court for partition.

A village was partitioned into two *mahals* D, and G *Mahal* D was allotted to the plaintiff. In a subsequent Settlement a plot belonging to *mahal* D was by mistake of a clerk included in *mahal* G. The plaintiff, who was the owner of *mahal* D, then purchased a share in *mahal* G. When *mahal* G was partitioned the plot belonging to *mahal* D, which had by mistake been included in *mahal* G, was allotted to the defendant. The plaintiff, after completion of his partition, brought a suit for declaration that the plot in question belonged to *mahal* D and that the partition proceeding in respect of *mahal* G did not affect it:

Held, that the suit was not barred by section 233 (*k*) of the U. P. Land Revenue Act and was, therefore, maintainable.

Lachman Das v. *Hanuman Prasad*, 8 Ind Cas. 807; 7 A. L. J. 1156; *Tirbeni Sahai* v. *Gokal Prasad*, 9 Ind.

DHARAM SINGH v. RAM DIAL SINGH FULLER.

Cas. 475; 33 A. 440; 8 A. L. J. 244; *Kishen Prasad* v. *Kadher Mal*, A. W. N. (1900) 11, referred to.

Second appeal from the decision of the District Judge of Aligarh, dated the 10th April 1913.

Mr. *S. C. Chaudhri*, for the Appellant.

Mr. *S. K. Dar*, for the Respondent.

JUDGMENT.—This appeal arises under the following circumstances. The parties to this suit were co-sharers of a village named Bhankra. In 1898 the village was partitioned and divided into several *mahals*. One of these *mahals* was assigned to Thakur Dharam Singh, the plaintiff-appellant, and was named after him. Another *mahal* known as *Mahal Kalan Ghairkhwahindgar* was formed of the property owned by persons who had not applied for partition. In this *mahal* the defendant was a co-sharer. In *Mahal* Dharam Singh a plot of land, No. 337, with an area of 2 *bighas* 7 *biswas* was assigned to the plaintiff and he held that land as part of his *mahal*. In the other *mahal* there were two plots of land, No. 336 and 417, the area of which was also 2 *bighas* 7 *biswas*, which formed part of a road, and one of them at least, No. 336, was shown as the property of the defendant. In 1900 a settlement of the village took place. Plot No. 337 in *Mahal* Daram Singh was given a new number which if correctly stated was 931, and Nos. 336 and 417 in *Mahal Kalan Ghairkhwahindgar* received another number which if correctly stated was 797. The map of the village showing the *mahals* was correctly prepared and in that map old No. 337 was shown as in *Mahal* Dharam Singh and Nos 336 and 417 as being in *Mahal Kalan Ghairkhwahindgar*. But by some mistake in the *khasra* which had been prepared at the Settlement, as against No. 337 the corresponding number shown was 797 instead of 931. A similar mistake occurred in the *khasra* with reference to No. 336 and 417. Instead of the corresponding number being shown as 797 it was shown as 931. No one seems to have detected this mistake and it continued to linger on the record of the Revenue Settlement till it led to events which have given rise to this suit. The plaintiff continued to be in actual possession of the old No. 337 and the defendants of the numbers assigned to them inspite of the mistake on the record.

It appears that the plaintiff obtained a mortgage of the interest of some of the co-sharers in *Mahal Kalan Ghairkhwahindgar* and either by sale or foreclosure (the Court below is not clear by which procedure) he later on became full owner of the share mortgaged to him. The plaintiff thus became a co-sharer in *Mahal Kalan Ghairkhwahindgar* also. In 1907 *Musammat* Ram Piari, a co-sharer in *Mahal Kalan Ghairkhwahindgar*, applied for partition of her share in the said *mahal*. To this proceeding the plaintiff as a co-sharer of that *mahal* was a necessary party and was impleaded as such. On the said application for partition the Revenue Court proceeded to sub-divide this *mahal*. Ram Piari got her own *mahal* divided out and the non-applicants had a *mahal* assigned to themselves. In these partition proceedings by reason of the mistake of the entry which I have mentioned above, the plot shown as No. 981, *i.e.* the old No. 337 which belonged to *Mahal* Thakur Dharam Singh, was by mistake treated as belonging to the old *Mahal Kalan Ghairkhwahindgar*. It was in that partition assigned to the lot of the defendant. No one seems to have been aware of the mistake nor did the Revenue Officers discover it. It was only recently when the defendant took proceedings against the tenant in possession of old No. 337 that the mistake was discovered. The plaintiff has now instituted this suit to obtain a declaration that old No. 337, the corresponding number of which is 931, is part and parcel of his *Mahal* Thakur Dharam Singh and that the proceedings in the partition in which No. 931 had been deemed to be a part of *Mahal Kalan Ghairkhwahindgar* did not affect the plaintiff's right to the said land. The facts themselves are undisputed. There is no doubt that No. 337, the present number of which is 931, is part and parcel of *Mahal* Dharam Singh and that it never was part of the other *mahal*. The question, however, is whether by reason of its being erroneously treated as part of the other *mahal* and allotted in partition to the defendant the plaintiff is now precluded from asserting his right thereto. Under the Land Revenue Act in force in these Provinces the Revenue Courts are given exclusive jurisdiction to partition

a *mahal*. In respect of each *mahal* separate proceedings for partition have to be instituted. If parties are co-sharers in more *mahals* than one it is not necessary for them to bring all the *mahals* into Court for partition. The proceedings for partition, therefore, initiated by Ram Piari were proceedings for the partition of *Mahal Kalan Ghairkhwahindgar*. On that application the Revenue Court had no jurisdiction to partition any other *mahal* or to touch the land which did not form part of the *mahal* in respect of which the application was made. Under section 107 of the said Act an application for partition must be accompanied by a certified copy of the annual register of proprietors of the *mahal* sought to be partitioned. That copy would only show the shares in the said *mahal* owned by each proprietor. It would not show in detail the various numbers of the fields which go to make up the shares. Under section 110 the Collector is required to issue notices to all recorded co-sharers of the *mahal* who have not joined in the application, and under section 111 any such recorded co-sharer of the *mahal* may raise any objection that he may have to the partition of the *mahal*. Such objection must be filed on or before the date fixed in the proclamation for filing such objections. If in the objection so filed a question of proprietary title arises, the question may be disposed of in the manner provided by section 112. It will thus be clear that the entire proceedings in partition are confined to the *mahal* of the applicant. Under this Act it is not possible to deal in the same application with lands appertaining to another *mahal*. Now in this case it was perhaps not possible to raise any question as to the mistake in the numbers which has led to the present difficulty, as neither party seems to have been aware of it. In the application for partition this number was presumably not shown as part of Ram Piari's *mahal* and it is only later on, when the details of the partition were settled, that any question could possibly arise. If the mistake was not discovered before the date fixed in the proclamation it could not be made the subject of inquiry under sections 111 and 112 of the Land Revenue Act. The question then is, is the plaintiff now precluded either by the provisions of section 233 (*k*) or for any other reason from getting the numbers corrected?

The Courts below have held that section 233 (*k*) does not apply to this case. But the lower Appellate Court has held that by reason of the plaintiff not coming forward to disclose this mistake in the course of the partition proceedings he is now estopped from showing it and from retaining what he is entitled to. Mr. Dar on behalf of the respondent has supported the decree of the Court below on two grounds. In the first place he has urged that the suit is barred by section 233 (*k*) of the Land Revenue Act and has relied upon the case of *Lachman Das* v. *Hanuman Prasad* (1). In that case the plaintiff was a co-sharer in the *mahal* which was being partitioned. He did not put in a claim in the partition case within the time fixed by section 112 of the Land Revenue Act to *Khata* No. 34 of which he claimed to be the proprietor. The proceedings in that case were proceedings for the partition of the *mahal* in which this man was a co-sharer and of the lands which were admittedly in that *mahal*. The Court, in that case, held that being a co-sharer in the *mahal* it was his duty to bring forward his claim to the lands at the partition of that *mahal* in the course of those proceedings and as he had not done so, he was not competent to re-open the partition by a suit in the Revenue Court. The Court carrying on the partition had full jurisdiction to partition *Khata* No. 34 as it was admittedly part and parcel of that *mahal*. The other case relied upon is the case of *Tirbeni Sahai* v. *Gokal Prasad* (2). There again the partition related to a *mahal* of which one of the *pattis* was claimed by the plaintiff. The land which was the subject of the partition appertained to the *mahal*. In this case it is common ground that the land in suit was not part and parcel of *Mahal Kalan Ghairkhwahindgar*. The Revenue Court, therefore, had no jurisdiction to deal with it in the partition of that *mahal*. The case more in point is the case of *Kishan Prasad* v. *Kather Mal* (3). It has been urged that the plaintiff was a party to the partition proceedings in this case. He was, no doubt, a party in

(1) 8 Ind. Cas. 807; 33 A. 139; 7 A. L. J. 1159.
(2) 9 Ind. Cas. 475; 33 A. 440, 8 A. L. J. 244.
(3) A. W. N. (1900) 11.

his position as a co-sharer of *Mahal Kalan Ghairkhwahindgar*. It was in that character alone that he was impleaded in those proceedings. It is urged that he ought to have pointed out the mistake by showing the corresponding numbers. The answer to the objection is that neither party had discovered the mistake at that time. It is hard indeed to blame the plaintiff for not pointing out a mistake which it was equally the duty of the defendant to point out himself. He ought to have come forward when No. 981 was being allotted to him and to have told the Revenue Officer that that land was no part of that *mahal* and to have got in exchange therefor some other land in that *mahal*. I do not see on what principle by reason of a mistake like this the plaintiff can be precluded from retaining what admittedly belongs to him. The Court of first instance rightly held that section 233 (*k*) did not bar the suit. The plaintiff is not seeking to re-open the partition of *Mahal Kalan Ghairkhwahindgar*. He only seeks to point out that this land is not part of that *mahal*, but is part of *Mahal* Dharam Singh of which he is the owner, and for that purpose his position did not differ from that of an utter stranger who has no share in *Mahal Kalan Ghairkhwahindgar*.

The second ground relied upon by Mr. Dar is that the plaintiff is estopped. I do not see on what principle the plaintiff can be estopped. He made no representation that his old No. 337 was part of *Mahal Kalan Ghairkhwahindgar*. If anybody did make any representation it was probably the clerk who prepared the *khasra*. He misled both parties and I do not see how the plaintiff can be held responsible for his acts. The reason assigned by the Court below for refusing the plaintiff the decree asked for by him is that in the proceedings in 1907 he did not disclose this mistake. His claim is within limitation and his rights were subsisting rights on the date of the partition of 1907. Agreeing, therefore, with the Court of first instance I set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs including in this Court Counsel's fee on the higher scale.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 683 OF 1912.

July 22, 1914.

Present:—Mr. Justice Chevis and Mr. Justice Shadi Lal.

BHAGWAN DAS—PLAINTIFF—APPELLANT

versus

Lala KANSHI RAM—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Value of suit for purposes of jurisdiction—Right of appeal governed by Act in force at time of filing appeal—Alienation made pending temporary injunction not void—Sale by debtor to defeat creditor—Purchaser aware of fraudulent intention of vendor—Fraudulent transfer.

In a suit for declaration under Order XXI, rule 63, of the Civil Procedure Code, 1908, by the decree-holder, where there is no dispute as to title between the judgment-debtor and the other objector and the former is merely a *pro forma* defendant, the value of the suit for purposes of jurisdiction is the amount of the decree.

Under the Punjab Courts Act, as it stood before the amending (Punjab) Act I of 1912, there was no right of further appeal in a case decided by the first Appellate Court, but at the date of filing an appeal from the appellate decree the Amending Act had come into force which conferred a right of second appeal from the decree appealed from.

Held, that the second appeal was competent under the circumstances of the case.

An alienation made pending a temporary injunction is not void.

A sale effected by a debtor with intent to defeat the just claims of a creditor is void if the purchaser is aware of the fraudulent intentions of the debtor.

Second appeal from the decree of the Divisional Judge, Ferozepore Division, dated the 17th January 1912, affirming that of the Subordinate Judge, Ferozepore, dated the 25th August 1911, dismissing plaintiff's claim.

Mr. *Santanam*, for the Appellant.

Mr. *C. Beran Petman* and Lala *Durga Das*, for the Respondent.

JUDGMENT.—This suit relates to a shop which was sold by Ramditta to Lala Kanshi Ram by registered sale-deed on 26th November 1909. Bhagwan Das, the present plaintiff, instituted a suit against Ramditta on 4th October 1909, and on the same day applied for attachment prior to judgment. The Court on this ordered notice to issue to Ramditta to show cause against attachment and also directed the issue to him of a temporary injunction restraining him from transferring his property. This order was not served on him personally; a copy of it was affixed, not

to the shop in dispute, but to another shop situated at some distance. So at the time of the sale the shop in question had not been attached. It was attached later on in December 1909. Bhagwan Das, having got a decree and attached the shop, Lala Kanshi Ram raised an objection, on which the executing Court removed the attachment. So Bhagwan Das then brought this regular suit, asking for a declaration that the shop was liable to attachment and sale in execution of his decree. The suit having been dismissed by both the lower Courts, Bhagwan Das has preferred a second (or further) appeal to this Court. The order of the Divisional Judge dismissing Bhagwan Das' appeal from the order of the first Court was passed on 17th January 1912. The appeal to this Court was lodged on 18th April 1912. Between those dates the Punjab Courts Act had been amended by Punjab Act I of 1912. The admitting order (see page 2 of the paper-book) speaks of the appeal as a "further appeal under the previous Act." But Counsel for the respondent raises a preliminary objection that no further appeal lies under the Act as it stood prior to amendment, as the value of the suit is only Rs. 752-8, *i. e.*, the amount of the plaintiff's decree. We think this objection is good. There is no dispute as to title between the judgment-debtor and the objector, and the former is merely a *pro forma* defendant, as is apparent from the fact that the plaintiff has not thought it worth his while to make him a respondent either in the Divisional Court or in this Court. The plaintiff's interest is simply to get his decree satisfied, and the only question involved in the suit is whether he is entitled to get it satisfied by process out of the shop which has been sold to the objector. After referring to *Dwarka Das* v. *Kameshar Prasad* (1), *Dhan Devi* v. *Zamurrad Begam* (2) and an unreported ruling of this Court, Civil Appeal No. 105 of 1912, we have no hesitation in holding that the value of the suit is the amount of the decree, and as that amount is only Rs. 752-8 it follows that no further appeal lies under the Punjab Courts Act as that Act stood at the date when the decree under appeal was passed. But a second appeal, undoubtedly, lies under the Act as that Act stood at the date when the appeal to this Court was filed, though we cannot in second appeal go into questions of fact.

In support of his finding that an alienation made pending a temporary injunction is not void the learned Divisional Judge has quoted *Manohar Das* v. *Ram Autar Pande* (3), and we have no hesitation in agreeing with the Divisional Judge on this point. In fact Counsel for the appellant has not contested the correctness of the Allahabad ruling, but has urged that a sale effected by a debtor with intent to defeat the just claims of a creditor is void if the purchaser is aware of the fraudulent intentions of the debtor. Taking this proposition as correct, still we are quite unable to find in this case any proof that Lala Kanshi Ram was aware of any intention on the part of Ramditta to defeat the just claims of the plaintiff. It may be that Ramditta intended to defeat plaintiff's claims, but it is necessary for plaintiff to go further than this and to prove that Lala Kanshi Ram knew of such intention. Counsel for appellant has taken us into the evidence much as if the case were a further appeal under the Act as it stood prior to amendment.

Counsel first refers us to the fact that such deed was at first written on a stamped paper of the value of Rs. 35, and then re-written on a paper of Rs. 25 value, refund of the higher stamp being obtained. Counsel argues that this shows that at first Lala Kanshi Ram was going to purchase for Rs. 3,500, and then got the price reduced because he found that plaintiff was suing the defendant and that there was likely to be litigation. Mistakes, however, do occur, even when legal practitioners—Lala Kanshi Ram is a Pleader—are concerned, and we are not prepared to hold that this matter of the sale-deed being first written on a stamp of unnecessarily high value is any proof that Lala Kanshi Ram was conspiring with Ramditta to defeat the plaintiff's claims.

Then it is urged that, if an issue as to the market-value of the house had not first been framed and then struck out, the plaintiff would have shown by evidence that the house was sold for much less than the real value

(1) 17 A. 63; A. W. N. (1895) 3.
(2) 27 A. 449; 2 A. L. J. 115; A. W. N. (1905) 37.
(3) 25 A. 431; A. W. N. (1903) 93.

and that this would have shown that all was not fair and square. But plaintiff could have produced evidence as to market-value in connection with the fourth issue, which was whether the purchase was made in good faith. And it is hard to see why Ramditta should have been such a fool as to sell his property for less than the best price obtainable in the market. It was not to his interest to leave the plaintiff's claims unsatisfied.

Then we are referred to the evidence of Lala Bhana Ram and Kanshi Ram, son of Mul Chand, and it is urged that their conversations with Lala Kanshi Ram referred to in their evidence prove that Lala Kanshi Ram knew of the plaintiff's claims at the time of his purchase. But, having read their evidence, we agree with the learned Divisional Judge that it is by no means clear that these conversations refer to a time prior to the purchase by Lala Kanshi Ram. Then we are told that the broker who effected the sale knew of plaintiff's claims. Perhaps he did, but it does not follow that Lala Kanshi Ram must have known of these claims.

We hold it not proved that Lala Kanshi Ram had knowledge of any intent on the part of Ramditta to defeat the plaintiff's claims.

The appeal fails and is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1319 OF 1913.

July 7, 1914.

Present:—Mr. Justice Piggott.

RAJWANTI KUNWARI—DEFENDANT—APPELLANT

versus

DOMAN SINGH—PLAINTIFF—RESPONDENT.

Mortgage prohibited by law—Occupancy holding mortgaged with possession—Mortgagee neither entitled to recover possession nor his money.

The transfer of occupancy holdings being prohibited by law, a usufructuary mortgagee of such a holding can recover neither possession nor his mortgage-money.

Bihoran Upadhya v. *Uttamgir*, 12 Ind. Cas. 112; 8 A. L. J. 931; 33 A. 779, distinguished.

Ram Partap Rai v. *Ram Phal Teli*, 18 Ind. Cas. 9, referred to.

Second appeal from the decision of the District Judge of Ghazipur, dated May 27th, 1913.

Mr. *Parmeshwar Dayal*, for the Appellant.

Mr. *Gobind Prosad*, for the Respondent.

JUDGMENT.—The plaintiff in this case obtained from the father of the defendant No. 3 mortgage-deeds, on June the 12th, 1903, July the 2nd, 1905, and June the 14th, 1906, purporting to mortgage with possession certain tenant holdings. The holdings in question were occupancy holdings the transfer of which by way of mortgage is prohibited by law. The plaintiff, however, obtained possession under the said mortgages. He now comes into Court alleging that since the death of the original mortgagor his right to possession has been challenged by the defendant and has been doubted in the Revenue Courts.

The plaint as drafted avoids any express admission that the plaintiff has been dispossessed. The relief sought is described as a decree for maintenance of possession and there is an alternative prayer that if the Court considers the plaintiff is dispossessed in any way, he might be put in possession. As a further alternative relief the plaintiff also sought recovery of the principal and interest due under the bonds in question. The Court of first instance fixed an issue as to whether the plaintiff was in possession or not and found that issue against him. On other points that Court found in favour of the plaintiff and gave him a decree for recovery of possession over the plots of land specified in the plaint. The learned District Judge on first appeal held that the decree of the first Court as passed could not be maintained, and he has given the plaintiff a decree for the principal of the debt stated in the three bonds with an order that in the event of the defendant's failing to pay this money within three months from the date of the decree, the plaintiff will be put back in possession of the property specified below, that is to say, of the plots of land constituting the occupancy holdings in question. The learned District Judge purports to follow the decision of this Court in *Bihoran Upadhya* v. *Uttamgir* (1), but he has overlooked the

(1) 12 Ind. Cas. 112; 8 A. L. J. 931; 33 A. 779.

passage at the bottom of page 782 of the report in which the learned Judges point out that a case of a mortgagee under similar circumstances seeking to recover possession from the mortgagor is different. There is, as a matter of fact, a great deal of authority the other way. I expressed my own opinion in a case practically on all fours with the present case, *Ram Partap Rai* v. *Ram Phal Teli* (2), and I see that in a very recent unreported case, that of *Bhagwan Rai* v. *Ram Sobhag Rai* (Second Appeal No. 143 of 1914, decided on March the 6th, 1914), the appeal of a plaintiff suing to recover possession under circumstances practically on all fours with those of the present case was dismissed by a Bench of this Court, affirming the decision of the lower Appellate Court dismissing the suit. On behalf of the respondent in the present case it has been contended that there is no finding by the lower Appellate Court on the question of present possession. There is nothing on the record to show that the learned District Judge was asked to re-consider the finding of the first Court on this point. It was open to the plaintiff to have done this under the provisions of Order XLI, rule 22, Civil Procedure Code. As a matter of fact the form of the decree passed by the lower Appellate Court shows that the finding of the first Court on the question of present possession was accepted and endorsed. I am satisfied that the decree of the learned District Judge in this case cannot be sustained. Such a decree would virtually nullify the express provisions of the law prohibiting the transfer of occupancy rights. I accept this appeal and setting aside the decrees of both the Courts below I dismiss the plaintiff's claim with costs throughout.

Appeal accepted.

(2) 18 Ind. Cas. 9.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1510 OF 1913.

July 10, 1914.

Present:—Mr. Justice Sunder Lal.

CHANDARBHAN—PLAINTIFF—APPELLANT

versus

HAR GOPAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Fraudulent transfer—Intention to defraud future creditors—Presumption—Onus.

Where a donor had no debts to pay at the time of gifting his property but contracted some debts afterwards:

Held, that no presumption could be made that the donor intended to defraud his future creditors and that it was for the future creditors to prove that he had such an intention when he made the gift.

Second appeal from the decision of the District Judge of Agra, dated May 27th, 1913.

Mr. *S. K. Dar*, for the Appellant.

Mr. *M. L. Sanlal*, for the Respondents.

JUDGMENT.—One Hargopal was the owner of the property in suit, which on 6th February 1906 he conveyed to his wife and mother (the defendants Nos. 3 and 2) by way of family settlement. He was not indebted to any one at that time. The document was intended to make some provision for them. He had no other property left with him on that date.

On 6th August 1905 the present plaintiff brought a suit against Hargopal claiming a sum of Rs. 250 on foot of a *hundi* bearing date 3rd January 1906. August 17th, 1906, was fixed for the hearing of the case, but on 13th August 1905 the defendant filed a confession of judgment on which a decree was duly made against him on 17th August 1906. In execution of this decree the property in suit was attached as the property of Hargopal, but was released on objections taken by the defendants on 3rd July 1910. Hence the present suit by the decree-holder to obtain a declaration that the said conveyance was fraudulent and collusive, and that it was void as against the plaintiff. The defendants in reply urged that it was a good and valid conveyance executed with the object of making provisions for the maintenance of the defendants who had both legal and moral claims for it against the first defendant Hargopal. They further urged that the *hundi* on which the plaintiff had obtained the decree of 17th August 1905 was collusive and without consideration and that it had been antedated to

make it out that the plaintiff was a creditor of the first defendant on the date the transfer was made by him to the other defendants.

Both the Courts below have found that the *hundi* in question had been antedated. They doubt very much the fact of the plaintiff being really a creditor at all, but without committing themselves to a definite finding on the point, they hold that he was not a creditor at all on the date of the execution of the family settlement. They have held the conveyance to have been made at a time the vendor was not indebted at all to any one and have upheld it as a good family settlement and dismissed the plaintiff's suit.

The plaintiff appeals against the decrees of the Courts below. The first point urged on behalf of the plaintiff-appellant is that as a subsequent creditor he is entitled to impugn the settlement on the ground that it was made with the intention of defrauding and defeating future creditors, and that it is voidable as against him under section 53 of Act IV of 1882. It is further urged that as the judgment-debtor has no other property left in his possession the transfer has the effect of defeating future creditors, and that, therefore, the Court ought to have presumed that the document was executed with the intention of defeating such creditors.

Prima facie, the vendor not being indebted to any one at the time, he was perfectly competent to dispose of his property by way of family settlement. The document was duly registered, and the future creditors who lent him money, with presumably a full knowledge of the fact that he had no ostensible property from which they could recover the advances they might make, did so with their eyes open and have only themselves to thank if they find it not possible to recover now what is due to them. A creditor who under these circumstances takes the precaution of fraudulently antedating his *hundi* so as to pose as an existing creditor on the date of the transfer, must be taken to have knowledge of the transfer when he lent the money.

The question is, can such future creditor impugn the transfer and if so, on what grounds?

The rule applicable to a case like this is thus stated in May on Fraudulent Conveyances and Dispositions of Property:—"Where the settlor was not indebted at the time, the onus of proving the fraud is thrown on those who impeach the settlement, for fraud is not to be presumed. The facts that all the debts due at the date of the settlement have been paid since, and that the only debts due are those subsequently contracted, negative the inference of intent to defeat delay, or defraud creditors drawn from the indebtedness at the time. The mere fact of subsequent indebtedness is not evidence of a fraudulent intent against subsequent creditors."

Again in the well-known case of *Spirett v. Willows* (1) the Lord Chancellor Westbury thus points out the position of future creditors in such cases:—"But if a voluntary settlement or deed of gift be impeached by subsequent creditors whose debts had not been contracted at the date of the settlement, then it is necessary to shew either that the settlor made the settlement with the express intent 'to delay, hinder or defraud the creditors' or that after the settlement the settlor had no sufficient means or reasonable expectation of being able to pay his *then* existing debts", and I have italicized the word *then* in the above quotation. It may be noted that the rule applies to the case of the *then* existing debts. In *In re Lane-Fox; Ex parte Gimblett* (2) Wright, J., after quoting the above passage observes:—"I think no decision can be found anywhere inconsistent with the proposition that an honest settlement, affirmatively proved to be honest, ought not to be set aside merely because some years afterwards it is proved to have the effect of defeating or delaying subsequent creditors." Unless, therefore, it can be shown that the transferor at the time of making the transfer had made it with the express intention of defeating future creditors, the transfer cannot be avoided. As observed by Mr. Justice Ranade in *Sadashiv Vaman Dhamankar* v. *Trimbak Divakar* (3):"Such transactions do not become colourable merely because, in their ultimate consequences, they may have the effect of protecting the family property against the prospective extravagance of the settlors or because no adequate consideration is

(1) 3 De. G. J. & S. 293 at p. 302; 34 L. J. Ch 360; 11 Jur. (N. S.) 70; 11 L T. 614; 13 W. R. 329; 46 Eng. Rep. 649 at p. 653; 142 R. R. 65; 5 Giff. 49.

(2) (1900) 2 Q. B. 508 at p. 513; 69 L. J. Q. B. 722; 48 W. R. 650; 83 L. T. 176; 7 Manson, 295.

(3) 23 B 146 at p. 156

shown to have been paid by the party benefited.

"The consideration in such cases need not be valuable. It is enough if it is what the law regards as good, *i. e.*, natural affection for wife and children. There is nothing illegal in such a conveyance if it is made *bona fide*, and is not intended to defraud creditors. When the father is involved in debts and makes a settlement, *mala fides* is presumed. But when there is no such indebtedness, no *mala fides* can be presumed merely from the possibility that the settlement might prejudice the claims of subsequent creditors".

Another case resembling in many of its aspects the present case where this rule was followed by Mr. Justice Chandavarkar is the case of *Ebrahim* v. *Foolbai* (4). In this case actual intentions to defraud future creditors when making the transfer is not ascribed to Hargopal. There is no proof of it, and it cannot be presumed in this case on the authorities quoted above.

On the findings, therefore, I must affirm the decrees of the Courts below and dismiss the appeal with costs including in this Court fee on the higher scale for respondents.

Appeal dismissed.

(4) 4 Bom. L. R. 180.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 26 OF 1914.

July 16, 1914.

Present: —Mr. Justice Sunder Lal.

SHEO PRASAD SONAR —PLAINTIFF— APPELLANT

versus

MANGAR MANHAR AND OTHERS— DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 23, Sch. I, Art. 120—Recurring cause of action Injunction.

The defendants opened a door in their wall for passage through the land of the plaintiff to their house and used it for that purpose, and when the plaintiff sued for injunction they pleaded limitation:

Held, that each time the defendants trespassed upon the plaintiff's land they were committing a fresh act of trespass and on each occasion a new cause of action arose to the plaintiff to restrain the trespass complained of

Ramphul Sahoo v. *Misree Lall*, 24 W. R. 97, referred to.

Second appeal from the decision of the Additional District Judge, Gorakhpur, dated the 24th September 1913.

Mr. *Jang Bahadur Lal*, for the Appellant.

Mr. *Iswar Saran*, for the Respondents.

JUDGMENT.—The parties to the suit are neighbours. The plaintiff is the owner of a well marked yellow on the plan filed with the plaint. He also claimed to be the owner of a plot of land marked X. The defendants own a house adjacent to the well. According to the plaintiff they (the defendants) had recently opened a door at the point marked L in the said plan in a wall belonging to themselves and are now using that door for entering upon the platform of the well and the land X, and use it for going to a *dalan* belonging to them shown to the right of the line B in the plan attached to the plaint. The plaintiff also complained of certain beams which have been put on the wall but as to which there is no controversy now. The plaintiff sues for an injunction directing the defendants to close the door L and a further injunction to restrain the defendants from using the platform of the well and the land X as a passage to the defendant's *dalan*. The suit has been thrown out by the Court below on the ground that the door was opened nine years ago and the plaintiff not having sued for the injunction asked for within six years from the date of the opening of the said door, his suit is barred by Article 120 of the first Schedule to the Limitation Act. The plaintiff has appealed against the said decree. Mr. Jang Bahadur Lal in appeal has given up the claim in so far as the closing up of the door L is concerned; the wall in which the door is opened being the defendants' they were at liberty to make as many openings as they liked. But he has pressed the claim for the injunction restraining the defendants from stepping on to the platform of the well and using it as a passage to the *dalan* and has argued that the case is one of a recurring cause of action under section 23 of the Limitation Act and that so long as the defendants do not acquire a right of easement in accordance with law, he is entitled to sue for an injunction.

I think the contention of the appellant is

perfectly correct. All that has been found is that the door was opened nine years ago and assuming that for the first time the defendants walked through it on to the platform of the well, that was an act of trespass which came to an end when they walked back to the house. Each time the defendants trespassed upon the plaintiff's land they were committing a fresh act of trespass and on each occasion a new cause of action arose to the plaintiff to restrain the trespass complained of. A similar point came up in a case [*Ramphul Sahoo* v. *Misree Lall* (1)] under the provisions of Act XIV of 1859 and the learned Judge of the Calcutta High Court who delivered the judgment in that case at page 98 thus laid down the law: "But I do not think that this is a correct view of the law of limitation as applicable to this case. If the plaintiff has been dispossessed from any portion of his land by an adverse possession having been taken by the defendant, the case would then fall within clause 12; but if, on the other hand, no adverse possession has been taken by the defendant, then each act of trespass on the plaintiff's land would constitute a fresh cause of action, and whether the period be six years or twelve years, the plaintiff would be competent to rely upon the last act of trespass as constituting a cause of action; unless the defendant had acquired an indefeasible right of easement by user. I am of opinion, therefore, that the reasons assigned by the lower Court for holding that the plaintiff's claim is barred by limitation are erroneous." In this case the plaintiff is entitled to base his suit upon any act of trespass by the defendants committed within six years of the date of the institution of the suit. If the view taken by the Court below were correct, the result would be that a man would acquire an easement to walk over another person's land in six years instead of in twenty years, the period prescribed by law.

I set aside the decree of the Court below and direct that Court to re-admit the appeal to its list of pending appeals and to hear and dispose of it according to law. The appellant will have his costs of this appeal including Counsel's fee on the higher scale.

Decree set aside.

(1) 24 W. R. 97.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1142 OF 1913.

June 29, 1914.

Present:—Mr. Justice Sunder Lal.

AHMAD HUSAIN—PLAINTIFF—APPELLANT

versus

RIAZ AHMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 114—Forfeiture of lease—Sub-lessee's position.

Where a lessee is permitted by law to transfer, mortgage or sub-lease his rights, the transferee of the rights must be deemed to stand in the shoes of the transferor for the purpose of making payment of the rent in arrears and costs of the suit, under section 114 of Act IV of 1882, and he is as much entitled to be relieved of the forfeiture as the original tenant.

Second appeal from the decision of the Subordinate Judge of Budaun, dated the 18th July 1913.

FACTS.—Muhammad Ahmad, the predecessor-in-interest of defendants Nos. 1 to 3, mortgaged the house in dispute to the plaintiff-appellant with possession on 5th March 1912, and executed a lease of the house for 5 years on 7th March 1912. One condition in the lease was that if no rent was paid, the lessee would be liable to be ejected. Mohammed Ahmad died on 20th August 1912. No rent was paid by Muhammad Ahmad or his successors-in-interest till the filing of the suit. Plaintiff brought this suit for ejectment of the defendants on the ground of non-payment of rent. Defendants Nos. 1 to 3 pleaded that rent had been sent by money order by defendant No. 4, their sub-lessee, and they were consequently not liable to be ejected. They expressed readiness to pay the whole rent due with interest and costs of the suit and prayed relief against forfeiture under section 114, Transfer of Property Act. Both the Courts below allowed relief under section 114 and dismissed the suit.

Plaintiff appealed to the High Court.

Mr. *Ibn Ahmad*, for the Appellant.—The principal defendants, who are successors-in-interest of Muhammad Ahmad, did not pay any rent to the plaintiff-appellant nor did Muhammad Ahmad himself ever pay rent during his life-time. Muhammed Ahmad died in August 1912. After his death, the lease practically came to an end and so did the sub-lease in favour of respondent No. 4 The respondent No. 4 was no longer a sub tenant or a tenant of the house in dispute

and has, therefore, no right to pay the rent. The readiness to pay the rent, assuming it to have been proved, was, therefore, by a person who was not at all competent to pay it and had no right to do so. The payment by respondent No. 4 is not proper. The defendants Nos. 1 to 3 not having paid the rent up to the time of filing the suit and the readiness to pay the rent being by one who was not competent to pay it, the lower Courts erred in applying section 114 of Act IV of 1882 in such a case.

The order of the lower Court is opposed to equity and justice and should not be allowed to stand.

The ruling of *Narain Naik* v. *Vasudeva Bhattar* (1) is in my favour.

JUDGMENT.—One Muhammad Ahmad owned the house in suit which he mortgaged with possession on 5th March 1912 to the plaintiff. Two days later, *i.e.*, on 7th March 1912, the plaintiff gave the house on rent to his mortgagor who executed an agreement to hold the house for five years as a tenant at a rent of Rs. 2 per mensem. One of the conditions of the agreement was that in case of non-payment of rent the lessor was entitled to eject the lessee, notwithstanding that the term of five years had not expired.

Muhammad Ahmad entered into possession of the house let, but paid no rent at all, and on 20th August 1912 the plaintiff sent him a notice calling upon him to vacate the house by the end of the month of the tenancy. Muhammad Ahmad, however, died the same day, leaving the first three defendants as his heirs and legal representatives. It also appears that Muhammad Ahmad had sub let the house to the fourth defendant, Ali Bakhsh. The plaintiff thereupon issued fresh notices to defendants Nos. 1 to 3 (the heirs of Muhammad Ahmad) and as a matter of precaution gave a similar notice to defendant No. 4. He now sues for their ejectment from the house and for the recovery of arrears of rent. The suit was filed on 19th September 1912.

The defence of Riaz Ahmad (defendant No. 1) is that the arrears of rent were offered to the plaintiff, and on 24th August 1912 "it was caused to be sent to him by money order by Ali Bakhsh, the sub-lessee. The plaintiff returned it also." He pleaded that the plaintiff was not entitled to sue before the expiration of the term of five years. The fourth defendant, Ali Bakhsh, also filed a written statement in which he referred to the money order sent by him for arrears of rent on 24th August 1912, which the plaintiff refused to accept.

The Munsif found that the money order for the arrears of rent was duly sent as alleged by the defendants to the plaintiff, which he had refused to take, and that the plaintiff's story that the money order reached him after the institution of the suit was not credible. As the defendant No. 4 had already deposited in Court the sum of Rs. 12 due on account of the rent in arrears and as he was willing to deposit the costs of the suit too in course of the day, the learned Munsif, applying the provisions of section 114 of the Transfer of Property Act of 1882 dismissed the suit. The plaintiffs appealed against the said decree to the Court below and urged that Ali Bakhsh, the sub-lessee, had no right to deposit the rent, that he was a trespasser so far as the plaintiff was concerned and that the Court below has erred in applying the provisions of section 114 of the Transfer of Property Act, 1882, to this case. The learned Subordinate Judge dismissed the appeal and the plaintiff has now appealed to this Court.

Under section 114 of that Act where a lease of immoveable property has determined by forfeiture for non-payment of rent and the lessor sues to eject the lessee, if at the hearing of the suit the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, the Court may in lieu of making a decree for ejectment pass an order relieving the lessee against the forfeiture and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred. It is noticeable that the right to make the payment of the rent in arrears, as a condition precedent to relief being given under the section, is reserved to the lessee. Under section 108 (*j*) of the Act in the absence of a contract to the contrary (and there is no contract to the contrary in this case), "the lessee may transfer

(1) 28 M. 330; 15 M. L. J. 208.

absolutely, or by way of mortgage of sub-lease, the whole or any part of his interest in the property.* * * The lessee shall not by reason only of such transfer cease to be subject to any liabilities attaching to the lease." The sub-lease to defendant No. 4 was, therefore, a good transfer and recognized by the lessor by his sending a notice to him. The rule as to relief for forfeiture for non-payment of rent is thus stated in Lord Halsbury's Laws of England, Volume 18, page 544: "The proviso for re-entry on non-payment of rent is regarded in equity as merely a security for rent, and accordingly, provided that the lessor or other persons interested can be put in the same position as before the lessee is entitled to be relieved against the forfeiture on payment of the rent and any expenses to which the lessor has been put."

Under the English Law, an under-lessee is entitled to claim relief from forfeiture, on the same way as the tenant (see page 545 of the same work) under the Common Law Procedure, 1852 (15 and 16 Vic., section 76) There is no similar statutory enactment in India. Relief against forfeiture for non-payment of rent used to be granted in India long before the enactment of the Transfer of Property Act. It is still granted on equitable grounds in the case of agricultural leases to which the provisions of the Transfer of Property Act do not apply. I have not been able to lay my finger on any case decided in India in which an under-lessee has been given the privilege that section 114 of Transfer of Property Act confers upon the lessee, nor am I aware of any decided case to the contrary. In England a liberal interpretation has been placed upon the term "*tenant*" as used in section 4, George II, C. 28, which has been held to include an under-lessee [*Moore* v. *Smee*(2)]. In my opinion where a lessee is permitted by law to transfer mortgage, or sub-lease his rights, as in this case, the transferee of the rights must be deemed to stand in the shoes of the transferor for the purpose of making payment of the rent in arrears and costs of the suit under section 114 of the Act. I am inclined to think that he is as much entitled to be relieved of the forfeiture as the original tenant. This is more especially so where the original tenant has transferred his entire rights to the defendant. The heirs of the original lessee are certainly entitled to pray for the relief which the lessee is entitled to and ask for relief against forfeiture under section 114, Act IV of 1882. I see no reason for holding that the assignee of the rights of the tenant should be in a worse position. I dismiss the appeal but without costs, as the respondents have not appeared.

Appeal dismissed.

(2) (1907) 2 K. B. 8; 76 L. J. K. B. 658; 96 L. T. 594.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 789 OF 1913.

June 15, 1914.

Present:—Mr. Justice Piggott.

SHAIKH MUHAMMAD —PLAINTIFF— APPELLANT

versus

Shaikh QADIR BAKSH AND OTHERS— DEFENDANTS —RESPONDENTS.

U. P. Land Revenue Act (III of 1901), s. 233 (k)—Suit filed within three months in Civil Court withdrawn—Fresh suit beyond three months—Limitation—Civil Procedure Code (Act V of 1908), O. XXIII, r. 2

Under an order of a Revenue Court in a partition proceeding the plaintiff was required to institute a suit within three months in a Civil Court for the determination of his claim. He instituted the suit within three months, but for some defect withdrew it and re-instituted it next day but beyond three months. The lower Appellate Court dismissed the suit, on the ground that the order of the Revenue Court to file a suit in a Civil Court within a limited time involved a suspension and supersession of the ordinary period of limitation prescribed for such a suit and as the suit was beyond three months it was barred by time.

Held, that under the circumstances there was no failure to institute a suit within the period prescribed by the order of the Revenue Court and that no question of limitation being involved, the suit, when instituted afresh after the order of withdrawal, was not obnoxious to the provisions of Order XXIII, rule 2, of the Civil Procedure Code.

Second appeal from the decision of the District Judge of Azamgarh, dated 25th April 1913.

Mr. *Peary Lal Banerji*, for the Appellant.—The present suit having been instituted the very next day after the withdrawal of the previous suit must be taken to be a continuation of the former suit. I rely on the ruling reported as *Randhir Singh* v. *Bhag-*

wan Das (1). The ruling reported as *Banwari Lal* v. *Gopi* (2) is a single Judge case and must be taken to have been overruled by the later Allahadad ruling reported as *Randhir Singh* v. *Bhagwan Das* (1).

Mr. *S. M. Suleman*, for the Respondents. – The provisions of Order XXIII, rule 2, are quite clear on the point. Section 14 of the Indian Limitation Act does not apply.

[PIGGOTT, J. –What is there to prevent the Civil Court from hearing the suit? The Revenue Court may not consider the decree to be binding and may not act upon it, but the Civil Court is not prevented from hearing the suit].

When a shorter period is fixed for filing a suit the suit, should be filed within that time. Section 233 of the Land Revenue Act provides that no suit shall be entertained by a Civil Court regarding any of the matters specified in the section. It is only under section 111 of the said Act that the Civil Court has jurisdiction

The ruling cited by the other side is not good law. Moreover, the present suit is only a suit for declaration and the partition proceedings having been going on, it is no longer necessary to give a declaration in favour of the plaintiff. This Court would be exercising a good discretion in refusing to grant a relief which it would be useless to grant now. In support of my proposition, I rely on the following rulings:- –

Pirjade v. *Pirjade* (3), *Krishnaji Lakshman* v. *Vithal Ravji* (4), *Varaj Lal Shaishanker Selat* v. *Someshwar* (5), *Bhagwat Parshad* v. *Lachmi Narain* (6).

Mr. *Peary Lall Banerji*, in reply.--The rulings cited by the other side are Bombay cases, the views expressed in which are inconsistent with the view laid down in *Randhir Singh* v. *Bhagwan Das* (1). I submit that the Allahabad cases must be followed in the absence of any ruling of this Court to the contrary. The ruling reported as *Narendra Bahadur Singh* v. *Moti Lal Singh* (7) was fully considered by the Judges who decided the case reported as *Randhir Singh* v. *Bhagwan Das* (1), and the view laid down therein was not approved of.

JUDGMENT.--This appeal arises out of certain proceedings connected with a partition case in the Revenue Courts. The plaintiff claimed to be entitled to, and also to be in possession of, a fractional share which stood recorded in the name of other co-sharers. He brought his claim before the Assistant Collector conducting the partition and eventually, on the 19th of July 1911, under an order passed by the Commissioner in appeal he was required to institute within three months a suit in a Civil Court for the determination of the question in dispute between himself and the other co-sharers. He did institute a suit within three months as required. Eventually he presented an application to be permitted to withdraw that suit with liberty to bring a fresh one on the same cause of action under the provisions of Order XXIII, rule 1, Civil Procedure Code, and he received such permission, the order under which the suit originally instituted was withdrawn being dated the 20th of May 1912. On the day following, namely, on the 21st of May 1912 the present suit was instituted. The relief sought was a declaration that the plaintiff is in proprietary possession of a certain specified share or in the alternative, if it were found that the plaintiff was not in possession, he sought a decree for recovery of possession. The first Court framed five issues and decided them all. It held that the plaintiff had proved his title and his possession also that his suit was not barred by limitation, that is to say, that he was within time under the appropriate Article or Articles of the Indian Limitation Act. It dismissed the suit, however, upon a somewhat curious finding, namely, that by reason of section 233 (*k*) of the United Province Land Revenue Act (Local Act III of 1901) a suit of this nature, which related to a partition or union of *mahals*, was only entertainable if brought in accordance with the provisions of section 111 of the same Act. The particular suit before him the learned Munsif held not to have been brought under section 111 of that Act, because instituted more than three months after the Commissioner's order of July the 19th, 1911. He accordingly dismissed that suit, relying upon a reported

(1) 21 Ind. Cas. 654; 11 A. L. J. 746; 35 A. 541.
(2) 4 A. L. J. 713; A. W. N. (1907) 282; 30 A. 44.
(3) 6 B. 681.
(4) 12 B. 625.
(5) 29 B. 219; 7 Bom. L. R. 90.
(6) 19 Ind. Cas. 978; 11 A. L. J. 621.
(7) 11 O. C. 114.

decision of two learned Judges both of whom have subsequently sat as Judges of this Court in the case of *Narendra Bahadur Singh* v. *Moti Lal Singh* (7). The plaintiff then appealed to the Court of the District Judge. The order dismissing his suit was there affirmed, though on a different ground. The learned District Judge referred to the reported decision of a single Judge of this Court in *Banwari Lal* v. *Gopi* (2). According to this decision an order requiring a party appearing before a Revenue Court to file a suit in a Civil Court within a limited time involves a suspension and supersession of the ordinary period of limitation prescribed for such a suit so that if the suit be instituted beyond the period limited by the order of the Revenue Court then it must be treated as barred by limitation, irrespective of any period which may be provided for such a suit by the first Schedule of the Indian Limitation Act. This ruling can no longer be accepted as good law. It was quoted before a Bench of this Court in *Randhir Singh* v. *Bhagwan Das* (1) and though not expressly dissented from in the reported judgment it seems to me to have been practically set aside. That case was very much on all fours with the one now before me and is in fact indistinguishable from it. It is obvious that the present suit was not barred by the ordinary law of limitation so that rule 2, Order XXIII, Civil Procedure Code, cannot be quoted or relied on with respect to it. The penalty provided by the Land Revenue Act itself for failure to institute a suit within the limited period is that the Collector shall decide the question in issue against the person who has failed to institute a suit. The learned Judges of this Court held that in circumstances like the present there has been no failure to institute a suit within the period prescribed by the order of the Revenue Court and that no question of limitation being involved, the suit when instituted afresh after the order of withdrawal is not obnoxious to the provisions of Order XXIII, rule 2, Civil Procedure Code. So far as the question discussed in the Oudh case as to the applicability of section 233 (*k*) of the Land Revenue Act is concerned, the point does not seem to have been expressly taken before the learned Judges of this Court. They seem to me to have decided by implication that the order of the Revenue Court directing a party to file a suit in the Civil Court within three months having once been complied with, the Civil Court became seized of jurisdiction in the matter, even though this jurisdiction might otherwise have been barred by section 233 (*k*) of the Land Revenue Act. Having jurisdiction to deal with the suit, the Civil Court could, therefore, permit the plaintiff to withdraw the same and re-institute it in an amended form. At any rate I am bound by the decision of a Bench of this Court in a similar case, and it follows that I cannot maintain the order of the lower Appellate Court. It has been represented to me in argument on behalf of the respondents that the proceedings in partition have in the meantime been going on, so that the state of affairs at the present moment is no longer the same as it was when this suit was instituted. The suggestion is that the defendants ought under the circumstances to be permitted to enter into fresh pleadings, and perhaps to satisfy the Court that whatever may have been the case at the moment when the first suit was instituted, the plaintiff is no longer entitled either to a declaration or to a decree for recovery of possession. This is a matter which the defendants should bring to the notice of the lower Appellate Court, to which Court the case must now go back. That Court dismissed the appeal of the plaintiff upon what was strictly a preliminary point. It has not gone into any of the other issues in the case, and its decision on the preliminary point in question I must, in accordance with the decision of *Randhir Singh* v. *Bhagwan Das* (1), now reverse. I, therefore, set aside the decree of the lower Appellate Court and remand the case to that Court under Order XLI, rule 23, Civil Procedure Code, with directions to re-admit the case on to its file of pending appeals and dispose of it according to law. Costs of this appeal which will include fees in this Court on the higher scale will abide the event.

Case remanded.

KARUPPAYEE v. CHINNAMMAL.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 578 OF 1913.

July 16, 1914.

Present:—Mr. Justice Oldfield.

KARUPPAYEE—PLAINTIFF—PETITIONER

versus

CHINNAMMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (*Act V of* 1908), *s.* 115—*Order setting aside* ex parte *decree without sufficient cause—Revision—High Court's power to interfere.*

Where a Subordinate Court sets aside an *ex parte* decree without sufficient cause and allows the suit to proceed, the High Court can, in the exercise of its revisional jurisdiction under section 115 of the Code of Civil Procedure, interfere with such an order (even if it be interlocutory in its nature) and set it aside.

A distinction exists between *an order setting aside an ex parte decree and an order refusing to set it aside*; in the latter case an appeal lies and section 115 of the Code does not apply, while in the former case it is otherwise.

Gopala Chetti v. *Subbier*, 26 M. 604; 13 M. L. J. 308, *Nand Ram* v. *Bhopal Singh*, 16 Ind Cas 1; 34 A. 592; 10 A. L. J. 130, distinguished.

Motilal Kashibhai v. *Nana*, 18 B. 26, followed.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Tirumangalam, in I. A. Nos. 42 and 43 of 1913 (in Original Suit No. 350 of 1912), dated 28th March 1913.

FACTS.—The defendants in a pending suit having absented themselves from Court on the day fixed for the hearing, an *ex parte* decree was passed against them. Later on they filed petitions for setting aside the *ex parte* decree and the District Munsif of Tirumanglam set aside the same. Against these orders plaintiff applied to the High Court in revision.

Mr. *C. A. Seshagiri Sastri* (with Mr. *K. V. Krishnasami Iyer*) raised a preliminary objection that the revision petition was incompetent as the matter can be agitated in the appeal against any final decree that may be passed in the suit. He relied on the judgments of Sadasiva Aiyar, J., reported as *Kajira Beeriammall* v. *Fathma Biriammall* (1) and *Gaeble* v. *Ramayi Ammal* (2); *Gopala Chetti* v. *Subbier* (3) and *Nand Ram* v. *Bhopal Singh* (4).

Mr. *B. Sitarama Rao* argued *contra* and relied upon the practice of the High Court.

The preliminary objection was overruled.

Mr. *B. Sitarama Rao*, for the Petitioner.—

The order of the Court below is unsustainable. There is no finding as to whether there was sufficient cause for the non-appearence of the defendants. The existence of sufficient cause alone can justify the setting aside of the decree. The Munsif has also gone wrong in saying that the case of the 5th defendant was similar to that of the defendants Nos. 1 to 3. The only explanation offered by him for non-attendance was that owing to distance and illness, he could not attend. That is not sufficient cause. In any event the absence of finding as to sufficiency of cause is fatal to the order.

Mr. *C. A. Seshagiri Sastri*, for the Respondents.—Sufficient cause is a question of fact. A reading of the order shows that the lower Court has come to the conclusion that sufficient cause existed and set aside the *ex parte* decree. In setting aside the decree the learned District Munsif seems to have been influenced by other considerations also. Anyhow the question is one of fact and the High Court will not interfere with the order in revision.

JUDGMENT.—A preliminary objection has been taken to this revision petition on the ground that petitioner will, if necessary, be able to advance the considerations now relied on in an appeal against any decree which may be passed against him.

There is no doubt that he will be able so to advance them. *Gopala Chetti* v. *Subbier* (3). And there is authority for treating this fact as decisive against the sustainability of a revision petition. *Nand Ram* v. *Bhopal Singh* (4). On the other hand, though, no doubt, the point has not been formally taken in any reported case in this Court, this Court's practice has certainly been to entertain petitions such as the present; and the reasons for abandoning that practice call for careful scrutiny, when its abandonment will entail in many cases the holding of a trial on the merits, which will ultimately turn out to have been unnecessary.

Sections 115, Civil Procedure Code, authorises revision in "any case in which no appeal lies to the High Court." The practice of the Court already referred to can be justified if the "case" in question is throughout treated as meaning only that which has resulted in the setting aside of the *ex parte* decree and not the suit in which the decree is passed, against which an appeal lies. The

(1) 24 Ind. Cas. 779; 1 L. W. 230.
(2) 24 Ind. Cas. 781; 1 L. W. 232.
(3) 26 M. 604; 13 M. L. J. 308.
(4) 16 Ind. Cas. 1; 34 A. 592; 10 A. L. J. 130.

latter view was taken by the Bombay High Court in *Motilal Kashibhai* v. *Nana* (5). But the Madras case therein referred to does not seem to me to support it. Nor has other Madras authority, which does so, been cited. In these circumstances, following the practice of this Court, I deal with the petition.

The lower Court's order in the case of Nos. 1 to 3 defendants contains no finding on the question whether they had sufficient cause for absenting themselves from the hearing. Instead there are references to the pendency and valuation of the suit. Yet only the existence of sufficient cause could justify an order in Nos. 1 to 3 defendants' favour.

The lower Court has disposed of 5th defendant's case by stating that it was similar to Nos. 1 to 3 defendants' and that the order in theirs would apply to it. As 5th defendant's only explanation for his absence was that, though he knew of the proceedings, he could not attend them owing to distance and illness, there was no foundation for this disposal.

The lower Court's order is set aside, and it is directed to re-admit the petitions and to dispose of them in the light of the foregoing after recording distinct findings in each on the issue, whether Nos. 1 to 3 defendants and 5th defendant had sufficient cause for their failure to appear. Costs will follow the result.

Order set aside.

(5) 18 B. 35.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 261 OF 1914.

July 12, 1914.

Present:—Mr. Justice Sunder Lal.

GANPAT MALAH—PLAINTIFF—APPELLANT

versus

Musammat SUNDRI—DEFENDANT—RESPONDENT.

Hindu law—Wife's right to remain in husband's house if he sues to eject her.

A Hindu wife cannot insist upon living in a house belonging to her husband so as to be able to resist successfully a claim on his part for her removal from the house occupied by her. The questions of her unchastity and immorality and residence and maintenance are irrelevant when her husband asserting his proprietary right sues to eject her from his property.

Second appeal from a decree of the District Judge of Azamgarh, dated the 26th November 1913.

Mr. *R. K. Sorabji*, for the Appellant.

Dr. *S. N. Sen*, for the Respondent.

JUDGMENT.—This is a suit by the husband to eject his wife from the possession of a portion of the house in which she is living now, on the allegations that she had become unchaste and left her husband's home and protection long ago and had been leading the life of a prostitute. She has now come back suddenly and taken possession of a portion of the house. The defendant denies these charges and by way of counter-charge alleges that the husband is keeping another woman as his mistress and it is under her influence that he has instituted these proceedings. The Court of first instance found that the defendant had become unchaste and had left her husband long ago. It decreed the claim. The learned Judge in appeal is inclined to doubt the evidence as to unchastity. He is of opinion that "*the defendant does not at present lead* an immoral life" and upon that ground has dismissed the suit.

Apart from that question of unchastity and immorality, whether a Hindu wife can insist upon living in a particular part of the house belonging to her husband so as to be able to resist successfully a claim on his part for her removal from the portion so occupied by her, is a question by no means free from doubt. In the case of *Baldeo Das* v. *Sham Lal* (1) a Division Bench of this Court made a decree for the dispossession of a Hindu son at the suit of the father. They held that even a Hindu son, who has proprietary rights in the ancestral dwelling house has no independent dominion over it, so long as the property is joint, as against his father. In this case the wife has no proprietary rights in the house. She has no doubt a right to maintenance against the husband and to be provided with a suitable place for her residence, unless for any reasons she has forfeited

(1) 1 A. 77.

her rights as a wife by reason of misconduct on her part. She can also claim a restitution of her conjugal rights against the husband who, in the absence of circumstances justifying his refusal to accede to the claim, is bound to receive her in his house and resume conjugal relations with her. The wife, however, has no proprietary interest in the house. The plaintiff in this case is asserting his proprietary rights in the house; whether the wife has a claim for maintenance and a right of residence in a house to be provided by the husband are questions foreign to this suit. The husband has full ownership and dominion over the house and the wife cannot resist the claim on the ground of any right in her in the house. The questions of unchastity and immorality tried by the Court below are, in my opinion, irrelevant for the purposes of this case, in which the husband is seeking to enforce his rights of property in the house. That the wife is the defendant in the case is a mere accident. The true issue for trial is, who is the owner of the house?

Any claims that the wife has for maintenance or restitution of conjugal rights do not afford a defence to this suit. They create no right of property in her in the house. The house being admittedly the property of the plaintiff he is entitled to a decree for possession of the house and for the ejectment of the defendant. I, therefore, decree the appeal, set aside the decree of the Court below and restore that of the Court of first instance.

This decree will not affect the right of the defendant to sue her husband for maintenance or for providing her with a suitable residence or for the restitution of her conjugal rights. All that I decide in this case is the right to the property in the house. The parties will bear their own costs of the litigation throughout.

Appeal decreed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 361 OF 1913.

June 30, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

Musammat MAQBUL FATIMA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

AMIR HASAN KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 11, 13—Judgment of Court in British India, whether can operate as res judicata *in Court of Native State—Injunction, suit for—Foreign judgment, effect of.*

The plaintiff sued the defendant for a declaration that a judgment obtained between the parties in British India would operate as *res judicata* even in a Native State and prayed that the defendant be restrained by a perpetual injunction from continuing his suit against the plaintiff in the Native State:

Held, that, as the Court in British India was not competent to try the suit in respect of the property which was situated in the Native State, the judgment of the Court in British India could not operate as *res judicata* in the Court of the Native State within the meaning of section 11 of the Civil Procedure Code.

A 'foreign judgment' has no force or authority as such in British India. A foreign judgment may give a cause of action and a suit may be based upon it to obtain the same relief as was given in the foreign judgment.

It is only in proceedings based upon 'foreign judgments' that the question of the effect of the foreign judgment can properly arise.

First appeal from the decision of the Subordinate Judge of Bareilly, dated 3rd November 1913.

FACTS.—In 1893 there was a dispute between Nawab Altaf Ali Khan and his wife's daughter about dower and ornaments. The dispute was referred to arbitration and under the award all the immoveable property was given to the plaintiff-appellant. On 20th February 1904, Nawab Altaf Ali declared himself a Shia by a Will. A daughter would exclude other heirs under Shia Law. When Nawab Altaf Ali died Amir Hussain and others attached plaintiff's title and possession. A suit was, therefore, brought in the Sub-Judge's Court and it was decreed. The Sub-Judge's decree was affirmed by the High Court on appeal. The bulk of the property lies in the Rampur State. After the suit for declaration was decided by the Sub-Judge of Bareilly and before the appeal to the High Court was filed, the defendants brought a suit in Rampur for recovery of possession of the property situated there. The

present suit was brought in the Court of the Sub-Judge, Bareilly, while the Rampur suit was pending, in order to stop the suit at Rampur from proceeding further. The Sub-Judge dismissed the suit, holding that he had no jurisdiction to entertain the suit. The plaintiffs appealed to the High Court.

Mr. *B. E. O'Conor* (with him Mr. *P. N. Banerjee*), for the Appellants.—Under section 13 of the Civil Procedure Code, a decision of a Foreign Court is binding on the British Court. The defendants are residents of British India and are exclusively subordinate to the British Indian Courts. The reliefs sought are declaration and injunction. We don't ask the Rampur Court to stay its hands. The suit as framed makes it quite clear that we have not asked this Court to make any order of injunction to the Rampur Court. We have asked for a relief *in personam*. When a case has been adjudicated upon in British Courts and one of the parties seeks to agitate the same matters in a Foreign Court, the Court can prevent him from doing so. There are many English rulings to that effect.

The property is an accretion to the Rampur State after the Mutiny. It was formerly a portion of the Bareilly District. In *Lachmi Narain* v. *Partab Singh* (1) a history of the relations between the Rampur State and the British State is discussed. The British Law applies to Rampur. After the accretion, there was a treaty with the Nawab, who promised to apply British Law to these lands. This fact is also clear from the *Rukka*, dated 6th October 1864, and the Regulations called *Dastur-ul-amal*.

Under the Codes of 1877 and 1882, section 13 (6) provided about foreign decisions.

The production of a duly authenticated copy of the decision raised a presumption that the Court had jurisdiction and this could be rebutted.

Section 13 of the present Code is wider than section 13 (6) of the old Codes. It is also analogous to section 14 of the old Code and provides that a foreign decision shall be conclusive as to any matter.

The only difference in the two cases is the subject-matter, *i.e.*, property, otherwise plaint allegation, defence, matters leading up to the decree and law are the same. Every issue is *res judicata*. In view of section 13 if the other side had obtained a decree in Rampur, they could have put forward the same in British India.

[RICHARDS, C. J.—A foreign judgment can only constitute a new cause of action.]

[TUDBALL, J.—In the Limitation Act, Article 117 (5) gives a period for bringing a suit on a foreign judgment.]

Section 11 requires that the two Courts should have equal jurisdiction. Section 13 does not require this.

[RICHARD, C. J.—If your contention is correct a foreign judgment would sometimes have a greater effect than a British Court judgment].

All reference about foreign judgment has been taken out of old section 13, thereby showing an intention to treat it as no part of section 11. They have placed it on a different footing.

[RICHARDS, C. J.—The proceedings founded upon the judgment of a Foreign Court would be conclusive. We would arrive at an extremely absurd result as, if a foreign judgment were considered to be *res judicata*, the decision of a Munsif in Rampur would be claimed to be conclusive in a suit regarding many lakhs worth of property in British India. The Sub-Judge of Bareilly is not competent to try the suit regarding property in Rampur. The decision cannot operate as *res judicata*, as otherwise very absurd results would follow.]

I submit that the effect of section 11 and section 14 is to make the foreign judgment operate as *res judicata*.

The Hon'ble Dr. *T. B. Sapru* (with him Mr. *D. C. Banerjee*), for the Respondent, was not called upon to reply.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs against the defendants for reliefs set forth in the following words:—

> "(*a*). That it be declared that the judgment, dated the 2nd February 1911, by the Subordinate Judge of Bareilly between the parties and upheld by the Hon'ble High Court on the 6th November 1912, is binding between the parties, and operates as *res judicata*

(1) 2 A. 1.

against the defendants on the points heard and decided between them in all subsequent proceedings *even in the Rampur Court.*"

"*(b).* That the defendants be restrained by a perpetual injunction from continuing their suit in the Court of the District Judge of the Rampur State against the plaintiffs, which they have instituted there for the recovery of a moiety of the estate situated in the ceded District of Rampur* * * *."

It will be convenient very shortly to state here the facts which led to the institution of the present suit. At one time one Nawab Muhammad Altaf Ali Khan was the owner of considerable property situated partly in Bareilly and partly in Rampur State. Upon the death of Nawab Muhammad Altaf Ali Khan disputes arose between the plaintiff and the defendants as to the title to the property situated in both places. The plaintiffs instituted a suit before the Subordinate Judge of Bareilly for a declaration of their title in respect of so much of the property as was situate in the District of Bareilly. That suit resulted in favour of the plaintiffs. While it was pending, the defendants instituted another suit in Rampur claiming possession against the defendants in that suit (the plaintiffs in the present suit) of the property situate in Rampur. Thereupon the plaintiffs instituted the present suit claiming the relief set forth above.

There can be no doubt that if all the property was situated in British India, the decision of the Subordinate Judge of Bareilly, confirmed by the High Court, would operate as *res judicata* against the defendants. The difficulty is that part of the property is situated in Rampur outside British India.

It is pointed out on behalf of the plaintiffs that they do not ask the Court to issue any injunction to the Court in Rampur and that the relief that they claim is against the defendants personally. It is strongly urged that even in Rampur the decision that was given in British India in respect of the Bareilly property is absolutely conclusive, and that, therefore, the defendants ought not to be allowed to re-open the matter in Rampur and put the plaintiffs to the expense and inconvenience of defending the suit in that State.

Assuming for a moment that this Court has power to grant an injunction which in effect would restrain proceedings in the Rampur State (even though the injunction is not directed to the Rampur Court), it is necessary to consider whether or not the plaintiffs are entitled to a declaration "that the judgment of the Subordinate Judge of Bareilly operates as *res judicata* in the Rampur State." It is said that in the District in Rampur, in which the property is situate, the laws in force in British India are observed, and that this condition has been observed by the Ruler of the Rampur State ever since the *ilaqa* was granted to the State in recognition of services in the Mutiny. A document is on the record called "*Dastur-ul-amal*" in which it is stated that "the affairs and cases of the new *ilaqa* shall be decided in accordance with the laws in force in British India." It was also stated at the Bar that the Code of Criminal Procedure has been printed in Rampur for the use of the *ilaqa*. No copy of this Code was produced. It might be difficult to decide, were it necessary to do so, that the meaning of the *Dastur-ul-amal* was that not only existing laws but all future laws, including adjective law like the Code of Civil Procedure, were to apply to the *ilaqa*. We will, however, assume that a Code of Civil Procedure in all respects the same (with the necessary modifications to make it applicable to the State) is in force in Rampur so far as this *ilaqa* is concerned. Section 11 of the Code of Civil Procedure is as follows:

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

The issues in the suit in Rampur are said to be, and probably are, identical with the issues in the suit that was tried in Bareilly, but the Subordinate Judge in

Bareilly was not competent to try the suit in respect of the property which is situated in Rampur. It seems, therefore, that so far as section 11 of the Code of Civil Procedure is concerned the judgment of the Subordinate Judge of Bareilly does not operate as *res judicata* in Rampur.

But it is contended that section 13 of the Code of Civil Procedure makes the judgment absolutely conclusive because the issues, though not the cause of action are the same. Section 13 is as follows:

"A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title, except" as in the same section provided.

The word "judgment" in the expression "foreign judgment" is evidently used in the sense in which the word 'judgment' is used in England.

It is contended that if in the Rampur Court the judgment of the learned Subordinate Judge of Bareilly was produced, that Court would be at once bound to pronounce judgment against the defendants in the Rampur State and in favour of the defendants by reason of the language of section 13. If this argument be sound the result would be somewhat startling. A Court in Rampur which was only competent to try suits where the value of the property was very small, might give judgment in favour of a party and in a suit subsequently brought in British India between the same parties in respect of different property worth many lakhs: if the judgment of the Rampur Court was produced nothing more could be said, and the Court in British India (no matter how high its jurisdiction) would be absolutely bound. This would mean that it was the intention of the Legislature to give greater effect to judgments of a Foreign Court, no matter how petty, than to judgments of as high or possibly higher Courts in British India. In British India it is only when the first Court is competent to try the second suit that the matter is *res judicata*.. Such a result, we think, would be almost absurd.

It is contended that no matter how absurd the result, the words of section 13 are quite plain. A "foreign judgment" is defined in our Code of Civil Procedure to be the judgment of a "foreign Court" and a "foreign Court" is defined to be a Court which has no authority in British India, and is not established or continued by the Governor-General. A "foreign judgment" has no force or authority as such in British India. It is, of course, true that a "foreign judgment" may give a cause of action and a suit may be brought based upon it to obtain the same relief as was given by the "foreign judgment." If we read the words of section 13 as meaning that the "foreign judgment" shall be conclusive as to any matters thereby directly adjudicated upon in any proceedings based upon such judgment, the meaning of the section becomes perfectly clear. In our judgment it is only in proceedings based upon "foreign judgments" that the question of the effect of the "foreign judgment" can properly arise. We may here point out that if the Code printed in Rampur is simply a copy of our Code and contains the same definition of "foreign judgment" and "Foreign Court", it is difficult to see how section 13 applies at all. We would be inclined, if such be the case, to infer that the Code was only printed as a guide to judicial officers in Rampur when dealing with cases in the *ilaqa*. For these reasons we are of opinion that the plaintiffs are not entitled to the declarations they ask for. If they are not so entitled they clearly are not entitled to the injunction claimed.

It is unnecessary to express any opinion on the other questions raised. In conclusion we wish to say that we have no reason for thinking that the suit will not be fairly and honestly tried out in Rampur on the evidence.

The result is that the appeal fails and is dismissed with costs, including in this Court fees on the higher scale.

Let the office report as to the correct valuation of the appeal having regard to the additional Court-fee paid by the appellants and the correct amount of Counsel's fee payable thereon.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1179 OF 1913.

June 30, 1914.

Present:—Mr. Justice Sunder Lal.

Musammat ANARAGI KUNWAR—PLAINTIFF—APPELLANT

versus

KASHI RAI—DEFENDANT—RESPONDENT.

Redemption of mortgage—Mortgage sought to be redeemed not proved—Suit to be dismissed—Another mortgage admitted by mortgagee—Admission to be taken advantage of in suit for redemption of that mortgage.

Where in a suit for redemption the mortgage propounded in the plaint is not proved, the suit must fail, and the fact that the mortgagee has admitted in his written statement a different mortgage may be taken advantage of in another suit to redeem that mortgage.

Second appeal from the decision of the District Judge of Azamgarh, dated July 25th, 1913.

Mr. *Jang Bahadur Lal*, for the Hon'ble Mr. *Gokul Prasad*, for the Appellant.

Mr. *Parmeshwor Dayal*, for the Respondent.

JUDGMENT.—This a suit for the redemption of a mortgage said to be made 14 years ago by Ram Harakh Rai in favour of Kashi Rai to secure a sum of Rs. 36. Under this mortgage the mortgagee was entitled to appropriate the produce in lieu of interest. He was, however, bound to pay Government revenue. The Court of first instance decreed the claim. But the learned Judge in appeal has reversed that decree. In the first place, according to the plaintiff, the mortgage was made by an unregistered document which has not been proved. No witness had been called who could give an account of the contents of the said document. The Court also considered the witnesses to be tutored. In that view the mortgage in suit not having been found to be proved, the Court rightly dismissed the suit. Mr. Jang Bahadur Lal, on behalf of the appellant, has argued that in the first plea in the written statement filed by the defendant the fact of mortgage, though with somewhat different conditions, was admitted and the Court below in any event ought to have given a decree for the redemption of the mortgage admitted by the defendant. This suit, however, was for the mortgage propounded in the plaint which was not proved and the suit, therefore, on that mortgage failed. Plaintiff, no doubt, is at liberty to sue on any other mortgage that may be admitted by the defendant. In fact he may take advantage of the admissions made in the written statement.

This suit was rightly dismissed and the ruling of this Court in *Sheo Prasad* v. *Lalit Kuar* (1) supports the view taken by that Court. I dimiss the appeal with costs.

Appeal dismissed.

(1) 18 A. 403; A. W. N. (1896) 132.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1145 OF 1913.

June 30, 1914.

Present:—Mr. Justice Rafique.

SAGWA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAM SARAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), s. 118, applicability of—Suit for possession of land allotted in partition—Whether Courts should wait for result of application to Revenue Court.

Where an application is made to the Collector under section 118 of the Land Revenue Act, the Civil Courts are not bound to await the result of the application or to dismiss the claim for possession of land allotted to the plaintiff under an order of partition on the offer of the appellants to pay rent for the plot in suit.

Iswar Parshad v. *Jagarnath Singh*, A. W. N. (1906) 194, distinguished.

Nawlan Pat Tewari v. *Radha Keshun Kalwar*, 5 Ind. Cas. 664, referred to.

Second appeal from the decision of the District Judge of Meerut, dated August 14th, 1913.

Munshi *Gokul Prasad*, for the Appellants.

Messrs. *Porter* and *Parmeshwor Dayal*, for the Respondents.

JUDGMENT.—The suit which has given rise to this appeal was instituted under the following circumstances:—

Banarsi Das, Dhanpat Rai, Sagwa and Kallu and some others were co-sharers in the village of Bijauli, Parganah Sarnwah, Tahsil Hapur. There was a partition of the village in 1316 *fasli* under which plot No. 364/1 with other lands fell to the lot of Banarsi Das and Dhanpat Rai. The said plot prior to the partition was in possession of Sagwa and Kallu. Subsequent to the partition Banarsi Das and Dhanpat Rai leased the said plot to one Ram Saran for building purposes. Ram

Saran was resisted in his attempt to take possession of the plot in question by Sagwa and Kallu and a female relation of theirs, called *Musammat* Chhoni, who apparently lived with them. Thereupon Ram Saran instituted the present suit for the recovery of possession of the said plot impleading Sagwa, Kallu and *Musammat* Chhoni, and also his lessors as defendants. The lessors put in no defence. Sagwa and Kallu contested the suit on the ground that the plot in question had been in their possession for many years upon which they had certain constructions and all that Banarsi Das and Dhanpat Rai or their representatives could claim was the rent of the said plot. The learned Munsif in whose Court the suit was filed decreed it. Sagwa and Kallu appealed to the District Judge who affirmed the decree of the first Court. The learned Judge found that the plot in suit was at the time of the partition *uftada* land and that there was no house or any other building upon it then. He, therefore, held that section 118 of the Land Revenue Act, to which reference was made by Sagwa and Kallu, had no application. The appeal was accordingly dismissed. Sagwa and Kallu have come up in second appeal to this Court. They challenge the decree against them on three grounds *viz.*:—

(1) that the finding of the learned District Judge that no building existed on the plot in suit at the time of partition is erroneous;

(2) that the lower Courts should have waited for the decision of the application made by the appellants to the Collector under section 118 of the Revenue Act, presumably after the institution of the present suit;

(3) that as the appellants were willing to pay rent for the plot in suit the claim for its possession should have been dismissed.

The first objection of the appellants attacks a finding of fact. They admit that a finding of fact cannot be questioned in second appeal. But they say that the learned Judge has based his finding on one piece of evidence only which he considers conclusive, *viz.*, the entry in the partition papers. That entry is not conclusive, *i.e.*, incapable of rebuttal and other evidence ought to have been taken into consideration also. I do not think that the learned Judge meant that the entry in question was conclusive in the sense that no other evidence could be given in rebuttal of it. What he meant was that he preferred the evidence of the said entry to other evidence in the case. There is nothing in his judgment to show that he did not consider all the evidence on the record. He mentioned the entry in the partition papers because he considered that to be the most important evidence on the question of the existence or absence of a building on the plot in suit. The first objection for the appellants, therefore, fails. In support of the other two objections the learned Counsel for the appellants relied on the case of *Iswar Parshad* v. *Jagarnath Singh* (1). The present case is distinguishable from the case of Ishwar Prasad in that in the latter case it was admitted that some buildings did exist at the time of partition on the land in dispute. Besides in a later case it was held that the provisions of section 118 of the Revenue Act could not be urged in defence to a civil suit for possession of land allotted to the plaintiff under an order of partition, vide *Nandan Pat Tewari* v. *Radha Keshun Kalwar* (2). I do not think that the lower Courts were bound to await the result of the application said to have been made by the appellants, under section 118 of the Revenue Act, to the Collector or to have dismissed the claim on the offer of the appellants to pay rent for the plot in suit. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) A. W. N. (1906) 194.
(2) 5 Ind. Cas. 664.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1079 OF 1913.

July 6, 1914.

Present:—Mr. Justice Sunder Lal.

GANGA DIN SONAR—DEFENDANT—APPELLANT

versus

JAGAT TIWARI—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Trespass—Improvements—Compensation—Building constructed upon land of another—Suit for possession—Decree, form of.

No one can, by merely trespassing upon the land of another and constructing costly buildings upon it, claim a right to retain its possession. He has no right to compel the real owner to receive compensation for his land instead of the land itself.

GANGA DIN v. JAGAT TIWARI.

In a case like this the decree should reserve leave to the trespasser-defendant to remove his materials within a time to be fixed by the Court, failing which the plaintiff, the true owner, should be put in possession of his land with or without the buildings, which he may pull down at his pleasure.

Second appeal from the decision of the Additional Judge of Gorakhpur, dated May 16th, 1913.

Messrs. *Haribans Sahai* and *L. M. Banerji*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—The parties to this suit are residents of a village named Sanadra in the Gorakhpur District. Neither party has any *zemindari* right in the village, but both are residents occupying house sites in the village. The plaintiff owns a house in the village appertaining to which is a courtyard bearing No. 226 which has always been in his possession and occupation, and a strip of land bearing No. 205 is the passage or pathway to this house. The plaintiff's case is that he has no other passage or way for egress or ingress to his house. He alleges that the defendant has recently taken possession of the plaintiff's courtyard and has commenced to build a house on it. He has also blocked up the passage to the plaintiff's house by building a wall across it. He sues for the possession of the land and the demolition of the constructions put upon it by the defendants. He also prays for the demolition of the wall put up on plot No. 205, so as to permit the plaintiff to have access to his house by the passage land marked as No. 205. The suit was filed on 14th May 1912.

The defence to the suit is that the land over which possession is claimed by the plaintiff is not a courtyard appertaining to the house of the plaintiff, but is a piece of waste land of the village which he has occupied with the permission of the *zemindars* since about eight years, that the house built thereon by the defendant has been in course of erection for about a year and a half without any let or hinderance on the part of the plaintiff, who has been a passive spectator thereof. They further allege that they have not blocked up any passage to the plaintiff's house, and urge that the claim in respect of it is altogether absurd and ridiculous.

Apart from the question of valuation, which was also put in issue, the Court of first instance framed four issues for trial in the following terms :—

2. Is the land on which the defendants have made the disputed construction *sahan* (courtyard) of the plaintiff?

3. Had the plaintiff any path to his house on the land the defendants have made constructions (upon)? If so was it the only path, or he had some other path?

4. Is the plaintiff entitled to any relief, and if so to what relief?

5. Have the defendants made the disputed constructions with the consent of the plaintiff?

The Court of first instance found that the land in question was part of the waste land of the village and was not a courtyard appertaining to the plaintiff's house, that the plaintiff has another passage to his house from the north-west which joins the public road on that side, that it was not proved that the constructions in question were erected with the plaintiff's consent and upon these findings the Munsif dismissed the suit.

The plaintiff appealed to the Court of the District Judge against the said decree. The appeal was heard by the Additional District Judge of Gorakhpur. The learned Judge after a consideration of the entire evidence, both documentary and oral, has found:—

(1) that the land in dispute is a courtyard appertaining to the plaintiff's house;

(2) that there is a footpath to the plaintiff's house east of land No. 226, and that foot-path has now been built upon by the defendants.

He has also found "that the plaintiff objected at the earliest moment to the erection of this house and that he complained about it to Dhanpatman, a *karinda* of the *zemindar*, and Dhanpatman admits in his deposition that such a complaint was made. In fact an injunction was issued by the Court also on 15th June 1912 preventing the defendant from going on with the building. In teeth of the opposition the defendant went on with his building and he must bear the consequences of his action." Upon these findings he has decreed the claim. The defendants have preferred this appeal.

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Mr. Haribans Sahai for the appellant has urged that the finding of the learned Judge to the effect that the land in question was part of the plaintiff's courtyard is not correct. The evidence at most showed that the plaintiff had been using a part of the village waste land for tying up his cattle etc. It did not go far enough to prove that it appertained to the plaintiff's house. In my opinion the contention of the learned Vakil on this point is concluded by the finding of fact arrived at by the Court below. In the recent partition the land has been recorded as a courtyard of the plaintiff's house and I do not see how I can go behind this clear finding of fact in second appeal. The fourth plea taken in the appeal, therefore, fails. The entry in the partition record was some evidence in the case, and though not binding and conclusive upon the defendants, it was a relevant fact in the case.

Mr. Haribans Sahai has next argued that the plaintiff made no objection to the construction of the house and allowed it to be constructed at a cost of about Rs. 800. He ought not now be allowed to sue for its demolition. The issue of an injunction for the demolition of the house is a matter entirely in the discretion of the Court, and he has argued that under the circumstances of the case, the Court ought not to have issued an injunction for the demolition of the building constructed at so much cost. In support of his contention he has relied upon the cases reported as *Ganesh Singh* v. *Kaushal Singh* (1), *Haji Syed Muhammad* v. *Gulab Rai* (2) and the Lectures on Specific Relief delivered by Dr. Satish Chander Banerji at pages 826 and 827.

In dealing with this contention it must be borne in mind, in the first place, that the suit so far as this courtyard is concerned is a suit for its possession. The plaintiff is entitled to a decree for its possession. No one can by merely trespassing upon the land of another and constructing costly buildings on it claim a right to retain its possession. He has no right to compel the plaintiff to receive compensation for his land, instead of the land itself. In a case like this the decree should reserve leave to the defendants to remove their materials within a time to be fixed by the Court, failing which the plaintiff should be put in possession of his land with or without the buildings, which he may pull down at his pleasure. The rule of law on this point is thus formulated in Dr. Satish Chander Banerji's work at page 815 :—

"Similarly, as a general rule, 'where a defendant has gone on without right and without excuse in an attempt to appropriate the plaintiff's property, or to interfere with his rights, and has changed the condition of his real estate, he is compelled to undo, so far as possible, what he has wrongfully done affecting the plaintiff, and to pay damages. In such a case the plaintiff is not compelled to part with his property at a valuation, even though it would be much cheaper for the defendant to pay damages in money than to restore the property. . . . One who has gone on wrongfully in a wilful invasion of the plaintiff's right in real estate has no equity to set up against the plaintiff's claim to have his property restored to him as it was before the wrong was done.' " The same view was taken by the Bombay High Court in *Jethalal* v. *Lalbhai* (3).

Of the two cases relied upon by Mr. Haribans Sahai, the first [that reported as *Ganesh Singh* v. *Kaushal Singh* (1)] was a suit by one co-sharer against the other, and the second [the one reported as *Haji Syed Muhammad* v. *Gulab Rai* (2)] was a suit by one who was found not entitled to recover possession of the land, but had only a right of user over it. Those cases are obviously distinguishable from the present case. In any case the finding of the Court below that notwithstanding remonstrances the defendant persisted in going on with the construction of the house. leaves no room for the application of any rule of equity in his favour. So far for the claim for the possession of the courtyard land.

I now come to the question of the obstruction to the foot-path of the plaintiff's house by the construction of the wall com-

(1) A. W. N. (1900) 55.
(2) 20 A. 345; A. W. N. (1898) 68.
(3) 28 B. 298; 6 Bom. L. R. 86.

plained of. Mr. Haribans Sahai has argued that the pathway in question is a public highway or street and the plaintiff is not entitled to sue for the removal of the obstruction in the absence of any allegation and proof of special injury to himself, and he has relied upon the case of *Bhawan Singh* v. *Narottam Singh* (4) in support of his contention. The point was not taken in either of the Courts below. The defendant's own case was that he had not obstructed any passage of the defendant (*vide* para. 5 of his written statement of defence). It has not been found that the foot-path referred to was a public street or way. The case for the plaintiff was that the foot-path was a passage to his house. The defendant's case was that there was no passage or way there at all. Thus neither party alleged that this was a public street or way. Where a plaintiff seeks to remove an obstruction to a public way or street it has been well settled that he must prove special damage to himself before he can maintain an action. In addition to the decision of this Court already mentioned I may mention two more recent cases which take the same view, and illustrate the law on this question: *Dunn* v. *Holt* (5), *Virupaxappa Fakirappa* v. *Sherif Sab Mulla Masud Sab* (6). "An infringement of a right which exists for the benefit of the community generally is subject. not of an action, but of an indictment." (Clark and Lindsell's Law of Torts, 4th Edition, page 28). The question then is, should I, as Mr. Haribans Sahai has argued, assume that it is a public highway and deal with the question on that footing, or, as he has suggested as an alternative, remit an issue to find out whether it is a public highway and whether the plaintiff has suffered any special damage. If I could have come to the conclusion that the defendant's house should stand, I might possibly have been inclined to accede to the latter suggestion. But if the house is to be demolished and the plaintiff is to be put in possession of his land, there is no point in remitting issues which bear upon the wall which obstructs the foot-path. In my opinion in view of all the circumstances of the case, as neither party urged that it was a public street, it would not be right for me to allow this question to be raised at this stage of the case and to remit the issues proposed.

In this view of the case I dismiss the appeal with costs which in this Court will include Counsel's fee on the higher scale. Mr. Haribans Sahai has asked for six months' time to demolish the house and remove the materials. The decree of the Court below makes no provision in this respect. I think the request is reasonable and in view of the fact that Rs. 800 had been invested in this building the defendants should have a reasonable opportunity for removing the materials. I give six months for their removal by the defendants. Failing that the decree of the Court below will stand.

Appeal dismissed.

(4) 2 Ind. Cas. 365; 31 A. 444; 6 A. L. J. 499.

(5) (1904) 73 L. J. K. B. 341, 68 J. P. 271; 90 L. T. 577; 20 T. L. R. 297; 20 Cox. C. C. 625.

(6) 2 Ind. Cas. 494; 11 Bom. L. R. 372.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 736 OF 1913.

July 20, 1914.

Present:—Mr. Justice Piggott.

RAM RACHA DUBE AND OTHERS—DEFENDANTS—APPELLANTS

versus

GOKUL RAI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Ejectment—Trespass—Mortgage of ex-proprietary right—Position of mortgagee after ejectment of tenant.

If an ex-proprietary tenant interferes with the possession of the landlord after ejectment, he does so as a trespasser without a shadow of title.

If an ex-proprietary tenancy is extinguished by virtue of ejectment, the interest of the mortgagee in respect of that holding also ceases from that date.

Second appeal from the decision of the District Judge of Ghazipur, dated March 25th, 1913.

Mr. *Haribans Sahai*, for the Appellants.

Mr. *Laksmi Narain*, for Mr. *Muhammad Ishaq*, for the Respondents.

JUDGMENT.—This is a second appeal by certain defendants in a suit for ejectment. There were three parties to the litigation, namely, the plaintiff, Gokul Rai, Gaya Singh and others, described as the defendants of the

first party, and Ram Racha Dube and others, described as defendants of the second party. It is these last who are the appellants now before this Court. The defendants of the first party mortgaged their *zemindari* rights in a certain 4-anna share in village Mahrauli to the plaintiff under a contract of mortgage by conditional sale. They subsequently mortgaged certain specified plots of *sir* land, alleged to appertain to the share in question, with possession to the defendants of the second party. The plaintiff sued on the mortgage and obtained a foreclosure decree under which he was put into possession on the 4th of July 1904. He has nevertheless been successfully prevented by the defendants between them from getting the benefit of his decree so far as the *sir* lands are concerned upto this present time. He seems to have availed himself from the first of the proper legal remedies open to him. He sued the defendants of the first party, who had become his ex-proprietary tenants in respect of these *sir* lands, for determination of rent, and finally accepted a compromise decree determining the rent with retrospective effect at a certain sum in the year 1905. The rent was not paid, and on September the 21st, 1906, the plaintiff obtained a decree for arrears of rent. This decree was not satisfied and the plaintiff proceeded to eject the defendants of the first party from their tenancy under the provisions of the Agra Tenancy Act. He obtained possession under that Act on February the 10th, 1907. He has nevertheless failed to obtain peaceable enjoyment of the rents and profits derivable from these *sir* lands and has been compelled to bring this suit in a Civil Court to turn out the two sets of defendants, who continue persistently to dispute his right to possession over these lands. The defence set up by the defendants of the first party was obviously not conducted in good faith. Their written statement is extremely involved and obscure, and it may be that they have just avoided committing themselves to any express statement for verifying which they could be prosecuted before a Criminal Court. They, however, did plead that they were still in possession of the land in suit, or at any rate of some part of the same, as tenants holding from the plaintiff, and on the strength of this plea they claimed the benefit of section 202 of the Agra Tenancy Act (Local Act II of 1901). The provisions of that section are mandatory, and I feel constrained to remark that Civil Courts should be on their guard against the artifice which has obviously been employed in the present case by the defendants seeking to obtain the benefit of that section for purposes of mere vexation and delay. It is quite true that the learned Subordinate Judge could not prevent the defendants of the first party from pleading that they held these lands as tenants of the plaintiffs, but he could, by a proper exercise of his powers, have taken care that this plea was not entered in vague and general terms, but was put forward clearly and specifically in answer to the plaintiffs' plea that the tenant rights of these defendants had been terminated by their ejectment according to law. It may be that if these defendants had been properly questioned by the Court they would have shrunk from committing themselves to denial of this, and at any rate they could have been properly dealt with when it was found that their denial was a wilful falsehood. However, having been permitted in this unsatisfactory manner to claim the benefit of section 202 of the Tenancy Act, the defendants first party duly filed a suit in the Revenue Court within the prescribed period of three months, and then permitted it to be dismissed for default. Their conduct seems to have been a deliberate one, for it is clear that they made no attempt to obtain a rehearing of the order of dismissal by satisfying the Court that they had been prevented from prosecuting the suit by any sufficient cause. What they did was to institute, after the period of three months referred to in section 202 aforesaid had expired, a fresh suit in the Revenue Court for the same relief. One of the pleas in the memorandum of appeal now before me is that the Civil Court was bound to wait for the result of this second suit. I am of opinion that there is no force whatever in this plea, and that the Court of first instance acted very properly in not permitting the defendants of the first party to continue indefinitely the game of obstruction and delay which they were obviously playing. Therefore, it has been properly decided, as against these defendants of the first party, that their rights as ex-proprietary tenants have been terminated by ejectment and that if they are interfering at present with the plaintiffs' possession in respect of any portion

of the land in suit, they are doing so as trespassers without a shadow of title.

The position of the defendants of the second party requires to be separately considered. They were impleaded as persons interestsd in a portion of the mortgaged property by the plaintiff in his suit for foreclosure. They thus obtained the only thing to which they had any right in law, *viz.*, an opportunity of redeeming the mortgage in favour of the plaintiffs; of this they failed to avail themselves. The contention on their behalf, however, is that the result of the foreclosure suit was merely to extinguish any interests they might have previously possessed in the proprietary rights over the plots of land mortgaged to them; but that their mortgagee rights enured in respect of the ex-proprietary tenancy created by Statute in favour of the defendants of the first party from the date of the foreclosure decree. For this proposition of law the authority quoted is the case of *Sham Das* v. *Batul Bibi* (1). A consideration of this ruling shows that one important factor in the decisions arrived at by the learned Judges who decided that case was the view taken by this Court that there was nothing in the provisions of the old Rent Act of 1881 to prevent an occupancy tenant from transferring possession over his holding by way of usufructuary mortgage. It may be doubted, therefore, whether this case is any longer to be relied on since the alteration in the law affected by the passing of the Agra Tenancy Act of 1901. Even apart from this, the defendants-appellants have, in my opinion, no case. Supposing that they were entitled to possession as mortgagees over some of the plots composing the ex-proprietary holding from which the defendants of the first party were ejected in 1907, it seems clear to me that, even in this case, whatever rights they possessed were extinguished by the ejectment. There ceased to be, from the date of the ejectment, any ex-proprietary holding over which these appellants could exercise their alleged right of mortgage possession. They should have protected themselves by seeing that the rent of the holding was duly and punctually paid. The plea taken on their behalf is that their rights cannot be affected by the decree for arrears of rent against the defendants of the first party or the subsequent ejectment proceedings, because they were not made parties to those proceedings. Now it is clear that on no possible view of the case did these appellants become tenants of any of the plots of land in suit on behalf of the plaintiffs; this was conceded in argument before me and, as a matter of fact, they never pleaded throughout the present suit that there existed any relationship of landlord and tenant as between them and the plaintiffs. The latter, therefore, could only take proceedings for the determination of rent and for subsequent realization of the same, against the defendants of the first party, who had become his ex-proprietary tenants by operation of law. The possession of the defendants of the second party was certainly no better in law than that of a sub-tenant of the holding; that is to say, they may have had, as against the defendants of the first party, a right to possession over some of the plots of land in suit, so long as the tenancy of the defendants of the first party continued. This right was extinguished when the plaintiff obtained possession after ejecting the defendants of the first party for non-payment of rent.

There remains, however, one other point to be considered on behalf of these appellants. They have pleaded in this, as in the lower Appellate Court, that a certain consent decree dated September 10th, 1908, arrived at in the course of a certain other litigation, operates as *res judicata* in the present case with regard to the right of these appellants to remain in mortgage possession over the plots of land in suit claimed by them. I find on examining the record of the previous litigation that Behary Rai, son of Gokul Rai, who is the plaintiff in the present case, had acquired mortgagee rights in respect of another fractional share in the same *mahal*. In seeking to enforce these rights Behary Rai became involved in litigation, in the course of which a question was raised as to his right of possession over the *sir* lands appertaining to the *mahal* as a whole. To that litigation the present defendants-appellants were parties. It resulted in a compromise decree affirming the right of the present appellants to possession over certain specified plots of land. Now the plea of *res judicata*, in the form in which it

(1) 24 A. 538; A. W. N. (1902) 155.

is put forward, is clearly not sustainable. The evidence on the record would not justify a finding that Gokul Rai, the plaintiff in the present suit, is claiming under Behary Rai, the plaintiff in the former suit above referred to. It is, moreover, quite clear that Gokul Rai is not in the present case litigating under the same title as was Behary Rai in the former suit. Whatever rights Gokul Rai is seeking to enforce in the present case are derived from a different mortgage over a different fractional share in the *mahal* to that on the strength of which Behary Rai was litigating in the former suit. I have, however, considered this plea from a slightly different point of view from which it was pressed upon me in argument. The suggestion is that, apart from any question of *res judicata*, the compromise on which the consent decree of September 10th, 1908, was based has the effect of an agreement, binding upon Gokul Rai, to leave these defendants in possession of the plots of land in suit until their mortgage-debt is repaid. I thought it right to give my best consideration to this plea, because it involves the only substantial defence on the merits which these defendants-appellants have been able to put forward. It seems to me, however, that the effect of the compromise and the consent decree of 1908 was not what the appellants contend. The present claim relates to certain plots of *sir* land all of which are specified as being fractional shares of larger plots and all of which have been expressly admitted on the pleadings in this suit to appertain to that fractional share in the *mahal* which was mortgaged by the defendants of the first party to the present plaintiff. The question raised in the suit decided by the consent decree of 1908 was as to the *sir* lands which should be presumed to appertain to another fractional share in the same *mahal*, and, in my opinion, the agreement come to between the parties in that litigation of 1908 did not refer, and was not intended to refer, to *sir* lands not appertaining to the share in respect of which Behary Rai was enforcing his rights in that former suit. There is nothing whatever on the present record to show that Behary Rai either had, or claimed to have, any right to bind his father by an agrement covering the *sir* lands appertaining to a different share in the *mahal*, a share in respect of which Gokul Rai had become full proprietor under a foreclosure decree obtained five years previously. For this reason I hold that there is no force in any of the contentions put forward in support of this appeal. I hereby dimiss it with costs including fees on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 2 OF 1912.

CIVIL REVISION CASE NO. 2443 OF 1912.

May 27, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

PRANHARI GUHA—PLAINTIFF—APPELLANT

versus

CHANDRA KUMAR GUHA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure (Act V of 1908), s. 115—Admission of evidence, whether question of Law or of jurisdiction—Exclusion of document from evidence—Document, nature of—Res judicata.

It is only when a document has some legal effect on the decision in a case that its exclusion from evidence can be treated as a question of error by refusing to exercise jurisdiction. Ordinarily the question of admission of evidence is a question of law only and not of jurisdiction.

Where, therefore, a particular document merely proves that the claim of the plaintiff in a particular rent suit should be allowed but without further obligations, express or implied, such document cannot operate either as *res judicata* or as admission of relationship of landlord and tenant between the parties; and its exclusion from evidence cannot raise a question of jurisdiction under section 115 of the Code of Civil Procedure, 1908.

Appeal against the decree of the District Judge, Noakhali, dated 18th December 1911, reversing that of the Munsif, Sandwip Island, dated 15th May 1911.

FACTS.—This was a rent suit by the plaintiff-appellant against the defendant-respondent in the Court of the Munsif at Sandwip Island. The amount claimed was Rs. 15 only. The learned Munsif raised a question as to the rate of rent; so the matter was eventually dealt with by the District Judge of Noakhali in appeal, and the suit was dismissed on the ground that there was no relationship of landlord and tenant between the parties.

Thus it would appear that so far as the decree of the District Judge was concerned, no appeal would lie from it to the High

Court in virtue of section 153 of the Bengal Tenancy Act. But the appellant, being in doubt, presented both a memorandum of appeal and an application for revision against the same, and the question raised by him was that there was a *solenamah* between the parties incorporated in a decree some 20 years previously and that this, as a public document, was admissible in evidence and would operate as *res judicata* or as an admission by the defendant of the relationship of landlord and tenant, and as such the refusal of the Judge to admit it in evidence and to consider it would amount to an error of jurisdiction.

Babu *Dhirendra Lal Kastgir*, for the Appellant.

Babu *Bimal Chandra Das Gupta* and Dr. *Naresh Chandra Sen Gupta*, for the Respondents.

JUDGMENT.—This is a second appeal in a rent suit with a rule for consideration of the question of jurisdiction under section 115 of the Code of Civil Procedure in case no appeal lay.

The learned Munsif raised the question as to the rate of rent and the District Judge, therefore, after first holding that the plaintiff's suit must be dismissed in revision upon the gross error in the case subsequently held that by reason of this question of the amount of rent an appeal lay to him, and he, therefore, decided the appeal on its merits on the finding that there was no relationship of landlord and tenant between the parties.

It is clear that under section 153, Civil Procedure Code, we have only to deal with the judgment and decree of the learned District Judge. We have nothing whatever to do with what questions were raised before the Munsif. As there was no question before the Judge of the rate of rent, we are of opinion that no appeal lies to us in the case the rent sued for being 15 rupees only.

The point of jurisdiction is based partly upon this error of the Judge which we have just referred to in dealing with the case first of all in revision, and we do not think that there is anything in this part of the objection, for he did eventually, as we have seen, deal with it on the merits as an appeal. But the main contention is that there was a previous decree on a *solenamah* between the parties and that that *solenamah* was the basis of the decree as evidenced by the entry in the register of civil suits. The decree itself was nearly 20 years ago and has been destroyed in the ordinary course.

The question, therefore, before the Judge was whether this *solenamah*, if admissible as a public document, did operate as *res judicata* or as an admission by the defendant of the relationship of landlord and tenant. If it was a public document and if it operated as *res judicata* between the parties, it would undoubtedly be an error of jurisdiction or refusal by the Judge to exercise his jurisdiction if he did not consider it. He says that he could not consider it because it was only proved by the oral evidence of the plaintiff who was an interested party. If it was merely to be used as an admission, the learned Judge may be in error of law in refusing to admit it, but it would not be treated as a question of refusal to exercise jurisdiction. It is only if the document had some legal effect upon the decision in the case that its exclusion as evidence would be said to be an error by refusing to exercise jurisdiction. The question of admission of evidence is not a question of jurisdiction, it is a question of law. We, therefore, think as it is admitted that no question of *res judicata* can arise upon this document, section 115 cannot be applied to this case; but in justice to the parties we would go further and say that the *solenamah* appears upon the record and the Judge evidently read it and it contains no sort of admission of the relationship of landlord and tenant. It merely says that the parties agreed on that particular occasion that the claim of the plaintiff should be paid by the defendant without costs and without any further obligation, express or implied. It is settled law that a decision as to the amount claimed in a rent suit cannot operate as *res judicata*, nor can it be any admission of the relationship of landlord and tenant. The learned Judge has decided that that relationship does not exist upon some further grounds with which we are not concerned. They are grounds of fact stated by him and they certainly raise no question under section 115, Civil Procedure Code.

The appeal is, therefore, dismissed without costs, and the Rule is discharged with costs, one gold *mohur*.

Appeal dismissed; Rule discharged.

PERAYYA *v.* AHMAD ABDUL RAHIMAN SAIT.

MADRAS HIGH COURT.
CIVIL SUIT No. 27 OF 1911.
February 2, 1912.
Present:—Mr. Justice Wallis.
G. PERAYYA (MINOR), BY HIS MOTHER AND NEXT FRIEND, MAHALAKSHMAMMA —PLAINTIFF
versus
AHMAD ABDUL RAHIMAN SAIT—DEFENDANT.

Hindu Law—Joint family — Promissory note in adoptive father's name—Suit by adopted son—Whether adopted son can sue on note without succession certificate —Succession Certificate Act (VII of 1889), s. 4.

An adopted son is not entitled to obtain a decree in respect of a promissory note executed in favour of his deceased undivided adoptive father without the production of a succession certificate.

Neelu Amma v. *Krishna Panikar*, 6 Ind. Cas. 745; 8 M. L. T. 85; (1910) M. W. N. 211, followed.

FACTS.—The suit was upon a promissory note executed by the defendant in favour of one *G B*. The plaintiff, alleging himself to be the undivided adopted son of the said *G B* and to have become solely entitled to the suit promissory note on the death of *G B*, laid this suit for recovering the amount due thereon. The defendant contested the suit on the ground that under the Negotiable Instruments Act, the plaintiff was precluded from showing that he had any interest in the suit note and that he could not get a decree without the production of a succession certificate.

Mr. *P. Doraisawmi Iyengar*, for the Plaintiff:—No succession certificate is necessary. *Subramanian Chetti* v. *Rakku Servai* (1), *Vaidyanatha Ayyar* v. *Chinnasami Naik* (2) and *Jagmohandas Kilabhai* v. *Allu Maria Duskal* (3).

Mr. *V. V. Srinivasa Iyengar*, for the Defendant:—The plaintiff is not entitled to a decree without the production of a succession certificate. *Venkataramanna* v. *Venkayya* (4) and *Neelu Amma* v. *Krishna Panikar* (5).

JUDGMENT.—I hold, following *Neelu Ammah* v. *Krishna Panikar* (5), that the plaintiff cannot maintain the suit without a succession certificate. Decree for the amount

(1) 20 M. 232; 7 M. L. J. 100.
(2) 17 M. 108.
(3) 19 B. 338.
(4) 14 M. 377.
(5) 6 Ind. Cas. 745; 8 M. L. T. 85; (1910) M. W. N. 211.

MOHAMMAD ABDUL GAFOOR *v.* ARTHUR BARBAR.

claimed with interest at contract rate up to date and subsequent interest at 6 per cent., on plaintiff producing a succession certificate within two months. Otherwise the suit to stand dismissed. Plaintiff should pay defendant's costs as the litigation is due to his failure to produce succession certificate.

Suit decreed conditionally.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 346 OF 1913.
May 18, 1914.
Present:—Mr. Justice Chamier and Mr. Justice Rafique.
MOHAMMAD ABDUL GAFOOR AND OTHERS—DEFENDANTS—APPELLANTS
versus
ARTHUR BARBAR—PLAINTIFF—RESPONDENT.

Suit for declaration of title to hold land rent-free—Jurisdiction of Civil and Revenue Courts.

It is not competent to a Civil Court to make a declaration that a person who has failed to prove that he is the proprietor of the land, is entitled to hold it rent-free.

Second appeal from a decree of the District Judge of Azamgarh.

Mr. *Mahammad Rahmat-ullah*, for the Appellants.

Mr. *Muhammad Ishaq*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the respondent for a declaration that he is the owner of certain land and that the appellants have no right to receive rent from him therefor. The suit was instituted in consequence of an adverse decision by a Collector of the 2nd class in a suit brought by the appellants against the respondent for the rent of this land. It has been finally decided in the other suit that the present appellants are not entitled to receive rent for the land from the respondent. But, in our opinion, it was not competent to a Civil Court to make a declaration that the respondent who has failed to prove that he is the proprietor of the land, is entitled to hold it rent-free. The suit as brought was not maintainable in the Civil Court on the finding that the respondent had failed to

should have been dismissed. We, therefore, allow this appeal, set said the decree of the Court below and dismiss the suit with costs in both Courts.

Appeal allowed.

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 143 OF 1913.
March 27, 1914.
Present:—Mr. Justice Tudball.
MUL CHAND—PETITIONER
versus
JUGGI LAL—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Adjournment conditional on payment of costs—Interlocutory order—Revision.

An order granting adjournment of a case on condition of payment of costs to the opposite party, being an interlocutory order, is not revisable under section 115, Civil Procedure Code.

Civil revision against an order of the Subordinate Judge of Cawnpore.

Mr. *Hamilton*, for the Petitioner.

Mr. *R. K. Malaviya*, for the Opposite Party.

JUDGMENT.—This is an application in revision against what is really an interlocutory order of the Court below, under which it granted an application by the present applicant for an adjournment conditional on payment of Rs. 500 as costs thereof to the opposite party. A preliminary objection is taken that no revision lies under section 115 of the Code of Civil Procedure and it is quite clear that this objection is based on good grounds. The order is merely an interlocutory order and is certainly not one of those revision of which is contemplated under section 115. After all it is a question of costs, and the Court which finally decides the case will have full power to do justice in all matters of costs. The application fails and is, therefore, dismissed with costs.

Application rejected.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 1555 OF 1912.
April 7, 1914.
Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Banerji.
ABDUL SAMAD—PLAINTIFF—APPELLANT
versus
MUNICIPAL BOARD, MEERUT—DEFENDANT—RESPONDENT.

U. P. Municipalities Act (I of 1900), ss. 87, 152—Permission for repair refused—Remedy—Suit or appeal.

The remedy of a person aggrieved by an order of a Municipal Board refusing to give him leave to repair and re-erect his gallery and arches, is an appeal as provided in section 152 of the Municipal Act, and not a suit for perpetual injunction and damages.

Second appeal from the District Judge of Meerut, dated October 2nd, 1912.

Messrs. *B.E. O'Conor* and *Muhammad Ishaq*, for the Appelant.

Messrs. *Ryves* and *Wallach*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff against the Municipal Board of Meerut. The circumstances are as follows:—The plaintiff has been found to be the owner of certain shops on both sides of a public road in the city of Meerut. In the past there was some sort of gallery resting on arches which connected the shops on both sides of the road. The gallery had got out of repair and the plaintiff applied to the Municipal Board for leave to repair the arches and gallery and also to build on the top of the gallery. The Municipal Board refused permission. Thereupon the suit out of which this appeal has arisen was instituted, the plaintiff claiming a perpetual injunction restraining the Municipal Board from interfering with what he wanted to do and damages. On the facts as found, so far as the plaintiff sought to repair an existing structure the case came within the provisions of section 87 of the Municipalities Act; so far as he sought to make a new structure the case came within the provisions of section 88. We need not consider now the provisions of the last mentioned section. So far as the case came within that section it was admittedly within the right of the Board to refuse permission to allow the structure to be made. Section 87 provides that a person who intends to re-erect a building of the kind must give notice in writing of his intention,

The Board may refuse to grant permission upon some one or more of the grounds mentioned in the section. If they neglect to answer the application there is further provision made showing the applicant the course he is entitled to take. If the order of refusal is made and the applicant feels himself aggrieved at what the Municipal Board has done an appeal is provided by section 152, which further provides that save by such appeal the order of the Municipal Board shall not be liable to be called in question. It is quite clear, therefore, that if the plaintiff in the present case felt himself aggrieved by the order of the Municipal Board refusing to give him leave to repair and re-erect his gallery and arches, his remedy was by way of an appeal. But it is quite clear that he is not entitled to maintain a suit like the present one. This being so, the decision of the lower Appellate Court was correct and the appeal fails. We accordingly dismiss the appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1117 OF 1913.

July 2, 1914.

Present:—Mr. Justice Sunder Lal.

MEGH RAJ VAISH—DEFENDANT—APPELLANT

versus

ABDULLAH KHAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Vendor and purchaser—Transfer of Property Act (IV of 1882), s. 55 (4) (b)—Claim for recovery of unpaid purchase-money—Limitation—Vendor's lien—Charge under s. 55 (4) (b) of Transfer of Property Act, whether enforceable against transferees from vendees

A vendor is entitled to recover the unpaid purchase-money as a debt from the vendee either by enforcement of payment against him personally or by enforcement of the charge on the property sold. The latter remedy is available to the vendor even if the personal remedy is barred by lapse of time. Where the purchase-money is left with the vendee for payment on behalf of the vendor, the money is payable to the latter and he has a lien for it so long as it is not paid. A personal remedy against a vendee is not enforceable against his transferees, but where the charge is on the property whosoever obtains the property, either by inheritance or by transfer, does so subject to the burden of the charge.

Munir-un-nissa v. *Akbar Khan*, 30 A. 172; A. W. N. (1908)71; 3 M. L. T. 374; 5 A. L. J. 243; *Har Chand* v. *Kishori Singh*, 7 Ind. Cas. 639, *Webb* v. *Macpherson*, 31 C. 57; 30 I. A. 238; (P. C.); 5 Bom. L. R. 838; 8 C. W. N. 41; 3 M. L. T. 389, *Ram Din* v. *Kalka Prasad*, 7 A. 502; 12 I. A. 12; 4 Sar. P. C. J. 619, followed.

Second appeal from the decision of the Assistant Sessions and Subordinate Judge of Meerut, dated 30th May 1913.

Dr. *S. N. Sen*, for the Appellant.

Mr. *Shafi-uz-zaman*, for the Respondents.

JUDGMENT.—This suit arose under the following circumstances. On June 20th 1901, the present plaintiffs sold certain property to Kalli Mal for a sum of Rs. 800. Of this amount Rs. 150 were left to pay Megh Raj and Karia Mal on account of a decree which they had obtained against the vendors. A sum of Rs. 300 was also left with the vendees to pay the said persons on account of a mortgage under which those persons were in possession of the property sold. Kalli Mal did not pay this amount and Karia Mal and Megh Raj took out execution of their decree. The plaintiff-vendors on July 25th, 1904, paid up those amounts by executing a mortgage of some other property in favour of Karia Mal and Megh Raj, part of the consideration of which was the amount which Kalli Mal was required to pay under the terms of the sale to those persons. Later on, on May 14th, 1909, Karia Mal and Megh Raj purchased from Kalli Mal the property which has been purchased by him on June 20th, 1901. The plaintiff now brings a suit to recover unpaid purchase-money which the vendee was bound to pay to Karia Mal and Megh Raj in accordance with the understanding arrived at, at the time of the sale. The plaintiffs claim to recover their money under a charge against the property in the hands of Karia Mal and Megh Raj who are assignees of the property from Kalli Mal. The defence to the suit is that the claim is time-barred, that there was no vendor's lien in favour of the plaintiffs who in the sale-deed expressly stated that the purchase-money had been paid up and that they had no claim therefor. It was further pleaded that the claim against Karia Mal and Megh Raj was time-barred because the vendors had allowed the claim against the person of Kalli Mal to become time-barred and it was finally contended that the charge created by section 55 (4) (*b*) was a charge enforceable only against the buyer and not against the buyer's transferees. It was said

that Megh Raj and Karia Mal had purchased the property without notice of the charge claimed by the plaintiffs and in any case the charge is not enforceable against them. Before dealing with the other points arising in the case I may at once dispose of the last point. It has been found by both the Courts below that the defendants-appellants had full notice of the charge that at the time of the sale the original sale-deed of June 20th, 1901, was handed over to them and that they were in a position to know exactly whether or not the charge existed. The last contention, therefore, fails on this finding.

I now take up the other contentions urged on behalf of the appellants by Dr. Sen. It is true that the claim against the person of the original vendee has become time-barred under Article 111 of Schedule I of the Limitation Act. So far as this Court is concerned the point has been settled by a decision of the Full Bench of this Court in the case of *Munir-un-nissa* v. *Akbar Khan* (1). The question still remains whether by reason of the claim against the original vendees personally being time-barred, the claim for enforcement of the charge should, therefore, fail. This point, in my opinion, is equally governed by the ruling of the Full Bench. The plaintiffs were entitled to recover the amount due to them on account of unpaid purchase-money as a debt due from the vendee. They had two remedies given to them by law. One of these was to enforce payment of the said sum against such persons personally, and the other by enforcement of the charge. This happens constantly in mortgage cases. The personal remedy is barred by lapse of time, but the debt is thereby not extinguished. It is still a subsisting debt. Though the creditor has lost one of the remedies for recovering it, the other remedy is still available to him.

In the case of *Ram Din* v. *Kalka Prasad* (2) their Lordships of the Privy Council had to consider a similar point. At page 505 they observe as follows: "There are two remedies distinctly sought in the plaintiff's petition, the one against the mortgaged property, the other against the person and against the other property of the defendant. As to the mortgaged property there is now no question. Their Lordships are of opinion that the law of limitation, which says a bond for money must be enforced within a certain date, applies to the specific demand here for a personal remedy against the defendant. The plaintiff can have no personal remedy—his remedy against the person of the mortgagor is barred, but his right remains to enforce his demand against the mortgaged property." In view of the decision of the Privy Council and of the Full Bench of this Court, I think the contention of the learned Vakil for the appellants is untenable.

The second contention is that by reason of the plaintiffs having acknowledged payment of the full amount of the purchase-money no amount on account of purchase-money is now due and he relies in support of his contention on certain rulings of the Madras High Court. In our Court the point was considered in the case of *Har Chand* v. *Kishori Singh* (3) and Mr. Justice Karamat Husain held that the vendor's purchase-money remained still unpaid, until and so long as the money had been actually paid out, notwithstanding the recital in the sale-deed, and the charge still subsisted. His Lordship relied upon a ruling of their Lordships of the Privy Council in the case of *Webb* v. *Macpherson* (4). Their Lordships at page 72 observe as follows: "With reference to the conveyance a number of English cases were cited. No doubt, English cases might be useful for the purpose of illustration, but it must be pointed out that the charge which the vendor obtains under the Transfer of Property Act is different in its origin and nature from the vendor's lien given by the Courts of Equity to an unpaid vendor. That lien was a creation of the Court of Equity, and could be modified to the circumstances of the case by the Court of Equity. But in the present case there is a statutory charge. The law of India, speaking broadly, knows nothing of the distinction between legal and equitable property in the sense in which that was understood when equity was administered by the Court of Chancery in England, and the Transfer of Property Act gives a statutory charge upon the estate to an unpaid vendor unless it be excluded by contract. Such a charge, therefore, stands in

(1) 30 A. 172; A. W. N. (1908) 71; 3 M. L. T. 374; 5 A. L. J. 243.

(2) 7 A. 502; 12 I. A. 12; 4 Sar. P. C. J. 619.

(3) 7 Ind. Cas. 639.

(4) 31 C. 57; 30 I A. 238 (P. C.); 5 Bom. L. R. 838; 8 C. W. N. 41; 13 M. L. J. 389.

quite a different position from a vendor's lien. You have to find something, either express contract or at least something from which it is a necessary implication that such a contract exists, in order to exclude the charge given by the Statute. In their Lordships' opinion there is no ground whatever for saying that that charge is excluded by a mere personal contract to defer payment of a portion of the purchase-money, or to take the purchase-money by instalments, nor is it, in their Lordships' opinion, excluded by any contract, covenant, or agreement with respect to the purchase-money which is not inconsistent with the continuance of the charge. It is quite clear that the agreement by Mr. Tucker, the purchaser, to pay the balance of the purchase-money (Rs. 51,210) in three annual instalments with interest was in no way inconsistent with the existence of a charge to the vendor for the amount of the instalments with interest to become due from time to time." This contention, in my opinion, is equally untenable. Even in the Madras High Court the rulings are not consistent. The case of *Abdulla Beary* v. *Mammali Beary* (5) is not in point. That Court in that case on the interpretation of the sale-deed came to the conclusion that the purchase-money was not payable to the plaintiffs. They had, therefore, no right to recover it. They could, therefore, have no charge for the money to which they were not entitled. Whether that conclusion on the terms of the sale-deed in that particular case was correct or not it is the basis upon which the judgment of the Madras High Court proceeds. Under the terms of the sale-deed now in suit, it is not possible to say that the money was not payable to the plaintiffs. It was at the plaintiffs' request left in the hands of the vendee to pay for and on behalf of the vendors and in that sense the money was payable to the vendors and they have a lien for the money so long as it was not paid.

The last contention urged is that the charge is only enforceable against the buyer and not against the buyer's transferees or legal representatives. If this contention were correct the moment the vendee died the charge could not be enforced against his heirs, although the heirs of the transferees were in possession of the property sold. In my opinion, the charge was on the property in whosoever's hands it may pass. It is only a personal remedy against the vendee which is not enforceable against his transferees. Whosoever obtains the property either by inheritance or by transfer does so with the burden of the charge, and the defendants who are purchasers of the property with notice of the charge are not relieved of the necessity of paying it merely because the property had changed hands. The point has been considered by the Privy Council in the case of *Webb* v. *Macpherson* (4). At page 244 of the report their Lordships thus lay down the law:—"In the absence of a contract to the contrary.....the seller is entitled, where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, 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 for interest on such amount or part." Mr. Llyod's executors, therefore, had a statutory right to a charge upon the property in the hands of Mr. Tucker and *those claiming under Mr. Tucker*, unless it can be shown that there was a clear contract to the contrary between the parties." The italics are my own. This contention, therefore, is untenable. I dismiss the appeal with costs including Counsel's fee in this Court on the higher scale.

Appeal dismissed.

(5) 5 Ind. Cas. 87; 32 M. 446; 7 M. L. T. 376.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 196 OF 1913.

April 29, 1914.

Present:—Mr. Justice Piggot and Mr. Justice Rafique.

CHANGA MUL AND OTHERS—DEFENDANTS——APPELLANTS

versus

PROVINCIAL BANK LD.—PLAINTIFF—RESPONDENT.

Companies Act (VI of 1882)—Directors irregularly appointed—Allotment of shares, validity of—Allotment of shares after unreasonable delay—Failure to give notice of allotment—Liquidation of company—Contributories.

CHANGA MAL *v.* PROVINCIAL BANK LD.

Where under the Articles of Association of a Company the least number of Directors required to form a quorum is three and out of these three two only are regularly appointed, the constitution of the Board is irregular, and the allotment of shares by such irregularly constituted Board of Directors is invalid. But if the Articles of Association validate an act done by a *de facto* Director in a *bona fide* manner, the Courts will uphold his act. Where the applicants for shares did not decline to accept the shares allotted to them on the ground of unreasonable delay, they could not raise an objection against their being put on the list of contributories when the company had to go into liquidation.

Where no notice of allotment of shares is served upon those to whom shares are allotted, they cannot be put on the list of contributories when the Company goes into liquidation.

In re British Empire Match Company Limited; *Ex parte Ross*, 59 L. T. 291; *In re Scottish Petroleum Company*, (1883) 23 Ch. D. 413; 49 L. T. 348; 31 W. R. 846; *Dawson* v. *African Consolidated Land and Trading Company*, (1898) 1 Ch. 6; 67 L. J. Ch. 47; 77 L. T. 392; 46 W. R. 132; 4 Manson 372; 14 T. L. R. 30 and *British Asbestos Company Limited* v. *Boyd*, (1903) 2 Ch. 439; 73 L. J. Ch. 31; 88 L. T. 763, 51 W. R. 667; 11 Manson 88, referred to.

First appeal from an order of the Additional Judge of Meerut.

Messrs. *D. R. Sawhny* and *Brajnath Vyas*, for the Appellant.

Mr. *M. L. Agarwala*, for the Respondent.

JUDGMENT.—The three appeals of Changamul, Durga Prasad and Jagmander Das marked as Nos. 196, 197 and 198 respectively of 1913 arise out of the proceedings in liquidation of the Provincial Bank Limited, Meerut. It appears that the Official Liquidator called upon the three appellants to contribute the balance of the price of shares which had been allotted to them at different times by the Board of Directors of the Bank. The appellants objected to be put on the list of contributories and supported their objection on several technical pleas. The learned Judge disposed of their objections in a very summary manner without discussing the objections or giving any reason for rejecting them. In appeal three objections are urged on behalf of the appellants, namely, that the Board of Directors which allotted the shares to the appellants was not properly constituted, that the allotment was made after an unreasonable delay and that no notice of allotment was given to or received by the appellants. The first objection is founded on an alleged defect in the constitution of the Board of Directors which allotted the shares to the appellants. It is said that under the Articles of Association the least number of Directors required to form a quorum was three. The Board that allotted the shares to the appellants was composed of three persons two of whom only were regularly appointed Directors. Changamul was allotted shares at a meeting held on September 17th, 1910, at which three persons were present, *viz.*, Shafique Ilahi, E. A. Roberts and Abdul Majid. The first two were among the first three Directors originally appointed and named in the Articles of Association. Abdul Majid was, according to the Directors' Minute Book, appointed at a meeting of the Original Directors held on May 1st, 1910. At that meeting only two Directors were present, namely, E. A. Roberts and Shafique Ilahi and it was resolved that as the third Director Parbhu Dayal could not always attend, Fakir Chand and Abdul Majid should be added to the Board of Directors. Under the Articles of Association in case of an occasional vacancy among the Directors the remaining Directors could appoint a properly qualified member of the Company as Director pending the confirmation of his appointment at a general meeting of the share-holders. But there was no vacancy as Parbhu Dayal had not resigned and even if he had, only one person could be appointed in his place and not two. Moreover, the name of Abdul Majid must have been added after the meeting of May 1st, 1910, and probably at the meeting of September 17th, 1910. The proceedings of September 17th, 1910, as recorded in the Directors' Minute Book, at first mention the name of Fakir Chand as one of the three Directors present. But his name is scored off in pencil and that of Abdul Majid added in ink at the end. The appellants suggest that the name of Fakir Chand was written at first in the hope that he could be present at the meeting but as he did not come the name of Abdul Majid, a share-holder, who was probably sent for at the time, was added and in order to show that he was a Director regularly appointed, his name was added to the proceedings of May 1st, 1910. That the suggestion as to the interpolation of Abdul Majid's name in the proceedings of

the meetings of May 1st, 1910, and September 17th, 1910, is not unfounded, reference is made to the circulation of a printed notice convening a general meeting for the confirmation of Fakir Chand's appointment and the absence of any such notice about Abdul Majid. The shares to Durga Prasad and Jugmander Das were allotted at a meeting held on April 7th, 1912, at which E. A. Roberts, Fakir Chand and H. Hussan were present. It is said that there is nothing to show that Fakir Chand's appointment was confirmed at a general meeting and his provisional appointment at the meeting of May 1st, 1910, was irregular. As to H. Hussan he was appointed in place of Shafique Ilahi who resigned on January 4th, 1912. The Board that appointed H. Hussan consisted of E. A. Roberts and Fakir Chand and the approval and signature of Parbhu Dayal were obtained subsequently. The allotment of shares to Changa Mal was thus by two regularly appointed Directors only, *viz.*, E. A. Roberts and Shafique Ilahi, and to Durga Prasad and Jagmander Das by one Director only, *viz.*, E. A. Roberts.

As no business of the company could be transacted without a quorum of three Directors the allotment of shares to the appellant was, therefore, clearly invalid and the latter are not bound by such allotment. In support of his contention that such an allotment is invalid at law the learned Counsel for the appellants has relied on the case of *In re British Empire Match Company Limited, Ex parte Ross* (1). We think that the objection of the learned Counsel as to the irregularity in the appointment of Fakir Chand and Abdul Majid is well-founded. But we cannot say on the evidence in the case that the name of Abdul Majid was inserted in the proceedings of the meeting of May 1st, 1910, after the meeting. The appointment of H. Hussan seems to have been regular as there was a vacancy in the Board of Directors and he was appointed to the vacancy by the remaining Directors. However the objection for the appellants remains that on both the occasions, *viz.*, the 17th of September 1910 and the 7th of April 1912, there were only two regularly appointed Directors, as Abdul Majid in one case and Fakir Chand in the other was not a properly appointed Director. It may also be conceded that the case relied upon by the learned Counsel supports his contention that allotment of shares by an irregularly constituted Board of Directors is invalid. But other cases, some of them later, lay down that if the Articles of Association of a company validate an act done by a *de facto* Director in a *bona fide* manner the Courts will uphold his act; vide, *In re Scottish Petroleum Company* (2), *Dawson* v. *African Consolidated Land and Trading Company* (3), *British Asbestos Company Limited* v. *Boyd* (4).

In the present case Article 96 of the Articles of Association of the Bank is directly in point. It is as follows :—"The *bona fide* acts of the Board of Directors and of any committee appointed by it shall, notwithstanding any vacancy in the Board or committee or any defect in the appointment of any Director or member, be as valid as if no such vacancy or defect had existed, provided they were done in the case of any defect before its discovery." Now it is not said or at least not proved that the appointment of Fakir Chand and Abdul Majid was made by the Directors with the knowledge that they were acting against the rules of the company or that the allotment of shares was made to the appellants by the Directors who were conscious of the defect in the constitution of their Board. It is neither alleged nor proved that the Directors who allotted shares to the appellants acted in a *mala fide* manner. They, no doubt, thought that the Board was regularly constituted and acted in a *bona fide* manner in allotting shares to the appellants. The provisions of Article 96 sufficiently cover, in our opinion, the irregularity complained of by the appellants and validate the allotments made by the Directors.

The second objection, that of unreasonable delay in awarding the shares, has no force. If the appellants had declined to accept the shares allotted to them on the ground of unreasonable delay, their objection might

(1) 49 L. T. 291.

(2) (1883) 23 Ch. 413; 49 L. T. 348; 31 W. R. 846
(3) (1898) 1 Ch. 6; 67 L. J. Ch. 47; 77 L. T. 392; 46 W. R. 132; 4 Manson 372; 15 T. L. R. 30.
(4) (1903) 2 Ch. 439; 73 L. J. Ch. 31; 88 L. T. 763; 51 W. R. 667; 11 Manson 88.

have succeeded. They cannot raise that objection against their being put on the list of contributories when the Bank has gone into liquidation.

The third objection as to the receipt of the notice of allotment must, we think, prevail in the case of Jagmander Das. It has not been shown to us that any notice of allotment was received by him.

In view of our findings the result is that the appeals of Changa Mul and Durga Prasad fail and that of Jagmander Das succeeds. The appeals of Changa Mul and Durga Prasad are dismissed with costs and the appeal of Jagmander Das is decreed with costs.

Appeals dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 631 OF 1912.

July 24, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Napier.

VILAKATHALA RAMAN—DEFENDANT No. 1—PETITIONER

versus

VAYALIL PACHU—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151—Inherent power of Court—Order obtained by fraud set aside in exercise of inherent power.

Under section 151 of the Civil Procedure Code the Court has inherent power to vacate an order obtained by manifest fraud on it.

Petition, under section 115 of Act V of 1908 and under section 15 of Charter Act, praying the High Court to revise the order of the Court of the District Munsif of Chowghat, in Execution Petition No. 31 of 1912, in Small Cause Suit No. 405 of 1910 on the file of the Court of the Principal District Munsif of Calicut.

Mr. *A. Sundaram*, for the Petitioner.

Mr. *S. T. Srinivasagopalachari*, for the Respondent.

JUDGMENT.—The revision petition before us statedly asks this Court to interfere only with the lower Court's order, dated the 27th February 1912. It, however, also contains a prayer for the setting aside of an order directing the petitioner's prosecution, which was, it appears, actually passed on the 29th February 1912. We cannot deal with the order of the 29th February 1912 on this petition.

The order of the 27th February 1912 was one by the District Munsif of Chowghat vacating his previous order recording satisfaction of a decree, on the ground that the latter was obtained by the petitioner's gross fraud on his Court. This petition is argued on the ground that the District Munsif had no power to pass such an order.

We should be prepared to sustain the order as passed under either section 47, or Order XLVII, of the Civil Procedure Code. But it is sufficient that it was passed in the exercise of the Court's inherent power under section 151 of the Civil Procedure Code to vacate an order obtained by manifest fraud on it. The propriety of such exercise was recognised in *Paranjpe* v. *Kanade* (1) and *Subbaji Rau* v. *Srinivasa Rau* (2) and this is sufficient ground for our refusal to interfere.

The petition is dismissed with costs.

Petition dismissed.

(1) 6 B. 148.
(2) 2 M. 264; 4 Ind. Jur. 505.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 727 OF 1913.

June 29, 1914.

Present:—Mr. Justice Sunder Lal.

Musammat KHURSHEDI BEGAM—DEFENDANT—APPELLANT

versus

KHURSHED ALI—PLAINTIFF—RESPONDENT.

Muhammadan Law—Restitution of conjugal rights—Apprehension of cruelty and ill-treatment—Decree, whether proper.

A decree for the restitution of conjugal rights at the suit of the husband is generally a decree directing the wife to return to husband's home to live with him.

Where it is evident from the circumstances of the case that the husband is an impecunious, selfish and unscrupulous young man who cares more for his wife's property than for her and who does not hesitate to resort to violence and abuse to coerce her into yielding to his views, it is not at all safe to leave the young wife to the tender mercies of such an ill-tempered and unkind husband and no conditional decree even for the husband to live with his wife in her father's house can be given, as the danger and apprehension of cruelty and ill-treatment of the wife by the husband exists in the same degree whether she lives at the husband's house or he at hers.

Second appeal from the decision of the Assistant Subordinate Judge of Meerut, dated May 9th, 1914.

Mr. *Muhamad Ishaq Khan*, for the Appellant.

Mr. *Mohamad Ishaq*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for the restitution of conjugal rights instituted by the plaintiff Khurshed Ali, against his wife, Khurshedi Begam, and her father Hashmat Ali. His case is that he was married to Khurshedi Begam in August 1907 and lived with her at her house in *Kasba* Hapur for some months. He then left for Indore in search of service which he obtained in the Police Department of the Indore State. He returned back to Hapur about a year ago. It appears that the plaintiff has no property or income of any kind nor has he a house of his own. On the other hand his wife Khurshedi Begam owns property said to be worth about Rs. 20,000 which she has inherited from her maternal grandfather and from her former husband. The wife is about twenty years in age and the plaintiff is a few years older.

On his return to Hapur plaintiff began to live with the defendant at her father's house, but after residence for a few months at his father-in-law's place he seems to have persuaded his wife to come over to live with him at a house taken on rent where the plaintiff's father also resided. He there seems to have persuaded his wife to execute a power-of-attorney in his favour to enable him to manage her property. So far the couple seem to have lived in amity and happiness, but ill-feelings and discord, arising, no doubt, out of the plaintiff's desire to appropriate his wife's property soon began to manifest themselves. Acting under the authority of the power-of-attorney the plaintiff disposed of a grove belonging to her without her consent. He tried to sell another property of the wife notwithstanding her remonstrances, and according to the defendant he began to abuse and ill-treat her on her refusing to consent to the sale. The relations between them became so strained that she was compelled to fly from her husband's house and seek refuge at her father's. The plaintiff threatened violence to her and to her father and the result was that on 2nd June 1911 Mr. Pearson, Magistrate of Meerut, ordered the husband to furnish security for keeipng peace, to prevent him from committing acts of violence against the wife or her father. The plaintiff had on his part filed this suit for the restitution of conjugal rights on 8th February 1911. The defence among other grounds urged that the plaintiff had divorced his wife and in any case until the payment of a sum of Rs. 5,000, due to her on account of her prompt dower, the plaintiff was not entitled to a decree for the restitution of conjugal rights. Babu Sushil Chunder Banerji, who tried the suit in the first instance, found on both these pleas for the defendant and dismissed the suit. His decree on both these points was set aside on appeal by M. Mubarak Husain, Khan Bahadur, Additional Judge of Meerut, on 22nd April 1912, and the case remanded for the trial of the following issue in the case as formulated by him, *viz.*:—

"Has the plaintiff been treating the defendant No. 1 cruelly? Is he entitled by law to the recovery of his wife unconditionally, or subject to any condition."

The case then came up for hearing before B. Sumer Chand, Munsif, (who had succeeded B. Sushil Chunder Banerji) who found for the plaintiff and decreed the claim. The defendant, *Musammat* Khurshedi Begam, appealed against the said decree. The appeal was heard by M. Mubarak Husain, Khan Bahadur, who has decreed the claim for the restitution of conjugal rights "subject to the condition that he (the husband) will not remove her, unless she herself agrees to that, from her own house in which she lives at present. Nor will he interfere with her father living with her if so desired by her." His judgment concludes with an order that: "The defendants are hereby enjoined to allow the plaintiff to live with and exercise all the conjugal rights with defendant No. 1 wherever she lives."

The decree made by him is drawn up exactly on these terms.

The husband has submitted to the decree, but the wife has appealed against it on grounds set forth in the memorandum of appeal filed in this Court.

For the purpose of disposing of the points taken in appeal, it is necessary in the first place to consider the findings at which the learned Judge has arrived on the issue of cruelty and ill-treatment formulated

by him. He is of opinion that it had been fully made out by the defendant's evidence that on her leaving her father's house and going over to her husband's, the latter had been trying to force her to sign deeds disposing of her property and on her refusing to do so, he (the husband) has been beating and abusing her. To quote the words of the learned Judge: "Having become tired of such treatment the defendant left her husband's maternal uncle's house, where the couple had been living on the morning of 17th January 1911 and sought her father's protection. The husband followed her there on that day, and on 20th January 1911 asked her to go back with him. She declined to go with him and it is said that the husband then threatened to cut off her nose. This may be an exaggeration, but I am quite convinced from the evidence on the record that the plaintiff did abuse and even beat the wife with a view to force her to give him a free hand in the disposal of her property. The plaintiff is a bad-tempered man and has been bound down by the Criminal Court to keep peace on the application of his father-in-law."

It is for these reasons that he has made the conditional decree in the terms set forth above.

The questions raised in appeal are :—

(*a*) whether upon the findings, the Court below ought not to have dismissed the suit, and

(*b*) whether the Court below was competent to make the decree in the terms in which he has made it.

"The Muhammadan Law", says Mr. Ameer Ali in Volume II of the work on Muhammadan Law at page 462 (3rd Edition), "lays down distinctly that a wife is bound to live with her husband, and to follow him wherever he desires to go; and that on her refusing to do so without sufficient or valid reason, the Courts of Justice, on a suit for restitution of conjugal rights by the husband, would order her to live with her husband."

According to Sir Roland Wilson the wife is bound

"(*a*) to live in the house of the husband,

"(*b*) to admit the husband to sexual intercourse etc."

Mr. Justice Abdur Rahim in his work on Muhammadan Jurisprudence observes :—

"The husband has the right to insist that the wife should live in his house and afford him access, abstain from undue familiarity with strangers, obey him in all reasonable matters and be faithful to him" (page 333).

As observed by their Lordships of the Privy Council in the well-known case of *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (1), "The matrimonial law of the Muhammadans, like that of every ancient community, favours the stronger sex..... The cases already cited are to the effect that he may compel her to return to his house, if she has left it..... In fact, the principle of keeping a man's *hareem* in seclusion and under his control is so essential a part of the framework of Oriental society, that it is naturally assumed and taken for granted by the Mussulman expounder of the law."

The wife may refuse to perform the obligation thus imposed upon her by the Muhammadan Law if the husband be guilty of cruelty. Their Lordships further observe :

'The Muhammadan Law, on a question of what is legal cruelty between man and wife, would probably not differ materially from our own, of which one of the most recent expositions is the following :—

"'There must be actual violence of such a character as to endanger personal health and safety; or there must be a reasonable apprehension of it.' 'The Court', as Lord Stowell said in *Evans* v. *Evans* (2), 'has never been driven off this ground.'"

Later on at page 612 their Lordships make the following general observations as to what Indian Courts might do in such cases. They say : "An Indian Court might well admit defences founded on the violation of those rights, and either refuse its assistance to the husband altogether, or grant it only upon terms of his securing the wife in the enjoyment of her personal safety, and her other legal rights; or it might, on a sufficient case, exercise that jurisdiction which is attributed to the Kazi by the *fatwa* (if the law, indeed, warrants

(1) 11 M. I. A. 551 at p. 610, 8 W.R. P C. 3; 2 Suth. P. C. J. 59, 2 Sar. P. C. J. 259; 20 Eng. Rep. 208.

(2) 1 Hagg. Con. Rep. 37

such a jurisdiction) of selecting a proper place of residence for the wife, other than her husband's house. "

Further on at page 615 their Lordships thus sum up the law. "It seems to them clear that if cruelty in a degree rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back. It may be, too, that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the wife, might, if properly proved, afford good grounds for refusing to him the assistance of the Court. And, as their Lordships have already intimated, there may be cases in which the Court would qualify its interference by imposing terms on the husband." The principles laid down by their Lordships of the Privy Council were further explained and applied by this Court in the case of *Husaini Begam* v. *Muhammad Rustam Ali Khan* (3). Their Lordships in that case refused to grant the plaintiff a decree for the restitution of conjugal rights in view of the offer made and the undertaking given by the wife to receive the husband into her own house and there resume conjugal relations with him. They, however, reserved the husband leave to sue again for the restitution of conjugal rights in the event of the wife not fulfilling her undertaking.

It is evident from the finding and the circumstances of the case that the husband is an impecunious, selfish and unscrupulous young man, who cares more for his wife's property than for her, and who does not hesitate to resort to violence and abuse, to coerce her into yielding to his views. Within the very short time that they lived together he first induced her to give him a power-of-attorney to manage her property, and took advantage of it to dispose of a grove belonging to her without her consent. Not abashed at all at what he had done he asked her to consent to the sale of another grove and on her refusing to do so, resorted to violence and abuse. He made her life in her husband's house intolerable and unbearable and compelled the wife to seek refuge and safety in her father's house. He followed her there with abuse and threatened violence both to her and her father, so much so that a Magistrate considered it necessary to bind him down to keep peace for a year. It was under the circumstances not at all safe to leave the young wife to the tender mercies of an ill-tempered, unscrupulous and unkind husband like the plaintiff, who had so little regard for his wife.

The learned Judge of the Court below, who is a Muhammadan Judge of standing and experience, has, I think, rightly refused to make an unconditional decree for the restitution of conjugal rights. The husband has not complained of the decree and has not appealed against it. The wife, however, is not satisfied and has appealed to this Court. The question now before me is, was the learned Judge right in making the conditional decree he has passed in this case?

A decree for the restitution of conjugal rights at the suit of the husband is generally a decree directing the wife to return to the husband's home to live with him. The learned Judge has found himself unable to give such a decree. He has, however, ordered the wife to receive him into her own house in which her father also is living, and is to be permitted to live without any objection on the husband's part.

Where the husband has been found to be guilty of violence and cruelty towards the wife the Courts have, in many cases, anxious as they always are to bring married couples to live together in peace and amity, attempted now and then to lay down conditions in the decree which the husband was required to comply with for enforcing his decree for the restitution of conjugal rights. In the case of *Bapalal Tara Chand* v. *Bai Amrit* (2) a Judge in the Bombay Presidency gave a decree that "the woman to return to her husband after he shall have executed a bond with two securities in Rs. 500 each and his own cognizance in Rs. 500 either before this Court or a Magistrate to abstain from all personal violence towards her." The Bombay High Court set aside this condition both on the ground that the Court could not impose it, as also on the ground that it was not required under the circumstances of the case.

(3) 29 A. 222; 4 A. L. J. 60; A. W. N. (1907) 27.

(4) (1875) P. J. Bom. 247.

In the case of *Begam* v. *Khuda Baksh* (5) a Subordinate Court in these Provinces made it a condition of his decree for the restitution of conjugal rights "that the husband should enter into a bond with one surety for Rs. 1,000 not to do his wife any bodily harm." The High Court set aside that decree and dismissed the suit for the restitution of conjugal rights. In the case of *Motilal* v. *Bai Chanchal* (6) the District Judge in decreeing the suit for the restitution of conjugal rights directed the husband to provide "a suitable separate house for defendant-appellant, she do live there and allow plaintiff to enjoy his conjugal rights with her." The Bombay High Court held that the Judge was not entitled to impose such a condition and directed him to find whether the plaintiff had been guilty of such legal cruelty as would disentitle him to the relief sought [*Motilal Mahasukhbai* v. *Bai Chanchal* (6)].

The judgment of the Privy Council already quoted is, I think, an authority for the Courts imposing the necessary terms upon the husband for securing the wife in the enjoyment of her personal safety and her other legal rights. Whether this is a case for the imposition of any terms at all for that purpose and whether the term imposed sufficiently secures the personal safety of the wife, is the only question in this case. What provision does the decree of the Court below make to safeguard the defendant in this respect? It prevents the husband from removing her from her own house and away from the protection of her father. If, however, the husband still chooses to be ill-tempered and violent the decree only transfers the scene of violence and cruelty from the husband's own house to the home of the lady. It is true that the learned Judge has provided for the residence of the father of the wife in the same house and thus place her within easy reach of protection from physical violence at the hands of the husband. Is a husband who can only be permitted to live with the wife with these extraordinary safeguards entitled to any assistance at the hands of the Court? The husband is a younger and probably the stronger man of the two. How often can the elderly father come to help and interpose in such quarrels is a problem which it is not easy to determine. There is nothing in the decree to prevent the husband from insisting on the performance of the decree and being guilty of violence in his wife's house at the same time. In my opinion if the husband is disentitled by reason of legal cruelty to an ordinary decree for the restitution of conjugal rights directing the wife to live with him in his own house, he is not entitled to force himself into his wife's home in the manner provided by the decree appealed against. If he cannot be trusted to behave himself as a good husband and refrain from acts of cruelty in his own house, he is not entitled to enjoy his conjugal rights in his wife's house, with no better guarantees for good behaviour than perhaps the perpetual *chaukidarship* of his father-in-law. If the motive for all this cruelty is the desire to get at the wife's property, it will continue to exist wherever the wife may be living. A decree like this will only serve to make both the wife and her father unhappy and may possibly lead to more serious quarrels between the husband and his father-in-law. What is there to guarantee that the wife's father will undertake to continue to live in the same house with him and to afford the wife the protection which the decree thus intends to provide to her? Much as I wish, like the learned Judge, to bring the husband and the wife to live together and fully appreciating as I do his desire to make reconciliation between them possible by thus bringing them together, I cannot help feeling that the intervention of the Court is not called for to help a callous husband to whose tender care the wife can be entrusted only under such extraordinary precautions. There has been no complaint of any kind whatsoever against the wife, or her conduct and behaviour. She cannot under the Muhammadan Law divorce the husband and re-marry. She can enjoy conjugal happiness in his society alone. Her only misfortune is that she possesses property which her covetous husband wishes to dispose of at his own will and pleasure. His main object in the suit, as the Court below has found, is somehow or other to get her under his control so as to get a control over her property. This she will as, she is entitled to do, naturally

(5) A. W. N. (1892) 77.
(6) 4 Bom. L. R. 107.

resist. She cannot permit that upon what alone they may have to depend for their future living and maintenance to be frittered away by a thoughtless and reckless young husband. I think the danger and apprehension of cruelty and ill-treatment of the wife by the husband exists in about the same degree whether she lives at the husband's house or he at hers or more specially when the father worried, as he is likely to be, by constant quarrels with his son-in-law may feel himself unequal to hold to his post. The sooner the husband realizes that the way to his wife's love and confidence is by deserving it, the better it will be for their mutual happines in life.

I think that the only safe course for the Court to follow at present is to refuse to grant to the plaintiff the relief he asks in this case. Unable as I am under the circumstances of the case to uphold the decree of the Court below, I still hope that the wife and her father will place no obstacles to the husband coming over to live with them as a matter of mutual consent and conciliation and that the husband will be able to adopt a less selfish and a more considerate attitude towards his wife.

I dismiss the suit for the restitution of conjugal rights on the cause of action set forth in the plaint, but under the circumstances direct each party to bear his own costs of this litigation in all Courts.

Suit dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2461 OF 1911.

May 19, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

BEJOY KRISHNA MAJUMDAR—

PLAINTIFF—APPELLANT

versus

DWARIKA KRISHNA MAJUMDAR—

DEFENDANT—RESPONDENT.

Compromise—Suit for annulling, grounds for—Trustee and cestui que trust, re-opening of accounts settled between.

A plaintiff who knows all the facts of his case and deliberately compromises his suit after taking independent advice cannot get the compromise annulled.

A compromise cannot be annulled simply because after it was effected one of the parties dealt with a portion of the property in such a way that the *status quo* could not be restored.

To re-open an account settled between a trustee and *cestui que trust*, some objection in substance must be shown, some error in the account must be established.

In re Webb, Lambert v. *Still*, (1894) 1 Ch. 73 at p. 83; 63 L. J. Ch. 145; 70 L. T. 318, referred to.

Appeal against the decree of the District Judge, Noakhali, dated 30th May 1911, affirming that of the Sub-Judge of that District, dated 21st June 1910.

Mr. *Caspersz*, Counsel, with him Babus *D. N. Chakravarti* and *Brajendra Nath Chatterjee*, for the Appellant.

Dr. *Rash Behary Ghosh* and Babu *Ram Dayal Dey*, for the Respondent.

JUDGMENT.—One Kali Krishna Mojumdar died leaving all his property by Will to his widow and to his adopted son, Bejoy Krishna Mojumdar. The boy was then only three or four years old. The Will provided for the management of the property by a number of executors, among whom one, the testator's nephew, Dwarika Krishna Mojumdar, was appointed the principal managing executor and was instructed to take out probate. Probate of the Will was accordingly granted to Dwarika Krishna in 1892 and the management of the property was in his hands. In 1908 the adopted son, Bejoy Krishna Mojumdar, applied to the Probate Court for an order revoking the probate granted to his cousin, Dwarika Krishna, in order that he might undertake the management of the property himself. The application was opposed by Dwarika Krishna. This litigation ended in a compromise under which the adopted son undertook to pay Dwarika Krishna the sum of Rs. 4,500 as reimbursement of expenses personally incurred and the latter consented to relinquish the property. Bejoy Krishna accordingly assumed the management. This was in September 1908. The present suit was instituted by the adopted son, Bejoy Krishna, in September 1909 against his cousin, Dwarika, for an order annulling the compromise and for accounts. The suit was dismissed in both Courts. The adopted son now appeals.

The case has been argued before us upon the ground of undue influence alone with special regard to the relationship between the parties at the time of the compromise. The relationship was that of trustee to *cestui que trust*. The facts of the transaction, therefore, required close examination. They have been dealt with in great detail both by the original Court and by the Court of first appeal.

The findings of the learned District Judge are that at the time of the compromise the plaintiff had the benefit of independent advice. The plaintiff had for some days before the compromise been in company of the defendant, but the terms were settled in the house of a *taluqdar*, an independent person, who asked the plaintiff at the time why he was making a compromise. Many friends and relations were present. Some advised against while others were in favour of the compromise. The terms were finally consented to and the document was signed in the house of a Rai Bahadur, another independent friend. The plaintiff was only 20 years of age, but he had attained majority and was able to make up his own mind in the matter. Almost simultaneously he entered upon other business transactions which indicated the provision of ability. Of the many advices all were finally reconciled except two. The parties were at the time in litigation and the Judge's conclusion is "that the defendant cannot have been in a position to take unfair advantage". It is true that the learned District Judge has also found that there was not in fact an exhaustive examination of the defendant's accounts or any production of vouchers, but that by itself would not be sufficient to justify the Court in re-opening an account settled between a trustee and a *cestui que trust* [*In re Webb, Lambert* v. *Still* (1)]. To open an account settled between a trustee and a *cestui que trust*, some objection in substance must be shown, some error in the account must be established. No attempt seems to have been made to establish any such error in the present case. It may be that the plaintiff was partly influenced by consideration of the fact that the defendant had been managing the property for 16 years without remuneration and it is possible that the defendant got the best of the bargain. But these are mere possibilities and would not justify our interference in face of the Judge's finding that the plaintiff knew all the facts of the case and, after taking much independent advice, some for and some against, deliberately chose to enter into the compromise.

The plaintiff and defendant are co-sharers and the compromise included the settlment of certain disputed matters between them *qua* co-sharers relating to possession of the joint estate. A portion of the property thus allotted to the plaintiff has been subsequently dealt with by him and, to that extent, the plaintiff will not be able, in the event of the annulment of the compromise, to restore the *status quo*.

We have examined the schedule to the Will and it is apparent that if the executor has carried out the wishes of the testator in regard to the expenditure on worship etc., the management must have been both unprofitable and fraught with much difficulty. The plaintiff's advisers, it is found, had some idea of the income of the estate and the expenses the defendant had to undergo. The amount, Rs. 4,500, which the plaintiff finally agreed to pay was the amount suggested, it is found, by the friends of the plaintiff in the earlier negotiations.

In all the circumstances of the case we are of opinion that the learned District Judge rightly refused to re-open the compromise.

The appeal is dismissed with costs. We do not interfere with the order of the learned District Judge as to costs in his Court.

Appeal dismissed.

(1) (1894) 1 Ch. 73 at p. 83; 63 L. J. Ch. 145; 70 L. T. 318.

R. M. A. R. FIRM *v.* M. R. M. S. FIRM.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL NO. 5 OF 1913.

July 9, 1914.

Present:—Mr. Justice Twomey and Mr. Justice Parlett.

R. M. A. R. FIRM—APPELLANT

versus

M. R. M. S. FIRM AND OTHERS—RESPONDENTS.

Arbitration—Award—Bar to further action—Limitation—Specific Relief Act (I of 1877), s. 21—Civil Procedure Code (Act V of 1908), Sch. II, Para. 18.

A valid award is operative even though it has not been enforced by suit or by application under the Code of Civil Procedure. An award extinguishes all claims embraced in the submission and after it has been made, the submission and award furnish the only basis on which the rights of the parties can be determined and constitute a bar to any action on the original demand, apart from section 21 of the Specific Relief Act which to some extent is replaced by paragraph 18 of the Second Schedule of the Civil Procedure Code.

Bhajahari Saha Banikya v. *Behary Lal Basak*, 33 C. 881, 4 C. L. J. 162, referred to.

Mr. *B. P. Lentaigne*, for the Appellant.

Mr. *Ormiston*, for 1st and 2nd Respondents.

Mr. *Chari*, for 3rd Respondent.

JUDGMENT.

TWOMEY, J.—The plaintiff firm, M. R. M. S., and three defendant firms owned and worked a certain rice mill in partnership from July 1907 to February 1909, when they sold the concern. The plaintiff firm sued the other partners for an account. One of the three defendant firms, R. M. N., was allowed to join as co-plaintiff and the Court granted a decree for accounts against the other two partners, the R. M. A. R. and M. L. M. firms. Costs were calculated on the assumption (entirely gratuitous) that each of the plaintiff firms was to get four thousand rupees at the final settlement, and it was ordered that the total amount of costs should be borne by the defendant firms, R. M. A. R. and M. L. M., in the proportion of 2/3rds by the former and 1/3rd by the latter.

There were disputes between the partners in the first year of working, 1907-1908, and they submitted the matters in dispute to a *panchayet* of Chetties who went into the accounts and made an award in May 1908. Up to that time the R. M. A. R. firm had been the managing partner and kept the accounts. But the award directed that the plaintiff firms, R. M. N. and M. R. M. S., should take over the mill as from the date of the submission to arbitration. The award was carried out. The payments directed by it to be made by each firm were made. The R. M. N. and M. R. M. S. firms took over and managed the mill up to the time of the sale in February 1909. The evidence also shows that there was some distribution of profits during the period of the management by R. M. N. and M. R. M. S. There is a dispute as to what became of the account books for the period prior to the arbitration. It is proved that these books were produced by the agent of R. M. A. R. firm before the arbitrators, and one of the arbitrators, Udyappa, states that he made them over to the new managers (the R. M. N. and M. R. S. M. firms) when the arbitration was finished. Udyappa is the arbitartor in whose house the *panchayet* was held and the accounts would naturally be with him. He does not remember who actually took the account books away; but he asked the representatives of the new managers of the mill to take them. No complaint was subsequently made that they had not received the accounts. There is every probability that the M. R. M. S. and R. M. N. firms got them, for it was provided in the award that the new managers should take over any debits and credits shown in the accounts as outstanding. From the evidence of R. M. A. R. agent, Raman Chetty, (taken on commission) it appears that these outstandings were in relation to servants' wages and certain bran contracts and that all accounts with customers of the mill had been adjusted. The accounts prior to the arbitration proceedings would be required by the subsequent managers only for the purpose of ascertaining and adjusting these outstandings. Any payments made or monies received in pursuance of article 2 of the award would appear in the accounts of the later managers. The later managers would not be absolved from accounting fully for their stewardship even if it were shown that the previous managers had withheld the account books dealing with the period prior to the arbitration.

In bringing their suit for an account the plaintiffs ignored altogether the settlement of May 1908. The District Court noted that the award was incapable of execution because it was not filed in Court and that

it had become barred by limitation when the suit was filed (in March 1910.) The learned Judge treats these as self-evident propositions and cites no authority in support of them. There is abundant authority to the contrary. It is sufficient to refer to the Calcutta case *Bhajahari Saha Banikya* v. *Behary Lal Basak* (1) and the rulings cited therein. There can be no doubt that a valid award is operative even though it has not been enforced by suit or by application under the Code of Civil Procedure (Second Schedule). The validity of the award in the present case is not impugned and the evidence shows that it was acted upon by all parties and that the plaintiffs received benefits under it. In the words of Mukerji, J., in the above case the award extinguishes all claims embraced in the submission, and after it has been made, the submission and award furnish the only basis on which the rights of the parties can be determined and constitute a bar to any action on the original demand. The award of May 1908 settles the accounts of the partnership finally up to the date of the submission, April 11th, 1908. The provisions of clause 22 of the Second Schedule of the Code of Civil Procedure have been referred to and it has been contended that this clause read with the last 37 words of the Specific Relief Act, section 21, prevents the award from concluding the accounts up to April 11th, 1908. There is no force in this contention. What the appellants set up in bar is not a mere contract to refer to arbitration, but an actual award in which all the parties concerned fully acquiesced and which they proceeded to carry out. The award operates as a bar apart altogether from the provisions of section 21 of the Specific Relief Act and apart from the provisions of clause 18 of the Second Schedule, Code of Civil Procedure, (which to some extent replaces section 21 of the Specific Relief Act in relation to arbitration proceedings under the Code of Civil Procedure). It follows that the account should be taken only from the date of the submission in April 1908 and will relate only to the period of the plaintiff's stewardship. There are no accounts for the defendants to render and they have been wrongly cast in costs. I think the order of the District Court should be modified accordingly, order as to the payment of costs by the defendants being set aside. As the defendant-appellants and respondent No. 3 have been put to unnecessary trouble and expense by the action of the plaintiffs (respondents Nos. 1 & 2), I would order the plaintiffs to pay the costs of the defendants-appellants and of the 3rd respondent in both Courts up to this stage—subsequent costs should be a charge against the partnership estate. Pleader's fee has been calculated at 5 per cent. on Rs. 400 in the District Court. This *ad valorem* calculation was wrong in a preliminary decree when the amounts due to the various partners had not been ascertained. A special fee of 5 (five) gold *mohurs* will be substituted for the amount of Pleader's fee of the 1st defendant. In this Court the appellants paid Rs. 395 Court-fee which they will recover from the plaintiffs.

The Advocate's fee in this Court to be recovered from the plaintiffs by the appellants and by the 3rd respondent is fixed at 5 (five) gold *mohurs* in each case.

PARLETT, J.—I concur.

(1) 33 C. 881; 4 C. L. J. 162.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2487 OF 1912.

July 31, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

SAMU *alias* ANANTANARAYANA PATTAR—APPELLANT

versus

SWAMINATHA IYER AND OTHERS—RESPONDENTS.

Hindu Law—Joint family—Litigation—Father represents sons—Agreement by father to be bound by oath, how far binding on sons.

A father fully represents the whole family consisting of himself and his undivided sons in a litigation which he conducts in the interests of the family. Unless the decree in such a litigation is passed owing to the fraud or collusion on his part directed against his sons, the decree and the findings of the Court are binding on the sons.

An agreement by father to be bound by an oath taken under the Oaths Act cannot, by the mere fact

In the matter of I. A. SOFAER.

that it is based on the special provisions of the Oaths Act, be said to be an agreement made to defraud his sons.

Keshava v. *Rudram*, 5 M. 259, *Thimmappaya* v. *Lakshminarayana*, 6 M. 284, disapproved.

Second appeal against the decree of the District Court of South Malabar, in Appeal Suit No. 116 of 1912, preferred against that of the Court of the District Munsif of Palghat, in Original Suit No. 507 of 1910.

Mr. *P. S. Vaidyanatha Aiyar*, for the Appellant.

Mr. *A. Sundaram*, for the Respondents.

JUDGMENT.—A father fully represents the whole family consisting of himself and his undivided sons, in a litigation which he conducts in the interests of the family. Unless the decree in such a litigation was passed owing to the fraud or collusion on his part directed against his sons that decree and the findings in that suit in which that decree was passed are binding on the sons.

An agreement by the father in the previous litigation to be bound by an oath taken under the Oaths Act cannot, by the mere fact that it is based on the special provisions of the Oaths Act, be said to be an agreement made to defraud the sons. Of course, a tort committed by the father is not necessarily one committed on behalf of his sons also and is not binding on the sons, and that is the ground of the decision in *Appa Row* v. *Sankara Venkatadri* (1) quoted by the appellants' learned Vakil.

The judgment in *Keshava* v. *Rudram* (2) which held that the decision of an issue of fact based on an oath taken under the Oaths Act is not *res judicata* between the same parties in a subsequent litigation relating to another property is no longer sound law. [See *Sanyasi Baritya* v. *Artaswaro* (3).

The decision in *Thimmappaya* v. *Lakshminarayana* (4) was based on the view then prevailing that a Hindu father, unless he expressly professed to act in the representative capacity of the head of his family in a litigation, must be treated as having acted solely in his personal or individual capacity. That case is, again, no longer good law. [See *Jijamba Bai Sahib* v. *Saginram Jathai Rao Sahib* (5)].

We dismiss the second appeal with costs.

Appeal dismissed.

(1) 17 M. L. J. 197; 2 M. L. T. 86.
(2) 5 M. 259.
(3) 18 Ind. Cas. 835; 36 M. 287; 24 M. L. J. 321; 13 M. L. T. 261; (1913) M. W. N. 220.
(4) 6 M. 284.
(5) 14 Ind. Cas. 374; 22 M. L. J. 45.

LOWER BURMA CHIEF COURT.

CIVIL REFERENCE No. 10 OF 1914.

August 11, 1914.

Present:—Sir Charles G. Fox, KT., Chief Judge, and Justice Sir Henry Hartnoll.

In the matter of I. A. SOFAER AND OTHERS—INSOLVENTS.

Presidency Towns Insolvency Act (III of 1909), ss. 17, 99—Firm adjudicated insolvent — Property of each partner affected—Lower Burma Chief Court—Rules under Insolvency Act, r. 83, ultra vires.

Under sub-section 1 of section 99 of the Presidency Towns Insolvency Act, III of 1909, an adjudication order can be made against a firm in the name of the firm and the order operates on the property of each partner.

Rule 83 of the Lower Burma Chief Court Insolvency Rules is *ultra vires*.

FACTS are fully set out in the following

ORDER OF REFERENCE.

ROBINSON, J.—An application was made on the 6th June 1913 headed, "In the matter of Sofaer & Co.," and then corrected to, "of I. A. Sofaer and others carrying on the business of traders in co-partnership under the style of Sofaer & Co."

The prayer at the end of the petition is—"Wherefore we hereby petition the Court for an order adjudicating the said Sofaer and Co. insolvents."

The order on this is "I, therefore, make an order of adjudication as prayed, schedules to be filed within thirty days."

The formal order of adjudication follows the phraseology of the heading of the petition, that is, it adjudges I. A. Sofaer and others carrying on the business of traders in co-partnership under the style of Sofaer and Co. insolvents. I. A. Sofaer appealed against this order but his appeal was dismissed. He has filed his schedules.

On the 24th January 1914 the National Bank of India, Limited, one of the creditors, petitioned for an order under section 99 of the Act for an order directing the dis-

closure of the names of the partners in Sofaer & Co. I. A. Sofaer then filed an affidavit that his brother M. A. Sofaer was his partner and that a deed of partnership was executed. He does not state this explicity, but sets out various facts and acts and leaves it to the Court to decide if his brother is his partner.

Some correspondence then passed between the Official Assignee and M. A. Sofaer's Counsel as to M. A. Sofaer filing his schedules and finally the petition on which orders have now to be passed was filed.

It recites that Sofaer and Company were adjudicated and prays that the Court will direct M. A. Sofaer to file his schedule.

For M. A. Sofaer it was urged that although a deed of partnership was drawn up the facts were such that it had not the legal effect of making him a partner. I, however, told Counsel I would not hear him on that point at present, as it appeared to me that what had to be decided was whether the firm of Sofaer and Company had been adjudicated and if so whether M. A. Sofaer, assuming he was a partner, had been adjudicated although the partners were not individually adjudicated by name.

The first question is, can a firm be adjudicated in the firm's name? On the 6th May 1913 in the matter of the M. L. R. M. A. firm, Case No. 51 of 1913, my brother Ormond passed the following order:

"The question whether a firm can be adjudicated in the firm's name to be argued hereafter. Section 99 of the Act would seem to allow it, but rule 83 expressly forbids it. Subject to objection let the firm of M. L. R. M. A. be adjudicated insolvent."

This was an *ex parte* order. The matter came up again on the petition of an alleged partner and my brother Young apparently also thought the section allowed this and that rule 83 was *ultra vires*. The matter is one of considerable difficulty and of very great importance.

Section 99 of the Presidency Towns Insolvency Act, which follows section 115 of the English Act, clearly provides that the Court may order the disclosure of the names of the persons who are partners in the firm. Then the section provides that in the case of a firm in which one partner is an infant an adjudication order may be made against the firm other than the infant partner.

To my mind it is clear that, whatever may be the value of the argument that the first sub-section only refers to the initiation of proceedings in the firm's name, the section as a whole does contemplate and authorise the Court to pass an order of adjudication against a firm in the firm's name. If this is so then, in my opinion, rule 83 of our rules is *ultra vires*. Section 112 gives the Courts power to make rules "for carrying into effect the objects of this Act" and in particular such rules may provide for and regulate

* * * *

"(*o*) the conduct of proceedings under this Act in the name of a firm."

Rule 83, however, directly forbids what section 99 allows, that is, an order of adjudication being made against a firm in the firm's name. If I am right in my view of section 99, it is *ultra vires* as overriding instead of carrying into effect one of the objects of the Act. Again, it is, I consider, open to grave doubt if this rule can properly be said to regulate the conduct of the proceedings against a firm. However right and proper it may be to permit proceedings to be initiated against a firm in the firm's name and however right and proper the provision made by this rule may be, I have now to deal with the Act and the order of adjudication passed.

Before, however, expressing my own opinion I think I should note certain facts in relation to the English Act on which our Act is based and as contained in the Rules of the High Courts.

Under the English Act the procedure is different and the present difficulty seems to be due to an attempt to utilize certain provisions of, and certain decisions under, the English Act and embody them in our Act.

Under the English Act proceedings may be said to commence with a receiving order. A receiving order may be made against a firm in the firm's name other than an infant partner. See *Lovell* v.

Beauchamp (1). The English rule 264, which is the same as our rule 83, has reference to this stage of the proceedings. Under the English Act the adjudication order comes at the end and it must be made against individual partners by name. Our Act places the adjudication order at the commencement of the proceedings, but has not made the salutary provision as to specifying individual partners by name. Our rules strive to cure the defect by incorporating an English rule dealing with a totally different stage of the proceedings.

The rules of the Madras High Court seem to be the same as those of this Court. There is no such rule in the rules of the Calcutta High Court. *cf.* Rules 150 and 151, nor in those of the Bombay High Court, but rule 154 of the latter lays down that the effect of an adjudication of a firm in the firm's name is to adjudicate every person who was at the date of the order a partner, insolvent.

To return to the present case. In my opinion the order of adjudication here, namely, the adjudication of "I. A. Sofaer and others carrying on the business of traders in co-partnership under the style of Sofaer and Co." is an adjudication made against the firm in the firm's name. I see no force in the argument addressed to me that this could only be done by adjudicating "Sofaer and Co." thus insolvents.

The question as to what is the effect of such an adjudication of a firm on individual partners is much more difficult. The adjudication of a firm vests the firm's property in the Official Assignee. If, as the Bombay rule lays down, the effect is that each partner individually is adjudicated, then apparently his individual property also so vests, but this may not be so. It is easy to conceive cases where individual partners have never committed an act of insolvency except in their capacity as partners, of which acts they may have been totally ignorant while they may be in no sense insolvent. As our Act at present stands and as I understand it, I am inclined to think that the effect is that an order in the firm's name adjudicates each partner. If so, M. A. Sofaer has been adjudicated and must file his schedule. He can still, however, move the Court to annul the adjudication as regards himself and in doing so could raise the question whether he is a partner; or if I passed orders he could appeal.

I am of opinion that the questions arising are so important and far-reaching and so difficult that I should refer certain questions for a decision by a Bench of this Court or by a Full Bench as the Chief Judge may decide.

I accordingly refer under section 11 of the Lower Burma Courts Act the following questions :—

1. Can an adjudication order be made against a firm in the firm's name ?

2. If so what is the effect of such an order on partners in the firm not named individually in the order ?

3. Is rule 83 of this Court's insolvency rules *ultra vires* ?

Mr. *Glenville*, for Mr. Sofaer.

Mr. *McDowell*, for the Hong Kong Bank and other certain creditors.

Mr. *M. Cowasjee*, for the Official Assignee.

JUDGMENT.—It is clear that under sub-section 1 of section 29 of the Presidency Towns Insolvency Act, 1909, an adjudication order can be made against a firm in the name of the firm. The answer to the first question is in the affirmative.

The necessary effect of such an order on the adult partners in the firm is that stated in section 17 of the Act, and the order operates on the property of each partner.

The second question is answered accordingly.

The answer to the third question referred is in the affirmative.

(1) (1894) A. C. 607; 63 L. J. Q. B. 802; 11 R. 45; 71 L. T. 587; 43 W. R. 129; 1 Manson 467.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1111 OF 1913.

June 29, 1914.

Present:—Mr. Justice Sunder Lal.

GANGA BISHAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MEHAR ILAHI KHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Res judicata—Ex parte *decree*—*Status as reversioners*

GANGA BISHAN *v.* MEHAR ILAHI KHAN.

declared—Alienation after decree—Status, whether res judicata.

On the suit of reversioners a lease of property, which a Hindu widow had inherited from her son, was declared by a compromise decree to be inoperative beyond her life-time. So far as the lady was concerned that decree was *ex parte*. After the decree the widow mortgaged the property and when the reversioners challenged this mortgage by suit, the mortgagee pleaded that the plaintiffs were not reversioners:

Held, that the question of the status of the plaintiffs as next reversioners was *res judicata* and though the mortgagee was no party to the former suit, yet his mortgagor, the lady, under whom he claimed, was a party to it, and as he was a transferee from her after the decree, he was bound by the adjudication arrived at against her to the same extent as she was bound by it.

An *ex parte* decree is as much binding upon the parties as a decree based upon a judgment passed after contest between the parties.

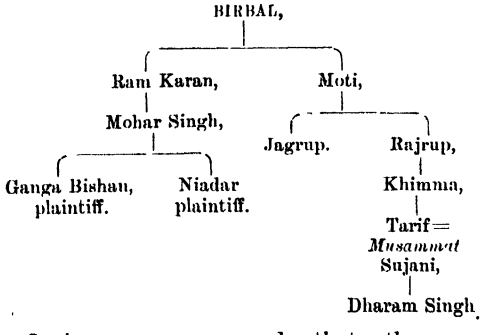
Seshappaya v. *Venkatramana Upadya*, 5 Ind. Cas. 732; 33 M. 459; 20 M. L. J. 752; (1910) M. W. N. 26 and *Lakshmishankar Dershankar* v. *Vishnuram*, 24 B. 77; 1 Bom. L. R. 534, referred to.

Second appeal from the decision of the Assistant Sessions and Subordinate Judge of Meerut, dated 4th June 1913.

Mr. *Benode Behari*, for the Appellants.

Mr. *Mohammad Ishaq*, for the Respondents.

JUDGMENT.—The following pedigree shows the relationship between the parties:—



It is common ground that the property in suit belonged to Tarif who died in February 1907. The property then according to the plaintiffs passed on to his son Dharam Singh who died in April 1907. On his death his mother Sujani inherited it. On 2nd July 1912 *Musammat* Sujani executed a deed of mortgage of this property in favour of the second defendant for Rs. 300. The plaintiffs who are the next reversioners to the estate according to the pedigree set forth above sue to obtain a declaration that the said mortgage was made without any legal necessity or consideration and is null and void as against them, and not binding upon them as next reversioners to the estate. The defence to the suit *inter alia* is that the plaintiffs are not reversioners of Dharam Singh and that the pedigree set up by them is not correct.

The Court of first instance found that the pedigree set up was fully established, and that the mortgage impugned was not shown to have been made for legal necessity. It decreed the claim of the plaintiffs.

The learned Subordinate Judge in appeal has reversed that decree, on the ground that the plaintiffs have failed to prove their pedigree. He has, of course, not tried the question of legal necesstiy, but has dismissed the suit upon the preliminary ground mentioned above.

So far as the question of the proof of the pedigree relied upon by the plaintiffs (apart from the question of *res judicata*) is concerned, the question is one of fact and I am bound in second appeal to accept that finding and to hold that the plaintiffs have failed to prove it.

Mr. Benode Behari for the appellants has, however, argued that that question was *res judicata*, having been decided in favour of the plaintiffs in a former suit on 22nd January 1909. That was a similar suit instituted by the plaintiffs against *Musammat* Sujani and one Bhikoo to set aside a lease which *Musammat* Sujani had executed in favour of the latter. The plaintiffs as the next reversioners of Dharam Singh had claimed a similar declaration. The decree in the suit was based upon a compromise under which Bhikoo consented to a declaration being made that the lease was inoperative beyond the life-time of *Musammat* Sujani and that the plaintiffs were the next reversioners to the estate of Dharam Singh. The decree so far as *Musammat* Sujani was concerned was made *ex parte*, and it in terms declared that the plaintiffs were the next reversioners. More than three years after that decree, *Musammat* Sujani has made the transfer now impugned. The present transferee, Mehar Ilahi Khan, was, of course, no party to the former suit, but it is urged that he is a transferee from the first defendant against whom the former

decree had been made on 22nd January 1909. He is claiming under her and is bound by the adjudications obtained against her.

This contention has been repelled by the learned Judge on two grounds *viz*:—

(1) that the present defendant Mehar Ilahi Khan was no party to the former suit;

(2) that the suit was "never heard and decided after a fair trial but was only compromised."

Before dealing with this contention, it would be perhaps as well to deal with a minor question upon which the Court below has partly based its judgment. That Court has held that it has not been proved that Dharam Singh (who was alleged to have died about a couple of months after his father) survived his father. If this be so, and I must take it to be so as a fact found, the plaintiffs are still the real reversioners of the property which on this finding must be deemed to be the estate of Tarif, its last full owner. The title of *Musammat* Sujani is that of a Hindu widow succeeding to her husband's estate. This finding makes no material difference in the plaintiffs' case.

I now return to the question of *res judicata*. It is true that Mehar Ilahi Khan was no party to the former suit, but his mortgagor under whom he claims was a party to it. He is a transferee from her after the decree had been made, and is bound by the adjudications arrived at against her to the same extent as she is bound by them. In Lord Halsbury's Laws of England, Vol. 13, the law is thus laid down at page 346:—"In order that a judgment may be conclusive against a person as privy in estate to a party litigant it is necessary to show (apart from his taking with a notice of a *lis pendens*), that he derives title under the latter by act or operation of law subsequent to the recovery of the judgment." [See also *In re De Burgho's Estate* (1)].

In Mr. Hukum Chand's work on the Law of *Res Judicata* the American Law on the subject is thus enunciated at page 185:—"It is quite a general rule, in fact, that to create the relation of privity, the person to be bound by the judgment must be one who claims an interest in the subject-matter affected through or under one of the parties, and he must claim it as acquired after the rendition of the judgment. It was held in *Hunt* v. *Haven* (2) that 'one cannot be a privy in estate to a judgment or decree unless he derives his title to the property in question, subsequent to, and from some party who is bound by, such judgment or decree.' Thus a mortgagee is in privity with a mortgagor as to all that happened before the execution of the mortgage, and not in regard to anything happening afterwards."

The law on the subject in India has been considered in a recent case in the Madras High Court [*Seshappaya* v. *Venkatramana Upadya* (3)]. At page 462 their Lordships (Miller and Sankaran Nair, JJ.) observe as follows:—"The rule that the interest to be bound, must be acquired after the action, is supported by the English cases of *Doe dem Thomas Foster* v. *Earl of Derby* (4) and *Mercantile Investment and General Trust Co.* v. *River Plate Trust, Loan and Agency Co.*, (5) and many American cases are cited in support of it in the work we have quoted."

It is thus evident that the defendant No. 2, being a transferee by way of mortgage subsequent to the decree, is bound by the adjudications contained therein against his treansferor.

The next question is whether the decree is binding on him though made *ex parte* or based on a compromise. The question was considered in *In re South American and Mexican Co.*, *Ex parte Bank of England* (6). Vaughan Williams at page 45 of the report states:—

"Under these circumstances I have only to consider, with reference to the second question, Mr. Moulton's suggestion, that a judgment by consent, upon which the Court has not exercised its mind, does not and cannot raise an estoppel *inter partes*. I can only say this is the first time I have ever heard such a proposition suggested. It has always been the law that a judgment by consent or by default raises an estoppel just in the same way as a judgment after the Court has exercised a judicial

(1) (1896) 1 Ir. Rep. 274; 2 Ir. L. R. 491.

(2) 52 N. H. 162.

(3) 5 Ind. Cas. 732; 33 M. 459; 20 M. L. J. 752; (1910) M. W. N. 26.

(4) 1 A. & E. 783; 110 E. R. 1406; 3 N. & M. 782; 3 L. J. K. B. 191; 40 R. R. 423.

(5) (1894) 1 Ch. 578 at p. 595; 63 L. J. Ch. 366; 8 R. 791; 70 L. T. 131; 42 W. R. 365.

(6) (1895) 1 Ch. 37; 64 L. J. Ch. 189; 12 R. 1; 71 L. T. 594; 43 W. R. 131.

discretion in the matter. The basis of the estoppel is that, when parties have once litigated a matter, it is in the interest of the estate that litigation should come to an end; and if they agree upon a result, or upon a verdict, or upon a judgment, or upon a verdict and judgment, as the case may be, an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the case had been fought out to the bitter end."

The case went up in appeal and Lord Herschell, L. C., thus summed up the law in his judgment:—"The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end." His Lordship dismissed the appeal. Lord Justices Lendely and Smith concurred in that order.

The same view was taken by Lord Esher, M. R., in *The Bellcairn* (7).

Mr. Hukum Chand in his work on the Law of *Res Judicata*, page 126, cites several cases to show that the American Courts take the same view.

The same view has been taken in India [Vide *Lakhsmishankar Devshankar* v. *Vishvanram* (8) and *Shib Lal* v. *Gouri Prasad* (9)].

An *ex parte* decree is as much binding upon the parties as a decree based upon a judgment passed after contest between the parties. I have, therefore, no hesitation in holding that the decree is binding upon defendant No. 2, just in the same way as upon defendant No 1. The learned Subordinate Judge observes that the case was "never heard and decided after a fair trial, but was only compromised."

In making this observation he has probably in mind the cases where decrees had been obtained by a stranger to the family against a Hindu widow in the possession of her husband's estate. It has been held that in such cases a decree fairly obtained after contest against the widow is binding upon the reversioners. It is necessary to show that a decree was so obtained to make it binding, not upon the widow alone, but also upon the reversioners. In this case it is not sought to do so against the reversioners. All that is sought in this case is to make the decree binding upon a person who claims title under the lady, and under her alone. There is no suggestion or proof that the compromise was obtained by fraud or misrepresentation or that it was not fairly obtained. The decree in the former suit clearly declares that the plaintiffs are the next reversioners to the estate. It gives effect to their claim by holding that the lease was binding only during the lady's life-time. I must, therefore, hold that the question of the status of the plaintiffs as next reversioners is *res judicata* and cannot be re-opened either by *Musammat* Sujani or by any one claiming under her by a title derived after the decree.

I set aside the decree of the lower Appellate Court and allowing the appeal direct the Court below to restore the appeal to its file of pending appeals under Order XLI, rule 23, of the Code of Civil Procedure, 1908, and to hear and dispose of the same in accordance with law. Costs here and hitherto incurred by the parties will be costs in the case.

Appeal allowed.

(7) 10 P. D. 161; 55 L. J. P. 3; 53 L. T. 686; 34 W. R. 55.
(8) 24 B. 77; 1 Bom. L. R. 534.
(9) 2 C. W. N. 174.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 5 OF 1914.
April 16, 1914.
Present:—Mr. Lindsay, J. C., and Mr. Kanhaiya Lal, A. J. C.

ABDUL BASIT AND OTHERS—DEFENDANTS—APPELLANTS
versus
ABDUL SALAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Arbitrator and Commissioner, positions of, difference between—Partition made by person nominated by parties and appointed by Court—Objections to partition made by Commissioner, entertainability of—Civil Procedure Code (Act V of 1908), O. XXVI, r. 14.

There is a difference between the positions of an Arbitrator and a Commissioner. The latter submits his report for the approval of the Court and has no greater power than what the parties or the Court nominating him chose to give him, whereas the

former has a final authority to settle all matters in difference between the parties which form the subject of the reference, subject to the power of the Court to set aside the award if certain specific circumstances affecting his conduct are proved to exist.

A decree based on a compromise directed that unless the parties made a partition between themselves it should be effected by the person nominated by the parties in the compromise petition. The parties having failed to effect a partition among themselves, their nominee did it as a Commissioner appointed by the Court. Objections were taken to his mode of partition.

Held, that in the absence of any indication in the decree that the nominee was to act as an Arbitrator, the objections were entertainable under Order XXVI, r. 14, Civil Procedure Code.

Appeal against the order of the Subordinate Judge, Barabanki, dated 22nd November 1913.

Mr. *Mohammad Wasim*, for the Appellants.

Saiyyed *Nabi-Ullah*, for the Respondents.

JUDGMENT.—These appeals arise out of a proceeding taken in execution of a decree for the partition of certain property. The decree was passed on the basis of a compromise and directed that unless the parties arranged to make a partition themselves, it shall be effected by Munshi Sajjad Husain, a Pleader nominated by the parties in the petition of compromise, and that in case of his refusal the parties or the Court would be at liberty to appoint any other Commissioner for the purpose of carrying out the said partition. It is admitted that the parties were not able to effect a partition among themselves by mutual consent. The Court accordingly appointed Munshi Sajjad Husain, the nominee of the parties, a Commissioner to make a partition. Various objections were taken by the parties to the form in which the partition was effected by Munshi Sajjad Husain. The Court below refused to entertain those objections on the ground that the position of Munshi Sajjad Husain was that of an Arbitrator, whose award was binding on the parties. There is nothing, however, in the decree to indicate that Munshi Sajjad Husain was to act as an Arbitrator for the purpose of making a partition in case the parties were unable to make a partition themselves. He was only a nominee of the parties for the purpose of effecting a fair division of property and the lower Court ought to have gone into the merits of the objections made to his report in the manner laid down in Order XXVI, rule 14, of the Code of Civil Procedure. There is an essential difference between the position of a person appointed by the Court or nominated by the parties to make a partition, and that of an Arbitrator. A Commissioner submits his report for the approval of the Court and has no greater power than what the parties or the Court by whom he was nominated choose to give him. An Arbitrator has a final authority to settle all matters in difference between the parties which form the subject of the reference subject to the power of the Court to set aside the award, if certain specific circumstances affecting the conduct of the Arbitrator are proved to exist. There is nothing to show that the petition of compromise or the decree passed on its basis empowered Munshi Sajjad Husain to act as an Arbitrator for the purpose of making a partition. The decree merely suggested the alternative methods to be adopted for the purpose in view. The parties and the Court treated him as a Commissioner.

The appeals are, therefore, allowed and the case remanded to the Court below, with a direction to reinstate the objections under their original numbers and to dispose of them after recording such relevant evidence as the parties may adduce in the manner provided by law. No order is made as to the costs.

Appeal allowed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 64 OF 1913.

March 25, 1914.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, and Mr. Justice D. Chatterjee.

BISSESWAR RAY CHOWDHRY—DEFENDANT—APPELLANT

versus

Lala RAJENDA KUMAR SINGHA CHOWDHURY AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 50 (1) *and* (2)

MONIJAN BIBI *v.* DISTRICT JUDGE, BIRBHOOM.

—Land held at fixed rate for twenty years—Enhancement of rent—Kabuliat—*Evidence.*

Where a landlord sues for enhancement of rent of a tenure held at rent or rate of rent which has not been changed for a period of twenty years immediately before suit, the tenant is protected from an increase of rent under sub-section (1) of section 50 of the Bengal Tenancy Act, 1885, unless the contrary required by sub-section 2 of the same section is proved.

A *kabuliat*, which only proves the recognition of an already existing tenure, does not amount to the contrary evidence required by sub-section (2) of section 50 of the Act.

Where there has been no alteration in the area of land held permanently, the rent cannot be enhanced.

Appeal against the decree of Mr. Justice Newbould in Second Appeal No. 2158 of 1910, dated the 14th of April 1913.

Babus *Tara Kishore Chowdhry* and *Atul Krishna Ray*, for the Appellant.

Babus *Mohendra Nath Ray* and *Bir Bhushan Dutt*, for the Respondents.

JUDGMENT.—In our opinion the judgment of Mr. Justice Newbould as also the decree of the lower Appellate Court must be set aside for these reasons. We are satisfied that the appellant, who is the defendant in the suit, is a tenure-holder, and that he and his predecessors-in-interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit. From that it follows that until the contrary is shown, the tenure-holder and his predecessors-in-interest have held at that rent or rate of rent from the time of the Permanent Settlement, and if that be so, then sub-section (1) of section 50 of the Bengal Tenancy Act protects the defendant from an increase of rent except on the ground of an alteration in the area of the tenure. The only question, therefore, is whether the contrary has been shown. For that purpose reliance has been placed on the *kabuliat* dated the 13th *Pous* 1238, one of the Exhibits in the case. The true meaning of this document has been the subject of considerable discussion before us, but this at least emerges clearly from the discussion that the document is the recognition of a previously existing interest and not the creation of a new one. Therefore, it does not show the contrary required by sub-section (2) of section 50.

The result then is that in so far as the lower Appellate Court has decided in favour of an enhancement of rent, the decree was erroneous. In so far as it decided that there had been no alteration in area, it must be upheld as it is a finding of fact which has not been controverted. The plaintiff's suit must, therefore, be dismissed.

Each party will bear his own costs throughout.

Suit dismissed

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 74 OF 1913.

AND

CIVIL RULE NO. 221 OF 1913.

May 15, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

MONIJAN BIBI AND ANOTHER—APPELLANTS—PETITIONERS

versus

DISTRICT JUDGE, BIRBHOOM—OPPOSITE PARTY.

Muhammadan Law—Guardian of marriage, who can be, obligations of—Muhammadan ward—Consent of Court—Procedure—Muhammadan Law of guardian of marriage, whether abrogated—Guardians and Wards Act (VIII of 1890), ss. 24, 25, 26, 43 (1), 47 (1)—Order of Court—Irregular—Appeal—Revision.

Under the Muhammadan Law the right of giving a male or female minor in marriage falls upon a line of guardians different from that to which the management of his property is entrusted and also from that to which the custody of his person is confided, and although the intervention of a guardian is an essential condition to the validity of the marriage of a minor, it is not obligatory upon the guardian of the person, nor even upon the guardian for marriage, to provide a suitable marriage for the ward.

The Muhammadan Law of guardianship in marriage has not been abrogated by implication by section 24 of the Guardians and Wards Act.

A Ward of Court cannot marry without the consent of the Court. If a proposed marriage is unsuitable the Court can, as representing the Sovereign in whom the guardianship of all infants is in theory vested, restrain the marriage, even though the guardian or the father has given his consent.

MONIJAN BIBI *v.* DISTRICT JUDGE.

Bai Diwali v. *Moti Karson*, 20 B. 509, not followed. *Eyre* v. *Shaftsbury*, (1723) 2 P. Wms. 103; 24 E. R. 659; 1 Wh. & T. L. C., 7th Ed., 413; *Jeffrys* v. *Vanteswarstwarth*, (1740) Barn. 141; 27 E.R. 588, *Tombes* v. *Elers*, (1747) 1 Dick. 88; 21 E. R. 201; *Gordon* v. *Irwin*, (1781) 4 Bro. P. C. 355; 2 E. R. 241; *Wellesley* v. *Duke of Beaufort*, (1829) 2 Russel 1; 5 L. J. Ch. 85; 26 R. R. 1; 38 E. R. 236; *Wellesley* v. *Wellesley*, (1828) 2 Bligh (N. S.) 124; 1 Dow. and Cl. 152; 4 E. R. 1078; 31 R. R. 15, followed.

The procedure to be followed for the marriage of a ward of Court pointed out.

If a District Judge irregularly on the basis of a report of a Hindu Nazir selects a husband for a Muhammadan girl who is a ward of his Court, his order is not appealable, as it is not covered either by section 47, clause (*i*), read with section 43, sub-section 1, or sections 24, 25 and 26 of the Guardians and Wards Act, but it can be set aside under the revisional jurisdiction.

Appeal and application against an order of the District Judge, Birbhum, dated the 6th December 1912.

FACTS.—The appeal and the petition in revision were filed by the mother and a half paternal uncle of a Muhammadan minor girl.

On 12th February 1910 the mother of the girl had been appointed guardian of her person and the *Nazir* of the Court of the District Judge of Birbhum guardian of her property though, it appears, this order was never communicated to the *Nazir* and he had no hand in the management of the property till quite recently.

On 22nd May 1912 an application was made to the District Judge by the mother of the girl and by another person who claimed to be the half-brother of the father of the infant, for direction as to a suitable marriage for the girl.

Objection was taken by a cousin of the father of the infant, who intimated that the bridegroom selected by the applicants was entirely unsuitable.

The District Judge thereupon directed the attendance of all the near relations of the girl as well as her own personal production, which was done on a later date, and then directed his own *Nazir*, a Hindu, to proceed to the village and to submit a list of likely bridegrooms prepared in consultation with persons interested in the welfare of the minor, stating their qualifications and positions in society etc., etc. This course was objected to by the mother and the above alleged uncle on the ground that it involved a supersession of persons who are entitled to act as guardians for marriage under the Muhammadan Law.

On August 16th the *Nazir* submitted his report and on 27th September the girl was again produced before the Court, when she expressed her preference for one named Ishak. The District Judge, without heeding this, on the 4th October, called upon the mother to select three youngmen out of the list of the *Nazir* and on her failing to do this, himself selected a bridegroom for the minor girl by his order of the 6th December 1912. This was the order brought into question in this appeal and the Rule.

Babu *Naresh Chandra Sinha*, for the Applicants.

JUDGMENT.—We are invited to set aside, in the exercise of our appellate or of our revisional jurisdiction, an order which purports to have been made by the District Judge under the Guardians and Wards Act for the marriage of a Muhammadan girl, in respect of whose person and property guardians had been previously appointed by him. On the 12th February 1910 the District Judge appointed the mother of the infant as guardian of her person and the *Nazir* of the Court as the guardian of her properties. The order, however, was not communicated to the *Nazir*, and he does not appear to have had any hand in the management of the estate, till quite recently, when the fact was discovered that the *Nazir* had never been apprised of his appointment. The proceeding now before us was initiated on the 22nd May 1912, when an application was made to the Court, by the mother and by another person who claimed to be the half-brother of the father of the infant, for directions as to a suitable marriage of the girl. Objection was taken by a cousin of the father of the infant who intimated to the Court that the selection of a bridegroom as made by the applicants was entirely unsuitable. The District Judge thereupon directed the attendance of all near relations of the girl and also ordered the girl to be produced in Court if the mother had no objection. On a later date, the girl was brought before the Court. The District Judge then directed his *Nazir*, Babu Siradindu Chakravarti, a Hindu gentleman, to go to the village and after consultation with persons

interested in the welfare of the minor, to submit a list of likely bridegrooms, stating their qualifications and position in society and making his recommendation with reasons. Objection was taken by the mother and the alleged uncle to the adoption of this course on the ground that it involved a supersession of the person entitled under the Muhammadan Law to act as the guardian for marriage. No heed was paid to this, and on the 16th August the *Nazir* submitted his report. On the 27th September the girl was produced again before the Court and she expressed her preference for a young man named Ishak. On the 4th October the District Judge further considered the matter, and although he came to the conclusion that the Court could not undertake to perform the functions of a match-maker, he called upon the mother to nominate three of the young men mentioned in the report of the *Nazir*. On the 6th December, the District Judge recorded in the order-sheet that the mother had failed to comply with the order of the 4th October, and he accordingly proceeded to select a suitable husband for the girl on the basis of the report submitted by the *Nazir*. This order is assailed before us as made without jurisdiction. In our opinion the proceedings before the District Judge have been throughout irregular.

The Guardians and Wards Act does not make specific mention of the disposal in marriage of an infant in respect of whose person a guardian has been appointed by the Court, although section 41, sub-section (1), clauses (*d*), provides that the powers of a guardian of the person cease in the case of a female ward by her marriage to a husband who is not unfit to be guardian of the person, or if the guardian was appointed or declared by the Court, by her marriage to a husband who is not in the opinion of the Court so unfit. The term 'guardian' is defined in section 4, clause (2), to mean a person having the care of the person of a minor or of his property or of both his person and property. Section 24 then prescribes the duties of a guardian of the person in these terms: "A guardian of the person of a ward is charged with the custody of the ward and must look to his support health and education and such other matters as the law to which the ward is subject requires". It is remarkable that while the Legislature makes specific mention of support, health and education, no reference is made to the marriage of the minor. If we assume that the individual who has by law the right and duty of disposing of a boy or girl in marriage may be said to have for that limited purpose the care of his or her person, the question remains whether "disposal in marriage" can be treated as included in the general words, "such other matters as the law to which the ward is subject requires", which find a place in the concluding portion of section 24. The answer must plainly be in the negative in the case before us; we need not express any opinion as to what the answer may be in cases where the parties are not Muhammadans. In the first place, under the Muhammadan Law, which applies to the parties before the Court, the guardian of the person of an infant is not necessarily the guardian for the marriage of the girl. In the second place, the Muhammadan Law does not require that the guardian should provide suitable marriage for his ward, though it gives him the power to contract a marriage for the infant. The Muhammadan Law does not impose upon guardians any religious obligation to provide suitable marriages for their wards; indeed their power is so restricted that, where a minor has been given in marriage by a guardian other than the father or paternal grandfather, the minor has what is called the option of puberty, or option of repudiation, on attainment of age. We have, therefore, two fundamental positions under the Muhammadan Law, namely, *first*, the right of giving a male or female minor in marriage falls upon a line of guardians different from that to which the management of his property is entrusted and also from that to which the custody of his person is confided; and, *secondly*, that although the intervention of a guardian is an essential condition to the validity of the marriage of a minor, it is not obligatory upon the guardian of the person, nor even upon the guardian for marriage, to provide a suitable marriage for the Ward (Macnaghten, Chapter VII, Articles 14, 16; Baillee, Book I, Chapter IV, page 45; Hamilton's Hedayah, Volume I, Book I, Chapter II, pages 36, 37 and 39; Ameer Ali, Volume

II, pages 280-282 (third Edition); Shama Charan Sarkar, Volume I, page 329; Abdur Rahman, Articles 34, 37, 41 and 42; Abdur Rahim, page 331). It cannot reasonably be held that the Muhammadan Law on the subject of guardianship in marriage has been abrogated by implication by section 24 of the Guardians and Wards Act. One would have expected to find a specific statutory provision to this effect if the Legislature really intended to interfere with the rule of Muhammadan Law which assigns the function of guardianship in marriage of an infant, under the name of *jabr*, to relatives who are not necessarily those entitled to the general care and direct custody (*hizanat*) of the person of the infant. The view we take is supported by the opinion of Sir Rowland Wilson (Anglo-Mahomedan Law, Articles 90 and 117).

The question next arises, what is the true function of the District Judge in the matter of the disposal in marriage of a Muhammadan minor in respect of whose person a guardian has been appointed by him? We are not prepared to accept the extreme view that the marriage of an infant, who is a Ward of Court, may be allowed to take place without the sanction or even the knowledge of the District Judge, although such view appears to have been indicated in *Bai Divali* v. *Moti Karson* (1). It would, we think, be contrary to first principles to hold that although a minor is Ward of Court, an obviously unsuitable marriage may be arranged for her, while the Court is powerless to prevent what would manifestly be an irrevocable act permanently injurious to her best interests for life. If this view were not maintained, then grave complications might also arise, because under section 41, sub-section (1), clause (*d*), the powers of the guardian of the person cease, when such guardian has been appointed or declared by the Court, only when the marriage has taken place with a husband who is not, in the opinion of the Court, unfit to be guardian of the person of the girl. This clearly indicates the desirability, if not the absolute necessity, of the sanction of the Court before the marriage is arranged and solemnised. We hold accordingly that a Ward of Court cannot marry without the consent of the Court.

(1) 22 B. 509.

This, indeed, has been recognised as an elementary principle in the Law of England [*Eyre* v. *Shaftsbury* (2), *Jeffrys* v. *Vantes-warstwarth* (3), *Tombes* v. *Elers* (4)] and it has been repeatedly held that if a proposed marriage is unsuitable, the Court can, as representing the Sovereign in whom the guardianship of all infants is in theory vested, restrain the marriage, even though the guardian or the father has given his consent [*Gordon* v. *Irwin* (5), *Wellesley* v. *Duke of Beaufort* (6) affirmed by the House of Lords, *Wellesley* v. *Wellesley* (7)]. This view was accepted as applicable to the case of a Hindu minor for whom a personal guardian has been appointed by the Court in *Subhadra Koer* v. *Dhajadhari Goswami* (8) where it was ruled that marriage or connivance at marriage with a Ward of Court, without consent of the Court, is a contempt of Court liable to be severely punished.

The proper procedure to be followed in cases of this description may now be briefly described. The guardian for marriage of the infant, who may have negotiated for the marriage, must apply to the District Judge for his sanction. Notice of the application should be given to the infant, to the guardian of person if he happens to be different from the guardian for marriage, and also to such relations of the minor as the Judge may deem necessary. He will then consider the objections and suggestions, if any, and then determine whether the proposal of the guardian for marriage is for the true welfare of the minor or whether the marriage is unsuitable by reason of incongruity of age, inequality of rank and fortune or any like reason. If, on the materials before the District Judge, he is satisfied that the marriage is not unsuitable, he will sanction it.

The order of the District Judge in the case before us, tested in the light of the principles just explained, is clearly unsustain-

(2) (1723) 2 P. Wms. 103 at p. 112; 24 Eng. Rep. 659; 1 Wh. & T. L. C., 7th Ed., 413.
(3) (1740) Barn, 141 at p 144; 27 E. R. 588.
(4) (1747) 1 Dick. 88; 21 Eng. Rep. 201.
(5) (1781) 4 Bro. P. C. 355; 2 Eng .Rep. 241.
(6) (1829) 2 Russel 1; 38 Eng. Rep. 236; 5 L. J. Ch 85; 26 R. R. 1.
(7) (1828) 2 Bligh (N. S.) 124; 1 Dow. and Cl. 152; 4 Eng. Rep. 1078; 31 R. R. 15.
(8) 14 Ind. Cas. 380; 16 C. W. N. 447; 15 C. L. J. 147.

able. No doubt, at one stage of the proceedings he rightly took the view that it is not the function of the District Judge to act as a match-maker, but at a later stage he adopted measures quite contrary to the principle he had laid down. There was also a dispute before him as to who was entitled under the Muhammadan Law to act as guardian for the marriage of the minor. This he did not decide as he should have done, but superseded both the claimants, appointed his *Nazir* to hold an inquiry in the village and to make a preliminary selection of possible bridegroons, and finally called upon the mother to select three from amongst the persons named by the *Nazir*. When the mother, who was apparently treated as the guardian for marriage, could not make the selection, apparently for the reason that she did not consider any of the young men named by the *Nazir* quite suitable, the District Judge proceeded to make his own choice. This was clearly an irregular procedure. It is difficult to see why the choice should be restricted to young men of the particular village and why the guardian for marriage should be limited to the preliminary list of possible candidates prepared by the *Nazir*. The choice has to be made in the first instance by the guardian for marriage, whoever he may be, and the true function of the District Judge is to test whether the selection made by the guardian for marriage is or is not suitable. The District Judge does not appear to have realised what responsibility would be involved, if he had, with or without the assistance of his *Nazir*, to select the most suitable bridegroom or bride, as the case might be, for every infant in the district in respect of whose person a guardian might have been appointed by him. Nor did the District Judge realise that while under the Muhammadan Law none but a Moslem can act as the guardian for marriage of a Muhammadan minor, the procedure he has followed has led to the supersession of such guardian by a Hindu gentleman who, *prima facie*, would not have an intimate knowledge of what would be deemed suitable in Muhammadan society.

The only other question which requires examination is, whether the order of the District Judge is open to appeal. We are of opinion that section 47, clause (1), of the Guardians and Wards Act, read with section 43, sub-section (1), and sections 24, 25 and 26, does not cover the case; consequently the order is not open to appeal and can be set aside only in the exercise of our revisional jurisdiction.

The result is that the appeal is dismissed, but the Rule is made absolute and the order of the District Judge discharged. The records will be returned to him to enable him to take such further steps, if any, as the parties interested may desire him to adopt in accordance with the principles explained above.

Appeal dismissed; Rule made absolute.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1441 OF 1913.

July 10, 1914.

Present:—Mr. Justice Sunder Lal.

SUKH KUNWAR CHANDAR *alias* SUKHMAR CHANDAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat BHAGWANI—PLAINTIFF—RESPONDENT.

Mortgage suit—Person claiming paramount title to mortgagor, whether necessary party.

A person who sets up a title paramount to the mortgagor is not a necessary party to a suit based on the mortgage. Such paramount title can be established in a separate suit.

Second appeal from the Subordinate Judge of Meerut, dated August 4th, 1913.

Mr. *K. N. Katjoo*, for Dr. *Tej Bahadur Sapru*, for the Appellants.

Mr. *D. R. Sawhny*, for the Respondent.

JUDGMENT.—This appeal arises under the following circumstances. One Har Dayal was the owner of the property in suit in this case and he was separate from his brothers Har Gyan and Baldeo, in estate. Har Dayal died about 40 years ago leaving a widow, *Musammat* Samai Kuar who succeeded him to the estate. Samai Kuar, died in May 1909 and Bhagwani Kuar, the daughter of Har Dayal, claims the property in suit as part of her father's estate. Her case is that on the death of her mother succession opened out to her and she is entitled to the property. It appears that soon after the death

of Har Dayal, Samai Kuar entered into a marriage in the *karao* form with Har Gyan. This was in the year 1872. The parties belong to the caste of *Gujars* among whom second marriage in the *karao* form is permissible. The fact of the *karao* marriage is not disputed, but it is urged on behalf of the defendants that by the custom of the caste a widow entering into a *karao* form of marriage forfeits all interest in her former husband's estate and that, therefore, Samai Kuar forfeited her interest in this property on her marriage in 1872. The defence is that the plaintiff, therefore, is not entitled to claim this property as the estate of Har Dayal and that the possession of Samai Kuar was adverse to the plaintiff. Her rights, if any, as the daughter of Har Dayal came to an end and she has no right of inheritance now in the property. The Court of first instance found that Samai Kuar, being in adverse possession for more than twelve years, acquired herself in her own right an interest in the property, that the said property was her *stridhan* to which *Musammat* Bhagwani, as her daughter, was entitled to succeed and on that ground has decreed the claim of the lady. The first defendant, Pershadi, is the son of Har Gyan by *Musammat* Samai Kuar. On her death he took possession of the property. The plaintiff, therefore, sued for possession of the property against Har Gyan. It further appears that on February 4th, 1895, Pershadi and Samai Kuar executed a deed of simple mortgage in favour of the other defendants. Under this deed, Pershadi has mortgaged the property inherited by her from Har Gyan and Samai Kuar the property which she at one time inherited from her former husband and over which she had acquired ownership by reason of adverse possession. These other defendants brought a suit on the simple mortgage of February 4th, 1895, for the sale of the mortgaged property. They made *Musammat* Bhagwani Kuar also a defendant to that suit. Bhagwani Kuar in her defence urged that the mortgagor, Samai Kuar, had no power to mortgage the property now in suit and that the mortgage was not binding upon her. She set up in that suit her claim to the property as the daughter of Har Dayal. On Bhagwani Kuar's setting up a title adverse to that of the mortgagor, the plaintiffs in that suit applied to have her name struck off from the array of defendants and the Court made the order asked for by the plaintiffs. The suit was heard by the Court and on March 7th, 1911, the Court made a decree for the sale of the property mortgaged. That decree is under execution now, though the property has not yet been sold. The plaintiff's suit as against these other defendants is to obtain a declaration that the proceedings in that suit which culminated in a decree on March 7th, 1911, are not binding on her and do not affect her rights. The plaint as originally framed was not clear at all as to the relief claimed as against the mortgagee defendants. But on the day when the issues were settled the Pleaders for the parties made statements which made it quite clear what the plaintiff's claim as against them was. I may note here that the defendants in that case pointed out that they were mortgagees in possession under a possessory mortgage of the same day *viz.*, February 4th, 1895. The plaintiff stated that she was unaware of that mortgage. They had claimed no relief in respect thereof in the suit and the defendants' claim to hold possession under the usufructuary mortgage was kept out of the purview of the plaintiff's suit, and the Court below has made no adjudication upon it. The claim has been limited simply to the claim to avoid the decree and the proceedings in the suit which ended in the decree of March 7th, 1911. Nothing that has been decided by the Court below will affect the defendants' title, if any, under the said mortgage, and the plaintiff's claim for possession is limited to a claim for that relief against the first defendant. The whole controversy in this appeal is with reference to the declaration granted by the Court below in respect of the said decree. The Court below having found that Samai Kuar was absolute owner of the property and that she held it as her *stridhan*, it naturally follows that she was competent to mortgage the property to the defendants-appellants by the document of February 4th, 1895. The plaintiff who succeeded to it as her daughter took it subject to that mortgage and on that finding the Court of first instance dismissed the suit as against the mortgagees. The plaintiff appealed against the said decree to the Court below. The only plea taken in appeal was in the following words:—

"Under the circumstances of the case the

whole of the plaintiff's claim as against defendants Nos. 2, 3 and 10 for decree No. 813 of 1910, dated the 7th of March 1911, being held ineffectual ought to have been adjudicated upon and decreed. The decree aforesaid was not obtained within the prescribed time as against the plaintiff nor is it legally binding upon her. The lower Court has improperly left out some points in issue without adjudicating upon them". It is noteworthy that the appeal raised no question as to the custom found by the Court of first instance, nor did it impugn the finding of that Court on the question that the property had become the *stridhan* of Samai Kuar. The only ground on which the appeal practically proceeded was that inasmuch as the plaintiff's name had been struck out of the array of defendants in the suit of the mortgagees, no decree passed in that case was binding on her, nor could it affect her rights. The Court below on that ground alone decreed the plaintiff's claim. The mortgagees have appealed to this Court. It has been urged on their behalf by Mr. Kailash Nath Katjoo that in view of the defence set up by *Musammat* Bhagwani in the mortgagees' suit and her disclaimer of any rights under *Musammat* Samai Kuar, she had no right now left in the property and reliance has been placed on the ruling of their Lordships of the Privy Council in the case of *Nilakant Banerji* v. *Suresh Chandra Mullick* (1). He has further urged that a person who sets up a title paramount to that of the mortgagor was not a necessary party to a suit for sale on the mortgage, and the Court in that case rightly struck out Bhagwani Kuar's name from the array of the defendants to that case. He has urged upon the strength of the findings of the Court of first instance that the only right left in Bhagwani Kuar under the mortgage was a right of redemption which under the ruling of the Privy Council she cannot now claim; the relief granted by the Court of Appeal was wrongly granted and the decree of the Court of first instance should have been affirmed. Mr. Sawhney, on behalf of the respondent, has urged that Bhagwani Kuar being no party to the decree of March 7th, 1911, any adjudication arrived at in that Court should not be binding upon her, that *Musammat* Samai Kuar also was not made a party to the suit by the mortgagees and any decree made in that case, therefore, for that reason also does not bind the present plaintiff. By way of explanation to that contention it was suggested on behalf of the appellants that Samai Kuar had died and that *Musammat* Bhagwani Kuar had been made a party to the suit as already stated and the suit as framed was rightly instituted. It was only on the disclaimer of Bhagwani Kuar of all rights under Samai Kuar that the mortgagees applied for her (Bhagwani Kuar's) name being struck off. It is a settled rule of law that a person who sets up a title paramount to the mortgagor is not a necessary party to a suit based on the mortgage and the same has been held to be the rule in a case reported as *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (2). So far, I think, this contention for the appellants is well-founded. In her position as a person claiming paramount title the decree does not and could not contain any adjudication. But it does not follow that because such claimant under a paramount title is not a necessary party that she cannot set up and establish her paramount title in a properly framed suit. To that extent I think the contention of Mr. Sawhney is perfectly correct. Bhagwani Kuar could set up her paramount title as she did in this case. But the Court of first instance found against her on that point. Her claim to the estate of Har Dayal was held to be untenable. She had, therefore, no paramount title and the finding was not appealed against on that point. I must, therefore, hold that upon the findings the claim to obtain a declaration that the decree was not binding upon her fails, and the Court of first instance in its decree rightly held that that title had not been established and dismissed the claim.

There remains the further point, whether under her subsidiary or derivative title as heir of Samai Kuar the plaintiff is entitled to any relief. The only relief that she could claim on that footing was a relief for redemption. This has not been claimed in this suit, nor has it been asked for even in this appeal. The question, therefore, whether she has a right of redemption is still left and does not arise. It is true that the Privy Council

(1) 12 C. 414 (P. C.); 12 I. A. 171; 9 Ind. Jur. 439; 4 Sar. P. C. J. 685.

(2) 33 C, 425; 3 C. L, J. 205.

case relied upon very much supports the contention of the defendants-appellants. But there are two points of distinction between that case and this. In the first place in that case the Mullicks remained parties to the suit up to the last moment and there was an adjudication that they had a title paramount to that of the mortgagor and were, therefore, not necessary parties to the suit. The second distinction is that the property in that case was actually sold and purchased by the plaintiffs in that case and the Mullicks were seeking redemption after the sale had taken place. Whether the ruling in the Privy Council case rigidly applies to all cases or not, is still an open question and a Bench of the Calcutta High Court in *Hare Krishna Bhowmik* v. *Robert Watson & Co.* (3) were inclined to take the other view. As, however, there is no claim for redemption in this case I need not adjudicate upon this. In my opinion, the plaintiff is not entitled to any declaration in this case, as to whether the decree of March 7th, 1911, is or is not binding upon her. In her capacity as heir of Samai Kuar, she cannot claim a declaration only when she can claim further relief by way of redemption. On that ground I decline to give her any decree for declaration as heir of Samai Kuar. This will leave the question of redemption open if she seeks it hereafter when she is so advised. For these reasons I dismiss the suit as against the defendants-appellants, so far as the plaintiff's paramount title is concerned, on the ground that she has not proved it, and so far as her title as heir of Samai Kuar is concerned, on the ground that as she could seek further relief other than a mere declaration she was not entitled to a mere declaration. I allow the appeal, set aside the decree of the Court below and affirm that of the Court of first instance upon grounds set forth by me. The appellants will have their costs in this appeal which will include Counsel's fee on the higher scale.

Appeal allowed.

(3) 8 C. W. N. 365.

CALCUTTA HIGH COURT.

CIVIL RULES NOS. 41, 42, 43, 144 AND 376 OF 1914.

May 20, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

IN NO. 41 OF 1914.

Srimati ISHANI DASI—DECREE-HOLDER—PETITIONER

IN NO. 42 OF 1914.

JOY CHANDRA ROY CHOUDHRI—DECREE-HOLDER—PETITIONER

IN NO. 43 OF 1914.

BROJENDRA KUMAR SINGH—DECREE-HOLDER—PETITIONER

IN NO. 144 OF 1914.

PRAHLAD CHANDRA BHAR—DECREE-HOLDER—PETITIONER

IN NO. 376 OF 1914.

PURNA CHANDRA DATTA—DECREE-HOLDER—PETITIONER

versus

GOPAL CHANDRA DEY AND OTHERS—JUDGMENT-DEBTORS—OPPOSITE PARTY IN ALL.

Married Women's Property Act (III of 1874), ss. 2, 6—Insurance policy effected by Hindu husband on his own life for benefit of wife and children, effect of—Money due under such policy, whether available for creditors of assured—Married women—Children—Application of Act to Hindus, Muhammadans and Buddhists—Policy effected under the Act, effect of—Surrender of policy, whether permissible—Powers of Governor-General in Council under s. 2 of Act—Terms 'race,' 'sect' and 'tribe,' refer to what communities.

Section 6 of the Married Women's Property Act does not apply to a policy of assurance effected by a Hindu on his own life for the benefit of his wife and children. Therefore the money due upon such policy forms part of the estate of the assured and is available for the payment of his debts.

Shankar v. *Umabai*, 19 Ind. Cas. 736; 37 B. 471; 15 Bom. L. R. 320, followed.

Pokkunuri Balamba v. *Kakaraparti Krishnayya*, 20 Ind. Cas. 934; 25 M. L. J. 65; (1913) M. W. N. 697; 14 M. L. T. 363, not approved.

Cleaver v. *Mutual Reserve Fund Life Association*, (1892) 1 Q. B. 147; 61 L. J. Q. B. 128; 66 L. T. 220; 40 W. R. 230; 56 J. P. 180, referred to.

Per *Fletcher, J.*—Section 2 of the Married Women's Property Act prohibits a Hindu married man from effecting a policy under section 6 for the benefit of his wife.

Section 6 of the Married Women's Property Act does not authorise a Hindu married man to effect a policy under the terms of the section for the benefit of his wife.

The Married Women's Property Act of 1874 does not apply to Hindus.

A wife of a Hindu married man is a married woman who or whose husband professes the Hindu religion.

ISHANI DASI *v.* GOPAL CHANDRA DEY.

A policy effected under the terms of section 6 of the Married Women's Property Act by a married man coming within the terms of the section for the benefit of 'his wife or his wife and children or any of them', if they come within the terms of the section, is a complete settlement as from the date of the policy on the wife and children and though there is no obligation on the husband to pay the premiums becoming due in the policy, he cannot surrender the policy to the office and receive the surrender value thereof.

Per *Richardson, J.*—When the wife or the husband was a Hindu at the date of the marriage, section 6 of Act III of 1874 applies neither to the wife nor to her children.

Section 6 of Act III of 1874 does not apply to the Hindu, Muhammadan and Buddhist married women, nor does it apply to their children. The reference to children in the section is quite incidental and the only children contemplated by the section were children born of marriages of the kind to which the rest of the Act applies.

Under section 2 of Act III of 1874 the Governor-General in Council has no power to exempt the members of the Hindu, Muhammadan and Buddhist communities from the operation of all or any of the provisions of the Act. The terms 'race', 'sect' and 'tribe' are used with reference to communities which cannot be described as Hindu, Muhammadan or Buddhist.

In the matter of applications under section 25 of the Provincial Small Cause Courts Act, IX of 1887, and of Suit No. 156 of 1913 in the Court of Sub-Judge, 3rd Court, Hughly.

FACTS.—One Radha Kishore De, the father of the judgment-debtors, effected a policy of assurance No. 24003 for Rs. 2,000 with the Oriental Government Security Life Assurance Company, Limited. The policy purported to be issued under section 6 of the Married Women's Property Act, III of 1874, on the life of the assured for the benefit of his wife and children. Radha Kishore De was a Hindu and he died in the month of January 1913, leaving a number of creditors, the petitioners in these Rules, and they attempted to attach the amount of Rs. 2,000 in the hand of the Oriental Government Security Life Assurance Company, Limited, which had become now payable, and were resisted by the sons of late Radha Kishore De, who claimed the amount as against them by virtue of the provisions of the above section 6. The Sub-Judge, 3rd Court, of Hughly with Small Cause Court powers, which was the executing Court allowed the claim of the sons of the deceased Radha Kishore De, and hence the present applications by the several decree-holders.

The question mainly turned on the applicability to the present cases of section 6 of Act III of 1874, Married Women's Property Act, it being concluded by the opposite party that no other portion of the Act is applicable to persons professing the Hindu religion. But they endeavoured to make out a case of exclusion of section 6 from the general scope of the Act by pointing out a slight apparent difference in the language used in the saving clause in section 2 and section 6 or at least a case thereout, in favour of the children who are not mentioned in the saving clause.

Babus *Jadu Nath Kanjilal* and *Jogendra Kumar De*, for the Petitioners in Nos. 41, 42 43 and 376.

Babus *Sasishekhar Roy* and *Rishendra Nath Sarkar*, for the Petitioners in No. 144.

Babus *Ram Chandra Mojumdar* and *Gurudas Sinha*, for the Opposite Party.

JUDGMENT.

FLETCHER, J.—The only question raised by these five rules is whether a sum of Rs. 2,000, payable by the Oriental Government Security Life Assurance Company, Limited, under or by virtue of a policy of assurance on the life of one Radha Kishore De numbered 24003 is available for the payment of the debts of Radha Kishore De. Radha Kishore De was a Hindu. He died in the month of January 1913. The opposite parties to these rules are his heirs.

Radha Kishore in his life-time effected the policy in question on his own life for the benefit of his wife and children. The policy purports to be issued under the provisions of the Married Women's Property Act, 1874. The question for our determination is, does section 6 of the Married Women's Property Act, 1874, apply to a policy of assurance effected by a Hindu on his own life for the benefit of his wife and children? In the present case the assured has not purported to create any trust in respect of the money payable under the policy. Unless, therefore, section 6 of the Act applies, the contract of assurance being with Radha Kishore, the right to call for payment is vested in his representatives and forms a portion of his estate: *Cleaver* v.

Mutual Reserve Fund Life Association (1). Different views have been taken in the High Courts in India as to whether section 6 of the Act authorises a married Hindu man to effect a policy of assurance in accordance with the provisions of the section.

The High Court at Bombay in the case of *Shankar* v. *Umabai* (2) take the broad view that the Act of 1874 does not apply to Hindus and, therefore, that a policy effected by a Hindu for the benefit of his wife and children is not governed by the provisions of section 6.

On the other hand the High Court at Madras in the case of *Pokkunuri Balamba* v. *Kakaraparti Krishnayya* (3) have held that the provisions of section 6 of the Act apply to a policy effected by a Hindu on his own life for the benefit of his wife and children.

Now section 2 of the Act provides that "Nothing herein contained applies to any married woman who at the time of her marriage professed the Hindu, Muhammadan, Buddhist, Sikh or Jaina religion, or whose husband, at the time of such marriage, professed any of those religions." And section 6 of the Act is in these terms:—"A policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife, or his wife and children, or any of them, shall enure and be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or to his creditors, or form part of his estate." A policy effected under the terms of the section by a married man coming within the terms of the section for the benefit of 'his wife or his wife and children or any of them', if they come within the terms of the section, is a complete settlement as from the date of the policy on the wife and children.

Thus although there is no obligation on the husband to pay the premiums becoming due on the policy, the husband could not surrender the policy to the office and receive the surrender value thereof.

Now a wife of a Hindu married man seems to me obviously to be a married woman who or whose husband professes the Hindu religion. And in that view, in my opinion, section 2 of the Act prohibits a Hindu married man from effecting a policy under section 6 for the benefit of his wife. I am unable to adopt the view that seems to have been expressed by Tyabji, J., that the policy would be a valid settlement on the children in case of a policy effected by a Hindu, although the wife is excluded by the terms of section 2 of the Act.

That view would involve reading into section 6 after the words "for the benefit of his wife or his wife and children or any of them" the words "in case of a Hindu and for the benefit of his children or any of them." But taking as I do the view that section 6 does not authorise a Hindu married man to effect a policy under the terms of the section for the benefit of his wife, it seems clear that section 6 does not apply to Hindus and that section stands on the same footing as the other sections of the Act. The view that the Act of 1874 does not apply to Hindus has been laid down more than once in judicial decisions in this country.

I agree with the view expressed by Scott, C. J., in the case of *Shankar* v *Umabai* (2). These five Rules ought, therefore, to be made absolute with costs. We assess the costs in each case at one gold *mohur*. Let the records be sent down at once.

RICHARDSON, J.—I have come upon consideration to the same conclusion.

Section 2 of the Married Women's Property Act (III of 1874) contains the following saving clause :—

"Nothing herein contained applies to any married woman who at the time of her marriage professed the Hindu, Muhammadan, Buddhist, and Sikh or Jaina religion, or whose husband, at the time of such marriage, professed any of those religions."

Section 6 so far as it need be quoted provides that "a policy of insurance effected by any married man on his own life, and

(1) (1892) 1 Q. B. 147; 61 L. J. Q. B. 128; 66 L. T. 220; 40 W. R. 230; 56 J. P. 180.
(2) 19 Ind. Cas. 736; 37 B. 471; 15 Bom. L. R. 320.
(3) 20 Ind. Cas. 934; 25 M. L. J. 65; (1913) M. W. N. 697; 14 M. L. T. 363.

expressed on the face of it to be for the benefit of his wife or of his wife and children, or any of them, shall enure and be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or to his creditors, or form part of his estate."

The question is whether this section applies to a policy taken out by a Hindu husband for the benefit of his wife and children.

It is argued that the section refers in terms to a "married man" and not to a "married woman" which is the expression used in the saving clause in section 2. This is a narrow foundation for the inference that the intention of the Legislature was to exclude section 6 from the scope of the saving clause and make it generally applicable to all married women whatever might be their religion. The section speaks not only of a "married man" but of his wife, and a wife is a "married woman." But then it is said, the saving clause at any rate does not extend to children and it would be attributing caprice to the Legislature to suppose that section 6 is applicable to the children, but not to the wife of a Hindu husband. It is urged that even at the cost of doing some violence to the language a construction which has this capricious result must be rejected.

The argument, of course, cuts both ways and the better opinion seems to be that when the wife or the husband was a Hindu at the date of the marriage, section 6 applies neither to the wife nor to her children.

No doubt the peculiar form given to the saving clause creates a difficulty. Nothing in the Act is to apply to a married woman who, or whose husband, at the time of the marriage professed one or other of the religions specified. The saving clause in section 331 of the Indian Succession Act is in regard to its actual terms more widely expressed :—"The provisions of this Act shall not apply to intestate or testamentary succession to the property of any Hindu, Muhammadan or Budhist" the term Hindu including, as is now recognized Jains and Sikhs. It may be that the title of Act III of 1874—The Married Women's Property Act—has something to do with the way in which the saving clause is drawn. But apart from that the Act must be read with reference to the object which it had in view and it must be read as a whole. It must also be read with section 4 of the Indian Succession Act. That section is the principal enactment to which the provisions of the Married Women's Property Act are supplementary and subsidiary.

Section 4 of the Indian Succession Act runs thus : "No person shall, by marriage, acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried."

Now as appears from the preamble the purpose of the Married Women's Property Act was two-fold. It aimed, *firstly*, at extending the protection afforded to women by section 4 of the Succession Act and *secondly*, to put it briefly, at extending in certain ways the liability of married women for their debts incurred before or after marriage. The extension of their liabilities was a necessary or reasonable complement to their enlarged rights of property. The first of these two objects which the Legislature had in view was carried out in Parts II and III of the Act, headed respectively "Married Women's Wages and Earning" and "Insurances by Wives and Husbands." Part II consists of one section, section 4, which in effect extends the protection of section 4 of the Succession Act which applied only to marriages contracted on or after the 1st January 1866 to the wages and earnings of women married before the 1st January 1866. Part III comprises sections 5 and 6 which make provisions for insurances on lives by persons married before or after the same date. The second object is carried out by Part IV containing sections 7 and 8 and headed "Legal Proceedings by and against Married Women" and by Part V containing section 9 and headed "Husband's Liability for Wife's Debts."

This is the whole of the Act, with the exception of certain paragraphs in section 2

to which I have not yet referred. Section 1 gives the short title and section 3, a commencement clause, has been repealed.

Of the operative sections from 4 to 9 it is admitted that no section with the exception of section 6 can possibly apply to a married woman who at the date of her marriage professed the Hindu or any of the other religions specified in the saving clause. Section 6 is in Part III and as already indicated, the only other section in that Part is section 5 which relates to policies of insurance effected by married women. That section clearly and admittedly does not apply to a policy taken out by a Hindu wife. It seems very unlikely, therefore, that section 6 should apply to Hindu wives or Hindu marriages or families. The scheme as a whole (including section 4 of the Succession Act) appears to be applicable only to marriages between persons governed by the Succession Act. At almost every step the Legislature is thinking of disabilities and inabilities imposed by English Law at the time on married women subject to that law,—disabilities and inabilities unknown to married women subject to the principal systems of family law prevalent in India. Such women may have their own disabilities and inabilities, but they were never subject to the rules peculiar to the English Law on this topic.

But the argument can be carried further. As the Succession Act was passed its section 4 was apparently of universal application. It was not subject to that part of section 331, quoted above, regarding the non-applicability of the Act to intestate or testamentary succession to the property of any Hindu, Muhammadan or Buddhist. As the Act stood, section 4 applied to all married persons whatever might be their religion. The only restriction was one of time. As already mentioned, it did not "apply to any marriage contracted before" the 1st January 1866. This restriction is also contained in section 331 and the form in which it is expressed should be noticed.

Now section 2 of the Married Women's Property Act (the extent and application of section) contains not only the saving clause which has caused the difficulty, but certain other clauses or paragraphs. The last paragraph enacts positively that "the fourth section of the said Indian Succession Act shall not apply, and shall be deemed never to have applied, to any marriage one or both of the parties to which professed at the time of the marriage, the Hindu, Muhammadan, Buddhist, Sikh or Jaina religion." This provision, important though it at first sight appears, is not mentioned in the somewhat elaborate preamble. The reason why it was not mentioned is probably that section 4 was never intended to apply to Hindu, Muhammadan and Buddhist marriages and had never been treated in practice as applicable to such marriages. It is the only section in a long Act which purports to affect Hindus, Muhammadans and Buddhists. If this result was due to some accidental error or omission in the framing of the saving clauses in section 331, it was very natural that the matter should be put right in the Married Women's Property Act. However that may be, if section 4 of the Succession Act had continued to be applicable to all married women, there might have been some ground for supposing that one or other of the sections of the Married Women's Property Act would or might have a similar extended application. But when we find Hindu, Muhammadan and Buddhist marriages expressly excluded from the operation of the principal enactment, it is unlikely that any of the supplementary and complementary provisions of the Married Women's Property Act should apply to such marriages. The suggestion that the benefit of section 6 of the latter Act was conferred by way of compensation for exclusion from section 4 of the former Act is hardly tenable. Reading section 6 with all the other provisions it seems to me clear at least that it does not apply to married women of the specified denominations.

As to the power given by section 2 to the Governor-General in Council to exempt the members of any race, sect or tribe from the operation of all or any of the provisions of the Married Women's Property Act, it has been suggested that the existence of that power enables the Governor-General in Council, if necessary, to take Hindus, Muhammadans and Buddhist out of the operation of section 6 and is, therefore, an

indication that *prima facie* they come within the section. It is obvious, however, that this provision, like the corresponding provision in section 332 of the Succession Act, was never intended to apply to members of the Hindu, Muhammadan and Buddhist communities. In both Acts these communities are specially dealt with by special saving clauses and the Governor-General in Council has in regard to them no power either of exemption or inclusion. The terms 'race,' 'sect' and 'tribe' are used with reference to communities which cannot be described as Hindu, Muhammadan or Buddhist, such as communities of Indian Christians, the Jewish community in Aden, hill tribes and others. No argument either way can, therefore, be drawn from the existence of this power of exemption. The extent to which Hindus, Muhammadans and Buddhists are affected or excluded depends on the special clauses relating to them and not on the power given to the Governor-General in Council in regard to other communities.

If it be taken as established that section 6 of the Married Women's Property Act does not apply to wives who come within the words of the saving clause, it would be an anomalous state of things if the sections were found to apply to the children of such wives. If the words of the Act are so plain that no other construction is reasonably possible, the anomaly must be accepted and effect must be given to the language which the Legislature has chosen to apply. But if that language is of doubtful import, the most reasonable construction of which it is fairly capable ought to be adopted. No doubt, children are not mentioned in the saving clause, but in the case of the exempted religions both parents are excluded from the operation of the principal enactment. With the possible exception of section 6 neither parent is affected by anything in the Married Women's Property Act and section 6 does not apply to the mother. Regard being had to the whole scope of the Legislation, it is evident that the Legislature were dealing with the legal aspects of marriages of a particular kind, namely, marriages between persons subject to the Succession Act. The reference to children in section 6 is quite incidental and, in my opinion, the only children contemplated by section 6 are children born of marriages of the kind to which the rest of the Act relates. This conclusion is strengthened by the difficulties which would attend the application of the section to the children of Hindu, Buddhist or Muhammadan marriages. Take the case of the married daughter. She is a married woman and would come within the words of the saving clause. Take the case of a policy effected by a Hindu for the benefit of children unborn at the date of the policy.

The result, in my opinion, is that section 6 does not apply to the policy before us and the money due upon it forms part of the estate of the assured [*Oriental Government Security Life Assurance Co.* v. *Vantedu Ammiraju* (4), *Shankar* v. *Umabai* (2)]. I concur in the order proposed.

Rule made absolute.

(4) 10 Ind. Cas. 263; 35 M. 162; (1911) 2 M. W. N. 276; 9 M. L. T. 451.

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT No. 963 of 1912.

March 13, 1914.

Present:—Mr. Justice Beaman.

HIRJI KHETSEY & CO.—PLAINTIFFS

versus

B. B. & C. I. RY. CO.—DEFENDANTS.

Contract Act (IX of 1872), ss. 151, 152—Goods entrusted to Railway Company destroyed by fire—Liability of Company—Burden of proof—Negligence, amount and quantity of—General principles.

When any one has entrusted goods to a railway company for carriage and those goods are lost, damaged, or destroyed while in the possession and under the control of the railway, the fact of the loss, damage or destruction is enough to cast upon the company the burden of proving that that loss was not due to any negligence on its part. The standard of negligence is given in sections 151 and 152 of the Contract Act, but no general rule universally applicable can be laid down as a rule of law defining the amount and quality of the proof in every case which will discharge the railway company's onus.

HIRJI KHETSEY & CO. v. B. B. & C. I. RY. CO.

The general principles deducible from the analysis of leading cases on the subject, however, are:

(*a*) that where a bailee cannot assign the cause of loss, he may always give evidence to prove, if he can, that, although unknown, the cause must have been external to himself and beyond his control;

(*b*) failing that, to exonerate himself he would have to prove that while unknown and in all probability attributable to himself, the cause was of such a nature that he could not have foreseen and prevented it by taking all reasonable care and precautions.

Where a railway company is sued for destruction of cotton goods by fire, before it can be exonerated, it has to satisfy the Court that, while the goods were in transit and under its exclusive control, it took every proper precaution, not only in the packing of the goods, but in the management of their numerous dangerous and unruly machines happening to come into close proximity with the goods, to have rendered any mishap of this kind impossible but for the intervention of some wholly novel and unpreventable factor, which they could not with reason have been called upon to anticipate and guard against.

Where the defendant-company admits that it is not aware of the cause of the loss, damage, or destruction, it is not on that mere pleading to be held answerable.

Mr. *Inverarity*, with him Messrs. *Raikes* and *Captain*, for the Plaintiffs.

Mr. *Binning*, with him Mr. *Strangman* Advocate-General, and Mr. *Jardine*, for the Defendants.

JUDGMENT.—The material facts about which there is little, if any, dispute are that the defendant-company received from the plaintiffs 186 bales of full-pressed cotton for conveyance from Ujjain to Colaba. The goods were to be carried at railway risk. They appear to have been loaded on a bogie open truck forty-five feet long by nine feet wide, inside measurements, between the 14th and 16th April at Ujjain. During that time, though there is no specific evidence on the point, it may be taken for granted that a considerable number of trains passed. Three lines converge on Ujjain, the defendant-company's lines, the G. I. P. Railway and the R. M. Railway. But the general control of the station is in the hands of the defendant-company. The waggon No. 13024 duly loaded with these 186 bales was finally despatched from Ujjain between 5 and 6 P.M. of the 16th April, being the 42nd waggon on the 62 up train, which consisted of 59 waggons and the guard's van. The contention of the defendant-company is that the waggon was properly and carefully loaded at Ujjain, that none of the coolies employed in loading it smoked in its vicinity, that there were notices prohibiting smoking, in English and Vernacular, that the waggon itself was examined and found not to be in any way defective, that the load was properly sheeted with three fire and water and rat proof sheets, the measurements of which are twenty-five by seventeen-and-a-half, and that the sheeting was roped and sealed and that all these precautions were verified more than once by the clerk in charge of that business at Ujjain. The train started and, like nearly every other train running that night on this section of the line, was considerably behind time. The traffic was greatly congested, and there was great lack of water between Bangrode and Rutlam. At a station called Nagda the 72-up was stopped and a down mixed brought up alongside it. The engine of that train must have been close to the 62-up, though the evidence in this case is that it was at some distance from waggon 13024. That engine went to water, that is to say, must, before the trains parted, have passed some part of 72-up at least three times and at very close range. No fire was, however, detected, and the 72-up proceeded to Bangrode which it reached between 11 and 12 P.M. on the 16th. Here, owing to the congestion of the traffic, it received orders from Rutlam not to proceed. The engine was needed to carry off the traffic which had accumulated in Rutlam; and the Bangrode station officials were ordered to stable this great train, consisting of 59 loaded waggons, at Bangrode. We may assume that if the waggons were loaded with merchandise averaging even only a quarter of the value of that packed in waggon 13024, the total value of this load would have been very considerable. I mention this in connection with one of many arguments which may have to be noticed later, namely, that it would be unreasonable to expect the defendant-company to maintain any fire-quenching apparatus at a small inconsiderable station like Bangrode, the average daily takings of which were from rupees five to ten a day. Bangrode is a small station, but it is clear that it is used as a supplementary stabling station to Rutlam when the accomodation of the latter is exhausted, and, therefore, may, at any time, be required to shelter goods of great value. On

receipt of these orders the 72-up was broken into two parts, one part consisting of fifteen waggons being stabled in the dead end siding, the other consisting of the remainder of the train being stabled in the refuge siding. The shunting operations occupied from half to three-quarters of an hour, and during that time no signs of fire were noticed. It will be noted that as soon as the first fifteen waggons had been subtracted from the train, the engine, if it had completed the shunting from the rear, would have been the guard's van and seventeen waggons off the burnt truck, and if from the other end 27 waggons off it. In neither case would it have been within a distance which, in the opinion of the heads of the defendant-railway, is dangerous. But presumably in the course of the shunting it must have passed the burnt waggon more than once at fairly close range. When the whole 72-up was thus stabled at Bangrode the engine drew off and waited on the main line at some distance, say roughly 100 yards, from the burnt waggon, with steam up, waiting for permission to proceed to Rutlam. It appears to have stood so for about an hour and a half in all before it got line-clear and went off with the engine-driver and guard. That was about 1-30 on the morning of the 17th. The actual hours and minutes are of no importance and I am only giving the times approximately. The Deputy Station Master was on duty during the night and superintended the shunting, but neither he nor anyone else detected any fire. Considering where the engine stood and how long it stood there, and considering that the driver, fireman and guard at any rate were probably awake, it is in the highest degree improbable that the fire which subsequently broke out and consumed all these bales but thirteen could have made much headway at that time, or been visible from without the waggon. The 63-down train from Rutlam reached Bangrode about two hours late, say at 3-30 A.M., on the 17th; and the driver of that train saw smoke rising from waggon 13024 at a distance of about a quarter of a mile from the station. It was a dark night, no moon, and I doubt whether it is possible to see smoke in such circumstances, unless it is slightly incandescent and shows a certain amount of glare or light as well as mere smoke. But the engine-driver declares that he did not see any flame or light, only smoke. There is a conflict of evidence (and a great deal too much has been made of it) whether the fire was first seen by the pointsman sent to prepare the points for the incoming 63-down or by the driver of that train, and who first reported it to the Deputy Station Master. In my opinion it makes not the slightest difference who first saw and who first reported the fact that the waggon was on fire, for it is common ground, and that is all that is important, that the fire was first seen and reported when this 63-down was entering Bangrode at about 3-30 A.M. The engine of the 63-down was at once utilized to isolate the burning waggon, while all available hands were summoned to help in putting out the fire. Unfortunately the only fire-quenching appliances available at Bangrode were six hand-buckets and a watering can. There is a well with a rope, but the water was very low and it is obvious that little could be done with such means to cope with such a fire as had now developed in this waggon load of cotton. While the waggon was being isolated it appears that three or four men got on the top and managed to dislodge 25 or 26 bales, with their hands and crowbars. Some of these were already on fire. But as the flames rose, the men could no longer stay on the waggon, and these attempts at salvage had to be abandoned. But if it be true that these men were able not only to mount the waggon but actually to work on it for some time (and something of the kind must certainly have been done), it follows that the fire could not at that time have seized the whole length of the waggon and probably was confined, as alleged by the defendent-company's witnesses, on the point to centre portion. There is some ambiguity on this point, the witnesses, or some of them, probably meaning by "the middle" of the waggon, not the middle portion of the surface, but the centre of the land. The latter statement could hardly be correct if the company's other evidence as to the complete and effective sheeting of the waggon be true. For it would then have been impossible to see into the centre of the waggon at all, and no fire would have been visible until the flames had burst through the sheeting. Nor is it probable that this would first have occurred at the side, although I suppose it is possible that it might have done. On the

question of sheeting the defendant-company contends that this waggon was sheeted with three sheets, while the plaintiff's case is that it was only sheeted with two. The third sheet is not traceable. The sheeting record book of Ujjain has disappeared. In fact it does not appear to have been kept during the first half of April as the local staff was overworked and unable to fill in all the required records. The evidence, so far as Ujjain is concerned, upon this point is purely general. None of the witnesses can pretend to have any definite recollection of this particular waggon, or how it was loaded, or sheeted or sealed. All that that part of the evidence amounts to is that the usual practice is to load sheet and seal in a particular way, and that no waggon loaded, as this waggon was, would have been allowed to proceed had it not been so loaded, sheeted and sealed. That is, of course, merely begging the question, and all such evidence appears to me to be quite valueless and negligible. But at Bangrode we have the evidence of the staff to the effect that the waggon had three sheets on it, of which the middle sheet was totally consumed, not a rag or vestige of it remaining. Considering that neither of the other two were much burnt that appears to me almost incredible. Of course, there are different ways of spreading three sheets of these dimensions over a waggon forty-five by nine and loaded to a height of say five feet. But Mr. Pechey's evidence suggested that the third sheet would be used under the other two, and there is other evidence in the case to the same effect, namely, that underneath sheets are first put over the goods and then sheets over these again. Now if that had been the method of loading here, I mean if the third sheet had been put over the central twenty-five feet of the waggon, dropping down say four feet over each side, and then the other two sheets had been placed over it so as to overlap say ten feet on either side leaving a drop for each of five feet over each end of the waggon (and that seems the natural way to employ three sheets of these dimensions upon a load placed in a waggon of the dimensions of 13024), then it is obvious that that central sheet could not possibly have been so utterly destroyed without doing a very great deal more damage to the overlapping sheets on either side than the evidence shows was done to them. And I see nothing inconsistent with Mr. Pechey's ideas of efficient sheeting in supposing that two sheets would have fulfilled all the requirements of such efficient sheeting. Two sheets twenty-five feet long by seventeen and a-half would, of course, have covered the waggon from end to end with a drop of two and a half feet at each end and about four feet over the sides, thus having three feet of cotton bales exposed at each end and about one foot at the sides. Mr. Pechey says that he is not much concerned with the sides of such loads, as the chief care of the Company is to protect the surface. But recollecting the manner in which engines come close alongside goods waggons, as one train passes another at a station, I confess I do not see why there is greater risk of conflagration on the surface than at the sides from sparks. But as I shall show later I do not think that this point is really important enough to deserve a twentieth part of the time and labour that has been spent over it during the trial. The fire having been discovered at 3-30 A. M. it appears that the Deputy Station Master at once awoke the Station Master of Bangrode and, as I have said, everything that could be done was done to extinguish the fire. Somewhere between four and five a telephone message was sent to Rutlam for help, and this was received by the Station Master himself who happened to have come on to the station premises a good deal before his usual hours of duty. The Bangrode staff wanted more water; but Rutlam had no water to spare. There is a water train of eighteen tanks which runs sometimes once, sometimes twice, a day out of Rutlam to a small watering station called Ghatla to just half way between Rutlam and Bangrode, that is to say, three miles from either, and brings back its tanks filled to supply the water needs of Rutlam. Rutlam is an engine-changing station, and, of course, if its water-supply runs out, traffic is at a standstill. I cannot in this sketch of the facts go into all the considerations *pro* and *con* which weighed with the Rutlam authorities, or have been suggested in argument as being such as ought to have weighed with them, on the subject of sending the water train, immediately the telephone message was received, to Ghatla to fill and go straight on to Bangrode. Had this been done, had it been feasible, and the staff at Rutlam are

unanimous in saying that in all the circumstances it was not feasible, the water train might have got to Bangrode by about 6-30 A. M. And as far as I can see having got there, it would have been quite useless. An immense amount of time has been spent by the plaintiffs over this point of the water train, probably as a consequence of the result of *Lakhichand's* case(1). But the short answer to all this argument is that supposing there had been no difficulties in the way of despatching the water train, and supposing it had been despatched and ranged up alongside (or as near as it could then get) to the burning waggon, what would have been the use? By 6-30 the flames must have been at their height: probably no one could have got within fifteen feet of the waggon (*vide* Storrer's evidence as to the state of affairs when he reached Bangrode, say a couple of hours later) and with tanks and tanks of water available no impression, as far as I can see, could have been made on the fire by tossing buckets of water at it from a distance of fifteen feet. What was needed, what alone would have been serviceable, was not only water in abundance but a hose and pressure pump as well; and there was no available hose or pressure pump at Rutlam, or at any place nearer than Godhra, 115 miles away. I may have to discuss this part of the case in a little more detail later, though I have long ago felt convinced that it really has little or no materiality if it can even be said to be relevant. For the present it is enough to say that the Station Master of Rutlam did not send the water train but ordered the Bangrode Station Master to take the drinking water tank off the up train which would reach Bangrode about 10 or 11 A. M. In the meantime the Kotah special had proceeded from Rutlam and found the waggon blazing at Bangrode. That would have been between 6 and 7 A. M. The engine-driver gave all the water he could spare from his tender, but this was useless, so he took his train on. Then followed the 17-down mixed, with Mr. Storrer on it. No mention appears to have been made of the fire at Bangrode to anyone on either of these trains, except the guard of the latter, who says (in opposition to all the rest of the evidence on this point) that it was common knowledge at Rutlam before his train left. When the 17-down got to Bangrode between 8 and 9 A. M., the engine was taken as close as it could get to the burning waggon and steam was blown upon it, seemingly more to enable the mixed train to get by than with any hope of putting out the fire. Then the 17-down went on its way leaving the waggon burning as hard as ever. In the meantime two telegrams appear to have been sent from Bangrode, one the formal, "to all concerned", and the other, sent later, a special telegram to the Station Master at Rutlam for more water. The "all concerned telegram" certainly suggests that the fire had done its work completely and that there was no hope of saving anything. But the other telegram asks for more water, and this appears to have reached the Station Master shortly after 8 A. M. He thought the best thing to be done, indeed the only thing to be done, in the circumstances was to order the Station Master at Bangrode to arrest the drinking water tank which would shortly come to his station; and this was duly done about 10 or 11 A. M. But when its whole contents had, like the spare water of three previous engine tenders, been thrown at the waggon out of the six hand buckets and watering can, naturally without the least effect, the staff at Bangrode gave the fire up as hopeless, and left the waggon to burn itself out. This it did in about two days from the commencement of the fire. Of the 26 bales which had been flung from the top of the waggon when the fire was first discovered, 13 appear to have been saved; the remaining 13 which were left lying about already on fire were burnt and utterly destroyed. As to that the position of the company might be different, had its liability to be determined solely with reference to the manner in which it discharged its obligations not only in the way of taking precautions against risks, but in dealing with the situation when in spite of those precautions the risks had actually occurred. For it is hard to see how, had any attention been paid to these smouldering bales lying on the ground, a few buckets of water thrown over them at once would not have finally put them out, and saved them, subject, of course, to whatever damage they might have suffered before being dislodged from the waggon top.

Those being in outline the principal facts, what are the legal rights and liabilities

(1) 14 Ind. Cas. 793; 37 B. 1; 14 Bom. L. R. 165.

of the parties? I do not see that sections 72 and 76 of Act IX of 1890 put a railway company sued in respect of goods entrusted to it for carriage in a better position than a common carrier under the old Carriers Act. Nor do I think it necessary to go minutely into any change which the Act of 1890 may have made in the liability of railway companies, when sued as bailees, as compared with their liabilities before the passing of that Act. For, as it stands, the law appears to be clear. When anyone has entrusted goods to a railway company for carriage and those goods are lost, damaged or destroyed while in the possession and under the control of the railway, the fact of the loss, damage or destruction is enough to cast upon the company the burden of proving that that loss was not due to any negligence on its part. The standard of negligence is given in sections 151 and 152 of the Contract Act, but no general rule universally applicable can, I think, be laid down as a rule of law defining the amount and quality of the proof in every case which will discharge the railway company's onus. It cannot be a rule of law, though speaking generally, I think it is a very sound rule of right reason, subject to all proper exceptions in special cases, that where the fact of loss, damage or destruction is proved, and the railway company cannot prove the cause of this loss etc., it cannot logically prove that it is not in law itself responsible for that unascertained cause. While on the one hand it is fair argument to say that a bailee who has goods in his sole possession and under his sole control and loses or allows them to be damaged or destroyed, must show first how the loss or damage was occasioned before he can be heard to say that it is not due to his own negligence, it is going too far in the other direction to maintain that it is a universal rule of law in such cases that where the bailee is unable to assign the true cause of the loss or destruction he must in every case be liable for the value of the goods to the bailor. In every case it is open to the bailee to satisfy the Court, if he can, that although he does not know how the goods came to be lost, damaged or destroyed it certainly was not owing to any want of ordinary care on his part. And this was actually done in the recent case of *Lakhichand* v. *G. I. P. Railway Company*(1). There the defendant-company could assign no cause for the fire, but the trial Court was satisfied that whatever the cause might have been it was not due to the negligence of the defendant company, and in this view the Court of Appeal concurred. The defendant-company in this case has from the first relied, in my opinion, much too confidently on *Lakhichand's* case (1) as establishing a rule of law that a defendant-company if sued, as this defendant-company is sued, may exonerate itself by proof of general care in dealing with large quantities of similar goods and proving that that amount of care is usually sufficient to prevent loss, damage or destruction. On the other hand, the case is certainly an authority for the proposition that a decree ought not to be given against a railway company sued as bailee for loss, damage or destruction of goods bailed to it the moment it admits that it is unable to assign the *vera causa* of the loss. Now what is the actual position at the outset of the case? The defendant-company has received goods to be carried at its own risk. Instead of delivering them, it allows them while in its sole possession and under its sole control to be burnt. Two main questions then arise:—(1) Has the defendant-company proved that it took as much care of the goods from the time they came into its possession to the time when they caught fire as an ordinary person would have taken of goods of the like quality and quantity of his own? (2). When the goods were found to be on fire did the defendant-company take as much care of them, that is to say, did it exert itself as strenuously, having regard to the means at its disposal and all the circumstances, to put the fire out and save the goods as an ordinary person might have been expected to do if the goods had been his own? It will be noted at once that the second question is totally distinct from the first and, in regard to the proof, has to be dealt with on a different line of reasoning altogether. The defendant-company might succeed, as in fact it did succeed in *Lakhichand's* case (1), in exonerating itself so far as the origin of the fire was in question, and yet fail as it did in that case to exonerate itself when the question was of the duty it owed its bailor after the fire had been discovered. And that distinction is also of some importance with reference to Batchelor, J.'s criticism of the judgment of the Privy Council in *The Rivers Steam Navigation Com-*

pany v. *Ghoutmull Doogur* (2). With respect I am unable to agree wholly either with the line of reasoning or the conclusion reached by Batchelor, J., in that part of his judgment. Presently I will explain more in detail why. Now in this case the defendant-company comes into Court and professes a total ignorance of how the fire was caused. In effect its case is this. We always take care, as much care as any ordinary owner would himself take, of goods committed to our care for carriage. This is proved by the fact that while we carry enormous quantities of cotton, just as this cotton was carried, in open waggons, we rarely let it get on fire. Tables have been put in for three years to show that the company has lost very little cotton in transport by fire. Therefore, it is contended, we must be exonerated in respect of this particular fire. Now I may at once say that that appears to me an entirely fallacious piece of reasoning. Doubtless a very similar cause was taken by the defendant-company in *Lakhichand's* case(1) and it proved successful. And the whole defence in this case has been modelled upon the defence in *Lakhichand's* case (1). But it can never follow as a matter of law that what satisfied a Judge in one case with special reference to the facts of that case must always satisfy every other Judge in dealing with cases in which the problem may be in many respects different, the facts either more simple or more complicated and the ground of inference, therefore, always liable to change. As to the defendant company's liability for what happened after the fire was discovered that must always be relatively simple and easy to determine compared with the first question, namely, was the defendant company, in the absence of any known cause, liable for the origin of the fire? And it is clear that if that question be answered in the affirmative the second question would lose all practical importance. Now let me explain in a word or two why I think the very simple reasoning upon which the defendant-company mainly relies, professing to borrow it bodily from *Lakhichand's* case (1), is fallacious. Assuming that the defendant-company has carried say 6,00,000 bales of full-pressed cotton, in all respects like the full-pressed cotton which was burnt in waggon No. 13024, and carried them safely with no greater percentage of loss than say 250 bales out of 6,00,000, how is that an answer to the fact that these particular 186 bales were set on fire while being carried by the defendant-company? Surely it is rather worse than no answer. For again assuming that exactly the same precautions were taken with these bales as with all other bales, and that in the vast majority of cases the bales reach their destination safely, does it not follow of necessity that since in fact these bales were burnt, the company must have exposed them to some extraordinary danger? Upon the defendant-company's reasoning it is certain that one of two things must have happened, assuming that their propositions be true. Either the ordinary precautions were *not* adopted in loading these bales, or they were exposed to extraordinary danger. In either case if the act was the company's—a point I will develop in a moment—it appears to me to follow that on the facts thus stated and admitted, to go no further, there is a clear case of negligence made out. I cannot myself see how evidence that as a rule bales are carefully loaded and in consequence reach their destination safely, can really have any relevance in the defendant's favour, although, no doubt, once believed that kind of proof would acquire a distinct cogency against the defendant-company as making it certain or almost certain (in the absence of any known or even suggested cause external to the company and its servants and machinery) that these particular bales were *not* treated with that degree of ordinary caution all along the route which has ensured the safe delivery of so many thousand other bales. I have read a great many cases, to which I have been referred, and carefully analysed their contents, and I have very little doubt about what is the law in cases of this kind. The company as bailee is primarily liable for the loss, but it may exonerate itself in two ways. It may, while ignorant of the cause of the fire, show, if it can, that that cause could not possibly be attributable to itself, that, in other words, it was altogether external and beyond the company's control. I should always feel that there was a logical difficulty in accepting such a demonstration in a case like that with which I am dealing. But in cases of loss, it might very well be that the bailee might show that he had taken all reasonable care of the goods and yet that

(2) 26 C. 398; 26 I. A. 1; 3 C. W. N. 145.

some person unknown had stolen them, and so they had disappeared. Here in a sense the cause of the loss is unascertainable and yet the bailee might exonerate himself. But that could only be by satisfying the Court that the cause of the loss was external to himself and beyond his control. The commonest case perhaps would be spontaneous combustion if that ever really happens.

But that again is not truly a case of an unknown cause, for once assigned and believed it is a complete and efficient cause and explanation. But the unknown felonious acts of others (which according to high authority ought never to be assumed), again narrowing the ground of this particular species of defence, or acts of others in no sense felonious but merely careless and guessed at as a cause, almost exhaust the category of unassigned causation external to the defendant-company itself which would be likely to be acceptable in a Court as a sufficient possibility, and when consistent with the proof of ordinary care, probability, to exonerate the bailee. Second, the bailee while ignorant of the *vera causa* might point to the fact that he had taken such precautions against risk, had dealt with the goods entrusted to him with such care, that whatever the cause might be and although attributable to his own act, yet it must be presumed to have been of such an uncommon, or of such an unpreventible, kind that he ought not to be held responsible for it. But such a defence could, I apprehend, only be logically (if ever logically) established by the virtual exclusion of all causes of an ordinary kind attributable to the bailee or his servants or machinery.

But I should think that it would be extremely hard for a defendant to make good such a defence, although, no doubt, it has been done. Those cases must, I think, be very rare in which a bailee, having the sole custody and control of goods and losing or destroying them without himself knowing the cause, would be able to satisfy a Court that whatever the cause was it *must* have been attributable either to some agency external to his own and beyond his control or to some thing so unusual and unpreventable that he could not in reason have been expected to guard against it. And that in effect is the law laid down, as I understand it, in *Rivers Steam Navigation Co.* v. *Choutmull Doogar*(2). Lord Morris is very careful throughout his judgment to insist upon the need of such evidence as he examined on this point showing that the fire was caused by something or somebody external to the defendant-company and beyond its control. His reasoning on that part of the case, which should not be confused with his reasoning upon the second part, namely whether apart from the origin of the fire the company was liable for negligence in not having detected it sooner may, I think, fairly be thus summarised. The defendant-company had these goods in their exclusive possession and control. They allowed them to get on fire and can assign no cause whatever external to themselves and their agents, nor can lay any solid foundation for the inference that the *vera causa* of the fire might have to be sought there, (his Lordship's examination of the evidence does not seem to me to have gone beyond this upon that part of the case) therefore, they are liable. In other words, having regard to the natural course of events and the admitted facts, the fire must have been caused by some act or neglect of the defendant-company: since it undoubtedly *was* caused, since a fire is not an ordinary event to be set down as an usual incident of transport, and since no one else, so far as the evidence on that point goes, could reasonably be held to have caused it, the defendants and no one else are answerable for the fire and were the cause of it. This does, of course, go very near laying down as a rule of law that where the bailee has the complete and sole control of the goods bailed, loses or destroys them and cannot prove the cause, the legal inference is irresistible that the cause is attributable to him and that, looking to the result, it must have been due to negligence. For fires are not caused except by negligence, though what the degree of that negligence may be would often depend upon all the facts being known, the true cause ascertainable. It would, I apprehend, have been no answer to the plaintiff's case in *Choutmul Doogur* v. *Rivers Steam Navigation Co.* (3), in the opinion of the Privy Council, had the defendant-company proved that it had carried thousands of loads of jute under similar conditions without losing a drum by fire.

(3) 24 C. 786; 1 C. W. N. 200.

From this brief analysis I deduce the following general principle, that where a bailee cannot assign the cause of loss he may always give evidence to prove, if he can, that although unknown, the cause *must* have been external to himself and beyond his control. Failing that, to exonerate himself he would have to prove that while unknown and in all probability attributable to himself, the cause was of such a nature that he could not have foreseen and prevented it by taking all reasonable care and precautions. Thus, of course, it will always be open to a bailee defendant to give evidence, although he has no hope of discovering the cause of the loss, to prove that it was beyond his control, and that he is not answerable for it. While such evidence would always be relevant and need to be examined, should it fail of its purpose, the mere fact that it was relevant and examined would not materially detract from the ordinary presumption of right reason that a man who has had the sole custody of goods and has destroyed them without knowing how, is himself responsible for the destruction. Such, I understand, was the view of Pallas, C. B., in *Flannery* v. *Waterford and Limerick Railway Company* (4), a judgment in which the nice points arising in all cases of the kind are treated with a subtlety and thoroughness that, I think, is rarely to be found in the judgments of the English Courts. Such too, I think, was the opinion of Erle, C. J., in *Scott* v. *Uxbridge and Rickmansworth Railway Company* (5) and the same doctrine was expressed in a sentence by Scrutton, J., in a very recent case, *Hurlstone* v. *London Electric Railway Co.* (6).

What is the evidence in this case? An immense amount has been accumulated, but I may say at the outset that, in my opinion, at least 90 per cent. of it will never be relied on, or even looked at, again during the much too protracted trial. I repeatedly protested, but both sides appeared to be equally desirous of heaping up evidence, apparently with the idea of making the case appear to be much more difficult and complicated than, in my opinion, it really is. A common reply was that days were spent over a similar point before Mr. Justice Robertson or Mr. Justice Heaton; and it looks as though the Bar had accepted a standard pattern (and I think a very bad standard pattern) for all cases of the kind. But where both sides are rich and money appears to be no more an object than time, naturally neither side likes to yield to the other in a plausible desire to lay every possible fact, material or immaterial, before the Court. Proof, if any were needed of the almost ridiculous superfœtation of evidence in this case, is given by the simple fact that in their final addresses Counsel on both sides hardly referred to the evidence at all. Mr. Binning for the defendant-company occupied about an hour and a half dealing almost entirely with generalities, with an occasional digression of which the object was to defend one of his witnesses from what he thought unjustifiably severe strictures, while Mr. Inverarity took perhaps an hour longer, but devoted almost all that time to a discussion of the law and English cases illustrating his main points.

The evidence, such as it is, breaks up naturally into three main divisions: (1) the evidence of the Ujjain witnesses intended to prove that all proper care was taken of the goods while loading, and that when loaded they were sheeted in the ordinary way, roped and sealed. That nothing was wrong with the waggon itself, and that, therefore, up to that point the defendant-company could not possibly be held guilty of any negligence; (2) the evidence relating to the journey between Ujjain and Bangrode; (3) the evidence relating to Bangrode, which again was to be subdivided into evidence relating to what happened before, and after the fire was discovered. The latter evidence includes all the Rutlam witnesses and the drivers, firemen, guards, etc., as well as the passenger Storrer on the train which left Rutlam and reached Bangrode after the fire had been discovered. This evidence also includes the train which brought the water tank, of which use was finally made, from Nagda.

Now a very little thought will show that most of this evidence must be valueless. Indeed, in spite of the length at which witnesses were examined and cross-examined, hardly a single fact which can help the Court is really disputed. Thus, for example, it is, of course, useful to know

(4) (1877) Ir. R. 11 C. L. 30.
(5) (1866) 35 L. J. C. P. 293; 1 C. P. 596; 12 Jur. (N. S.) 602; 13 L. T. 596; 14 W. R. 893.
(6) (1913) 29 T. L. R. 514.

what trains passed the 62-up on its way between Ujjain and Bangrode, and how long the foreman was in close proximity with any or all the latter. But such facts could have been elicited without dispute in five minutes from any of the defendant company's responsible servants. On the other hand the evidence is *not* explicit as to what trains passed the waggon, or at what distance, while it was being loaded at Ujjain. And I shall presently have to point out that the want of this information might tell seriously (though as the facts stand I do not think it does) against the defendant-company. Before I demonstrate, as I hope to do conclusively in a little while, that I have not exaggerated the worthlessness of most of the evidence, I will point out that the origin of the fire admits of only three practical possibilities: (1) that it was caused while the waggon was being loaded or after being loaded was awaiting despatch at Ujjain; (2) on the journey between Ujjain and Bangrode; (3) at Bangrode between the time of its arrival there at about 11-44 P. M. and 3-30 A. M. It is only the first of these three possibilities which offers the defendant-company any chance of satisfying the Court that the origin of the fire was not due to any act of theirs. For after the train, with this waggon making part of it, started for Bangrode, it cannot be contended that if the fire was caused by any act at all, and not due to spontaneous combustion, that act was not the act of the defendant-company or some of its servants. My opening analysis of the true content of the main propositions upon which this doctrine depends, as well as of the true content of that doctrine applied to any particular case, brings out clearly, I hope, the great importance of this factor in the reasoning. For if the act cannot possibly have been an act external to the defendant-company, that is to say, if it is not humanly speaking possible that anyone but the defendant-company itself caused the fire, then the further fact that the defendant-company is not in a position to show what the act was, who did it, or under what conditions it was done, virtually deprives all general evidence of ordinary care taken in this, as in innumerable other cases of like goods in quality and quantity, of all probative, or at any rate logical, value. The furthest such evidence could go in such circumstances would be to open a possibility of the origin of the fire having been due to some cause so extraordinary and unusual (the intentional felonious acts of any person being now entirely excluded since such are never to be presumed) that although in a sense the defendant's own act, the defendant could not be charged with liability in respect of it. Virtually the only real exception to this rule, I think, would be a true case of spontaneous combustion, a cause which is as truly external to the defendant-company as though the waggon had been set on fire by a passing engine belonging to some other company, or by a flash of lightning. But in this case the defence of spontaneous combustion was explicitly abandoned before the trial. At the close of the case Mr. Binning urged that while this was so, the defendant-company never meant to say that the fire may not after all have been a case of spontaneous combustion; all that the defendant-company meant was that they were not in a position to prove this and did not mean to try. But I think after the correspondence which passed on the point, it would be wrong for the Court to entertain that cause as even a possibility. For the plaintiff had expressed his intention of calling expert evidence to convince the Court that these bales could not have set fire of themselves, had that defence been directly, even indirectly, persisted in. I must, therefore, deal with the evidence on the assumption that whatever the cause of the fire really was, it was not spontaneous combustion. And I may add that I do not believe that full-pressed bales of cotton ever would ignite in that way. I do not know whether a single case has ever been scientifically proved, by which I mean that every other possibe and ordinary cause, such as smoking in the vicinity, sparks, etc., has been rigorously excluded. There may be many cases, both on railway lines and in godowns, where large quantities of cotton have been burnt and no cause has been discoverable. Some of these may have been attributed to spontaneous combustion. But had all the facts been known, as they never are in such cases, a simpler and more natural cause would probably have been discovered. For it must be admitted that the consensus of scientific opinion, while favouring the bare possibility, is strongly against the probability

of the occurrence of spontaneous combustion in pressed cotton. If such a cause is always to be regarded as extremely remote and unlikely, although just possible, it is hardly necessary to seek for it among half a dozen quite ordinary, probable and natural causes. Here, for instance, the burnt bales have been exposed over and over again to contact with passing sparks, and even if we exclude chance kindling from careless smoking while the bales were being loaded there are enough probable, not to say possible, causes of a very ordinary kind to render it unreasonable to go out of our way (as some members of the defendant railway staff appear to have done in the early correspondence) to ascribe the fire to such a very exceptional and questionable cause as spontaneous combustion.

It has never been suggested, I think, in this case that the cause of the fire may have been due to the friction of the iron hoops round the bales. This was put forward and, I believe, seriously considered in the former case. But standing alone it can hardly be regarded even as a possible cause. I am pretty positive myself, that without some added factor, some defect in the waggon bringing some of its parts while in motion in contact and violent contact with these hoops, no amount of ordinary friction in transport could suffice to generate a fire. Were that really so it must be a matter of averagely frequent recurrence, and having regard to the millions of pressed bales of cotton which are annually carried over hundreds and hundreds of miles of railway without a single case of this kind ever having been proved to occur, I think I may safely disregard this conjectural cause. I have laboured these two points more than I should otherwise have been disposed to do because the whole of my reasoning must ultimately depend upon a logical process of exclusion. I have to exclude all possible causes external to the defendant-company before I bring the problem into a narrowed focus, within which the application of what I conceive to be not only the governing principles of law, but of right reasoning, can be easily and clearly applied. I will now turn back to the Ujjain evidence which was quite unnecessarily voluminous. I think it is entirely negligible for this main reason that on the admitted facts, I do not believe that the fire did or could have originated at Ujjain. It will be observed that from the first, and in some parts of the oral evidence at the trial, the defendant-company attempted to show that the fire when first seen was in the middle, meaning the heart of the waggon. Of course, if that were so, its cause could not have been external ignition in transit, either at Nagda or at Bangrode. Some of the lowest or lower tiers of bales must have been set on fire at Ujjain while the waggon was being loaded, and the others being heaped upon them and the whole load sheeted down, the fire must have slowly smouldered from 14th April, when the waggon appears to have come in from Rutlam—or I should perhaps rather say from the moment it began to be loaded in Ujjain—up to 3-30 A. M. on the 17th, when the flames were seen at Bangrode. Now books of authority certainly do say that cotton may smoluder almost indefinitely once ignition has thus been partially started, and it is not absolutely impossible that sparks of some sort may have fallen upon and lodged among the lower or middle tiers of bales while the waggon was being loaded at Ujjain. But I should think that ordinarily, if such a thing happened, the almost immediate superimposition of other bales would have a very strong tendency to crush out a merely smouldering spark on the surface of the bale below. And although if the smouldering cotton were stationary, it may be that the process of ignition is sometimes extremely slow, this must be less likely to be the case where smouldering cotton is being dragged through the open air at a fairly high rate of speed. Although sheeted, a waggon like this would admittedly have had a foot or so of the lower part of the load exposed to the air, and if the origin of the fire had been as suggested by the defendant-company something which happened at Ujjain (I mean something beyond their own control) beginning in the lowest or lower and middle tiers, then it appears to me hardly possible that the fire should have remained unnoticed, merely smouldering, from say the 15th April to the early morning of the 17th. The fanning wind made by the moving train would have been just about the level where the fire was, on this theory, originating, and surely long before the train had completed its journey to Bangrode, the smouldering

centres would have broken out into flame. That is one reason, though it may not be deemed conclusive, for dismissing the whole Ujjain evidence. For, if the fire did not originate in Ujjain, it appears to me perfectly useless and bad reasoning to pile up evidence of careful loading at that place. However careful the loading, it was not careful enough. Either it was *not* careful, or the waggon was later exposed to heightened and unnecessary risk else there had been no fire. That I should have thought self-evident. And in this connection I will pause upon Mr. Binning's concluding presentation of his case. That learned Counsel was evidently as alive as I am to the rather absurdly disproportionate amount of evidence he had laid before the Court, for no better reason that I can see than that this had been done before in other Courts and was the approved way of conducting a railway company's defence. For he virtually gave the go-by to the whole of his evidence, resting his case on a syllogism and a very bad syllogism. He said in effect that the sum of the whole matter was this, the kernel lying in certain statistical statements put in by Mr. Pechey:—The defendant-company carries enormous numbers of bales every year. We have shown by these tables that relatively very few get burnt. Therefore, it follows inevitably that we take ordinary and reasonable care of *all* goods that are entrusted to us for carriage. The staring fallacy lies in the conclusion and the use of the word "all." The true syllogism is this. We carry innumerable bales every year loaded with ordinary care and upon an uniform principle. None of these bales get burnt. These (and a few rare cases to be found in our tables are of the same nature) did get burnt. Therefore, it is clear that either our ordinary usual precautions were *not* taken with these bales, or that something very unusual happened which rendered precautions ordinarily sufficient insufficient in the case of these bales. Now what was that? Here the defendant-company is silent, merely saying that we do not know, we have not the slightest idea. But whatever it was it was not our fault.

But another and more cogent reason for disregarding the whole Ujjain evidence is that upon examination it turns out that none of the witnesses who give it really has or possibly could have definite recollection of this particular waggon. All they can say (the superior officers from such records as are kept) is that waggons are always loaded and sheeted and sealed in a particular way, and that as there is nothing on record to show that there was any defect in the construction of this waggon, or anything wrong in the way it was loaded, and as it was allowed to start on the evening of the 16th April, it must have been etc., etc. Vinayak Vaman, for instance, says that he examined the waggon three-quarters of an hour before it left, but here he can only be speaking of his general practice, just as he is when he says that had bales been projecting he would not have allowed the waggon to go. Every one acquainted with the ways of station staffs up-country will easily rate such evidence at its true value. We have a photograph put in by the defendant-company of an ideally sheeted waggon, which makes it appear as though the whole load were completely swathed in sheeting, and then we have half a dozen photos put in by the plaintiff of waggons belonging to the defendant-company in which the load appears to be bulging out and is certainly considerably exposed. Except as showing that the perfect ideal of loading offered to the Court by the defendant-company is, to say no more, sometimes departed from, I do not attach much value to these pictures. Nor do they seem to be necessary, for two main reasons. One is the evidence of Mr. Pechey which makes it quite clear that not much concern is shown in loading waggons for the lower part of the side of the load. This must in almost every case of a fully loaded open truck, if Mr. Pechey is right, be exposed. And the next and far more decisive reason is that the evidence of two chemical analysers in this case proves conclusively that these very sheets, which are intended to protect the cotton against fire, are themselves rather more inflammable than cotton itself. If they afford any additional protection against ordinary sparkage at all, it must be rather on account of their surface than texture. Very likely a passing spark would have less chance of finding a dangerous resting place upon the surface of one of these sheets than upon the centre of an uncovered set of pressed bales. But not

much more can be said in favour of the sheets as a protection against fire. If they are at all loose and wrinkled on the top of the bales, thus forming ridges, as in Captain Higham's experiment, it appears that they would offer a comfortable and secure lodgment to a dangerous spark and would be almost certain, if then set in motion, to break out into flame. They appear to be saturated with a fatty substance, the main object of their manufacture being apparently to make them water, and not fire proof. This waggon was in process of being loaded at Ujjain from the 15th to the evening of the 16th when it was sent off on 62-up train to Bangrode. All the coolies available have been called and unanimously declare not only that they never smoke themselves, but that they don't know what *bidis* and *hukkas* are, and that some of them have never even heard of smoking or seen anyone doing it even in the town of Ujjain. This is simply absurd and indicates the true value of most of the Ujjain evidence. But taking it to be true, it excludes one very simple cause of the fire, assuming that the fire could have been caused at all at Ujjain and yet remained undiscovered till 3-30 A. M. at Bangrode. As far as Ujjain is concerned then we should be limited in our search for a cause to some spark thrown on the bales in process of loading by a passing engine not belonging to or under the control of the defendant-company, but there is no evidence of anything of the kind, and although engines belonging to other companies do pass through Ujjain, the general control of the traffic and loading there is in the hands of the defendant-company and it is just as much their business to see that nothing uncommonly dangerous in the management of engines, which they permit to pass, is done, as it would be were they dealing with their own engines. Now as to the sheeting of the waggon, the Ujjain staff cannot produce their sheeting record. Apparently they were all so overworked at that time that they were unable to write up records, which in the ordinary course they were bound to keep. And this, I may observe, is worth considering in connection with the evidence of such witnesses as Jamnadas and Vinayak Vaman. In such circumstances it is easy to understand that they might have relaxed some of their ordinary precautions and the rigour of their rules of inspection. But at any rate we have no evidence worth the name of how many sheets actually were placed over this particular load of 186 bales. The first report, made by a responsible officer of the company as the result of personal enquiries at Bangrode after the fire, suggests that the staff there were of opinion that only two sheets had been used. Much evidence in this case has been led to prove that three and not two sheets were used. I do not think the point very material for reasons which have already been given. But it appears to me more probable that only two sheets were used than that the third should have been utterly consumed leaving not a trace behind while the remaining two were but very slightly burnt. This is barely possible, if the fire, when first discovered, was confined to the middle of the truck, which for the purposes of this conjecture may be taken to have been covered by the third sheet. For then the first thing the local staff would have done would have been to pull off the remaining two sheets, while the fire may have got such a hold on the third as to render any attempt to save it useless. Its inflammable composition would also have contributed to its speedy and total destruction. The length of the waggon is 45 feet, and as I pointed out in an earlier part of this judgment, if three sheets were used in the manner suggested by Mr. Pechey, the central sheet would have been overlapped by the two end sheets to, say, the extent of ten feet or so, leaving a space in the middle through which the flames may first have broken. But the point appears to me to be of absolutely no importance, and the extent to which it has been laboured of a piece with the rather senseless determination to accumulate evidence rather than first reason out the content of the problem to be solved, which has characterized the conduct of the parties on both sides. For it is perfectly obvious that three sheets would not necessarily afford complete protection where two failed to do so, although (unless the ignition of the sheets themselves was the true cause of

the fire in which case no number would have increased the security of the load but rather heightened the risk) using three would have left rather less of the load exposed than would have been exposed had only two been used. According to Mr. Pechey's idea two sheets would have been quite adequate covering for such a load as this ; the whole of the top of the load would have been covered only about a foot of the lower sides, and two or three feet of the ends of the load would have been exposed. But the fact remains that whether two or three or thirty sheets were used the load caught fire, and there is nothing to show that increasing the number of sheets under certain conditions of danger would have increased the degree of protection.

Let it then be supposed for the rest of the argument that waggon No. 13024 left Ujjain loaded with 186 bales sheeted with either two or three sheets (in my opinion it makes not the slightest difference), duly roped and sealed, waggon in good running order, load so far safe and unignited. Will this state of preliminary facts exonerate the defendant-company ? They appear to have thought that it would. In my opinion it does not. They have still to account for the manner in which notwithstanding all these ordinary precautions having been taken, a most unusual thing happened, namely, how the waggon came to be on fire at 3-30 the next morning. Their reply would probably be, we have shown that in loading and despatching the goods we took as much ordinary care as a prudent man would have taken of those goods had they been his own. We are, therefore, freed of all liability under sections 151 and 152 of the Contract Act. That is a view which I cannot adopt. It appears to me to violate not only well settled law, but all canons of reasoning. Before the defendant-company can be exonerated they have yet to satisfy the Court that, while the goods were in transit and under their exclusive control, they took every proper precaution, not only in the packing of the goods, but in the management of their numerous dangerous and unruly machines happening to come into close proximity with the goods, to have rendered any mishap of this kind impossible but for the intervention of some wholly novel and unpreventable factor, which they could not with reason have been called upon to anticipate and guard against. And on this point the defendant-company is utterly silent. Absolutely no evidence has been given of the manner in which they manage their engines when these have to pass close to loads of valuable merchandise. If they could have proved that they have adopted every means known to science to neutralize the recurrent risk of sparkage, if they had proved that none of their engines were ever allowed to pass, particularly at night, close by loaded waggons containing highly inflammable goods without shutting off steam, and that after every such quite ordinary risk had been run, inspection was taken of the waggon which had been exposed to the danger—and all these appear to be quite ordinary precautions which any man would naturally take to protect his own very valuable property—then the defendant-company might fairly have said to the Court, we have now proved that we did everything in reason to take care of these goods and we have no idea how, in spite of having taken all those precautions, the fire occurred. The answer (not to that appeal, which would then be perfectly legitimate, but to the supposed need of ever making it) would be that in such circumstances it is almost impossible that any fire should occur or that the defendant-company would be called upon to account for it.

Before I deal with the question of sparkage which, in my opinion, is the most important in the case, if indeed not the only important one, I will say a few words upon another point upon which an entirely disproportionate amount of time and quantity of evidence has been wasted, I mean the manner in which waggons of this kind are loaded. The defendant-company stoutly maintain that fully pressed bales loaded in open trucks are always laid end to end within the truck, and then tier on tier till the full tonnage of the waggon is reached. The plaintiff, on the other hand, contends that it is a common practice for the defendant-company to load these bales in a very peculiar way. The length of a fully pressed bale is 4'1 and the interior width of one of these waggons is 9 feet. Thus laid end

to end on the floor there would be a space of eight inches between. The plaintiff, however, contends that the bales are commonly made to project anything from six inches to a foot over the rail of the truck. This rail is six inches high. Thus, if the plaintiff be right, the bottom tier of bales would be lying at an angle of about six inches in thirty-six. This would leave space between for placing a third row of bales upright. The width is 1'8. There is, of course, absolutely no evidence to show that waggon No. 13024 was loaded in this singular manner, but Mr. Inverarity relies on his pictures to show that in some waggons fully pressed bales do appear to be projecting slightly. Mr. Pechey appeared to doubt whether in one instance at any rate the bales were fully pressed, and if they were not, but the common *dokdas* of unpressed cotton, no inference could be drawn from the appearance of such a load as to exceptional methods of loading fully pressed bales.

Apart from Mr. Inverarity's pictures, which are not very convincing, I should certainly have thought that the method of loading he suggests is so inconvenient and purposeless that no sensible loaders would ever have recourse to it. Every tier would be tilted down to the centre and the whole load would, I should think, be so unstable as to be likely to fall while in transport. But Mr. Inverarity appears to think that the notion is to wedge the two outside tiers by the central row of upright bales so as to fix them more firmly than if they were merely left lying on the floor eight inches apart. I do not think, in the first place, that the plaintiff's point is of any importance. It is true that if the ends of a lot of uncovered bales were projecting with an upward tilt, say six inches beyond the waggon, and uncovered, they would be much nearer a passing spark and might offer it a more comfortable resting place. But the absurdity of the argument lies in this, that there is absolutely no evidence to prove that this method of loading is universal (and I should think every probability points the other way) or that the particular waggon was loaded in this way. It is going much too far afield to ask the Court first to hold that out of four or five thousand waggons one or two are loaded in this way on the strength of one or two photographs taken of waggons at rest in the Colaba Station (and for all we know partially unloaded or prepared for unloading) and two at rest in Broach and Surat respectively, and then to conclude that this waggon must have been loaded in that way and so exposed to an increased risk. Had it been so then the evidence pointing to the fire, when first seen, being in the centre of the waggon, would be made more credible. All I can say is that there is no evidence whatever that would warrant me in holding that this waggon was loaded in such a singular manner. I am inclined to agree with Mr. Pechey that no one but a fool would think of so loading an open truck. It is not as though by doing so more goods could be got into the waggon. Loaded in the ordinary manner the full tonnage of the waggon could be easily exhausted without the load being in excess of the prescribed height. But it cannot be denied that the plaintiff's photographs have this degree of value, supposing that they are not explainable or qualifiable on other grounds, that when the defendant-company with its picture of a completely sheeted waggon asserts, we invariably load every waggon in this manner, the pictures show that there are exceptional cases in which the defendant-company does not. But I do not understand Mr. Pechey to contend that there are *not* exceptional cases. There always must be over a great railway system in this country manned, as far as loading operations go at all sorts of out of the way places, by ignorant, careless and idle natives. But where goods catch fire, the case every time must be exceptional and some exceptional feature must have been introduced. Else we should have the proposition, all goods loaded, with ordinary care, according to our usual loading practices, and carried in the ordinary way get burnt, which is absurd. Where they *do* get burnt these questions arise:—What was the exceptional feature which brought about the exceptional result? Was it some act of the defendant-company? And, if so, was it some act which they ought not to have done in the exercise of ordinary care and prudence? Whether the exceptional feature, the cause of the fire, lay in the loading of the waggon or in the manner in which the defendant-company

managed the traffic through which that waggon had to pass, matters nothing. It is here, I think, that the defendant-company, perhaps misled by their rather easy success in *Lakhichand's* case(1), have been lulled into a false security. They appear to have thought throughout the trial that if they could get the Court to believe that this waggon was loaded with ordinary care, they had done all that was needed to absolve themselves. In my opinion it is not so. They are still, in the absence of a definite known cause, to satisfy the Court that in the management of their engines in the whole course of drawing this truck from Ujjain to the place (wherever that was) where it caught fire, they observed in all respects the same degree of care and prudence which an ordinary man conveying his own valuable goods might have been expected to take under the same conditions.

Then how does the evidence stand about this? It is certain that the 62-up was passed at Nagda by another of the defendant-company's trains, the engine of which went to water, that is to say, must have twice passed part at least of the train on which the burnt waggon was in performing that operation, and once in ordinarily crossing it, that is, three times in all. The engine must have started to water, and it is at starting that sparks are likely to be emitted more freely, just as they are under any other condition of strain, as for instance going uphill. It is pretty clear from parts of the defendant-company's own correspondence that some suspicion attached to this incident, and that it was at once seen to have been a possible—not to say a probable—cause of the fire. The only thing to be said against it is, that the fire was not discovered till some four or five hours later; and if a spark from this engine had set the truck on fire by lodging on the sheeting then, as the train moved from Nagda to Bangrode, it is pretty certain that the wind would have fanned the fire into a blaze and that it could not have escaped detection during the later shunting operations at Bangrode, which occupied about 45 minutes. But it is at least possible that the spark (if it was a spark here which set the waggon on fire) lodged in the lower tiers of the uncovered bales, and worked its way smouldering inwards, till later on it set the whole waggon on fire. However that may be, here is an obvious, a natural and possible cause. And if it were the true cause, could it be said that the defendant-company had taken all reasonable care of the goods in train 62-up although they allowed this engine to pass and re-pass close to the loaded waggon? I doubt it. I am sure that any private owner who had been so situated would at least have taken some precautions to minimise the risk of the engine throwing out sparks, and that he would probably also have been on the watch to see that no spark in spite of such precautions had actually lit on and was likely to set fire to his goods. If the fire had not been caused by the time this train left Nagda, then by a process of exhaustion we reach the conclusion that it must have been caused either by sparks from its own engine on the way to Bangrode after leaving Nagda, or by sparks from its own engine while engaged in shunting it at Bangrode, or afterwards when the whole train having been stabled, the engine stood for an hour and a half on the main line with steam up waiting for line clear to Rutlam. It is unlikely that any spark from the engine of train 62-up could have set a waggon, so far back on the train as this one was, on fire while the train was actually running. Such evidence as there is on the point, not very convincing evidence at best, points to the extreme improbability, verging on actual impossibility, of a spark travelling the length of 42 waggons. The danger line used to be put at ten waggon lengths, but has been reduced in Mr. Pechey's time to seven waggon lengths from the engine. Waggons loaded with inflammable goods are not under the present running rules allowed nearer to the engine than this. But from the very fact that there is a rule on the subject it is clear that the controlling authorities of the defendant-company do recognize a real danger from sparks. Nor can there be any serious doubt or controversy but that that danger is real and substantial.

But if any such rule is needed for running trains it is clear that some similar rules ought to be enforced to regulate shunting and the management of engines

passing close to loaded trains. No such rules appear to exist. It is idle to protect goods against this very special risk by insisting upon their being drawn at a greater distance than say 150 feet from the engine, if any number of other engines may pass and re-pass them at a distance of less than ten feet.

I have been referred to some English decisions upon the liability of a railway company for damage caused to adjacent properties, etc., by sparks from their engines. The case decided by Tyndall, C. J., in 1846 shows that much the same question I am now considering was raised there and that the railway company relied on much the same defence. But most of these cases differ from the present case in being actions brought by persons between whom and the defendant railway company no privity of contract existed. And perhaps the defendant-company here would seek to distinguish even what principles can be got out of those cases by pointing to the words of sections 151 and 152 of the Contract Act and saying that that was the utmost the railway company had to prove in any case in which it was charged with loss, damage or destruction of goods as a bailee by a consignor. I think, however, these cases are not without value as showing the views consistently maintained by many eminent English Judges where it was merely a question of negligence or no negligence. True, these may have been actions on the case, and not, as here, founded in contract, but I cannot see what fair distinction can be drawn between the principles upon which in the former class of cases there was said to be a case to go to the Jury for the plaintiff and cases like this in which again all that is to be decided is, whether in the whole ordering and management of the goods entrusted to them including in this, of course, the whole ordering and management of any other part of their machinery or running gear, from which any reasonable danger might be apprehended, the defendant-company had or had not exercised ordinary care and prudence. It might be argued that while in most, if not all, of those cases the Judges appear to have insisted with some rigour on the railway companies taking the utmost possible care to prevent their engines causing any injury to the property of other people, all that our law requires is that as between the railway company and their clients the railway company is only bound to take ordinary care. I confess I see no reason in principle why a company should be under a greater obligation towards those with whom it has entered into no contract than towards those with whom it has. And as I understand the terms of sections 151 and 152 of the Contract Act, they would not exclude from the reasoning by which the final conclusion is to be reached just those considerations on which so many English Judges have repeatedly laid stress in determining whether a case was proper or not to be left to the Jury. I can hardly doubt that in the admitted facts here there is a case which in England would most certainly have been left to a Jury, nor do I entertain much doubt as to what the Jury's verdict would have been. The defendant-company has not offered any evidence to show that its servants have orders to handle their engines with special care when passing stationary loaded waggons, particularly at night. And yet surely it is no extraordinary measure of precaution if their engines ever throw out sparks and glowing cinders at all. This they admittedly do. It is plain, I think, that whatever danger is reasonably to be anticipated from such a cause is greatly increased at night when, as a rule, there are long intervals during which probably no supervision is exercised at all, and at any rate the same degree of vigilance is hardly to be expected as during the day time. A fire kindled in day time might be easily and early detected by a hundred casual eyes; but during the small hours of the morning, unless the relatively few officers of the company on duty are wide-awake and on the alert, it might go undetected until it had got such a hold as to be beyond all local means available to check it. And this is exactly what did occur in this case. For, however the fire originated, it is certain that it was not found out till it had made such headway that

the staff at Bangrode found it impossible to cope with.

Some evidence was offered to show that the type of engine used to draw the 62-up is fitted with an internal arrangement—a brick arch and baffle plates—to reduce the quantity and size of sparks admitted to the funnel. But no one on behalf of the defendant-company can seriously contend that these, as well as all the rest of its engines, do not occasionally emit dangerous sparks and glowing embers. The defendant-company has adopted no spark arrester, although we are told that the G. I. P. uses one on all its engines. It is true that no spark arresters yet invented are, in the opinion of such experts as have been examined in this case, thoroughly satisfactory. But the fact that they are used on the G. I. P. and at least two Scotch lines of Railway, suggests that such as they are they are better than nothing. But the real point lies, I think, not so much in the extent to which precautions of that kind are carried, for in no event it is contended that they are always efficient, but rather in the degree of caution shown by the defendant-company in the management of its engines, it being admitted and universally known that they do constitute a danger to inflammable goods when close to them while passing and re-passing trains so loaded. And this appears to me in the admitted facts of this case to be the vulnerable point in the defence.

In the case to which I referred in an earlier part of this judgment, *Flannery* v. *Waterford and Limerick Railway Company* (4), although that was an action for damages in respect of an injury caused to a passenger in which, of course, the onus would be largely on him, Palles, C. B., laid it down that the accident must have been caused in one of three ways: (1) through some defect in the line; (2) through some defect in the carriage which ran off the line; (3) through some mismanagement of the engine and train while running. And it appears to me that *mutatis mutandis* that must always be very near the true principle to be applied in such a case as that with which I am dealing. The injury, if caused by an act of the company at all (and I think I have shown that it must have been), must have been caused by some carelessness in loading the goods, or after they were loaded, by some careless act of the company's servants, either individually or in the management of the rolling stock and all that passed it while the train was *en route* or being shunted. And as nobody knows what that act was, it seems to me that the defendant-company is placed, to say the least of it, in very difficult, if not hopeless, position. But this case is not so difficult as some might be, because we have here admitted acts of the defendant-company, any one of which might have caused, and probably did cause, the fire, and those acts all appear to be of a kind which is not within the contemplation or meaning of sections 151 and 152 of the Contract Act. So far then as the origin of the fire has to be determined and the degree of negligence on that account for which the defendant-company is fairly liable, I think it is clear that the defendant-company by some act of its own caused the fire, and on the admitted facts the only reasonable conclusion is that that act was not such as an ordinary man would have done had the goods been in his own and under his complete control. In other words, in my opinion, the defendant-company is plainly responsible for the fire.

That being my conclusion on the first and most important point in the case, it is less necessary than it otherwise might have been to examine in detail another mass of evidence relating to the steps taken by the defendant-company's servants at Bangrode and Rutlam to quench the fire after it had been discovered. Here again the shaping of the case has plainly been influenced by the result of *Lakhichand's* case (1). But it is surely rather unreasonable to insist that because in that case it was found that the defendant-company was negligent and, therefore, to that extent liable, because it did not take very simple, easy, effective steps to put out the fire, that here the defendant-company must likewise be held liable because they did not do all sorts of extreme, impracticable things which having been done, as far as the evidence goes, the destruction now com-

plained of could not have been averted. Briefly, the plaintiff complains that the fire was discovered at 3-30 A. M., but no message was sent to Rutlam for help till an hour or so had elapsed, and then the Rutlam authorities took no immediate steps to send water to Bangrode. Further, that it amounts to negligence on the part of the defendant-company not to have maintained at Rutlam an abundant supply of water together with fire-extinguishing apparatus, and in a less degree that they did not do the same at Bangrode. The latter point is a question of law and does not turn on any evidence at all. For the facts are admitted. There was not enough water at Rutlam to supply the needs of that station, and there was no apparatus kept there for putting out fires on a large scale. It certainly seems surprising, considering the large amount of merchandise which must be constantly lying at Rutlam, considering too that it is an engine-changing station and, therefore, in need of a large supply of water, that the two wells on which it depends locally are allowed to become practically useless, and that while depending for its engine water upon a water train which runs sometimes once, sometimes twice, a day to the little roadside watering station of Ghatla, three miles from Rutlam, it possesses no fire-extinguishing apparatus at all. So that should a fire occur in the sidings there involving loss to perhaps lacs worth of goods, the station authorities say that they would not be in a position to put such a fire out. Apparently the nearest station at which any proper fire extinguishing apparatus is to be had is Godhra, rather more than 115 miles from Bangrode. Of course, it was out of the question to obtain that in time to be of any service in the present case of fire. But as I say all that depends upon admitted facts and the point to which much evidence and argument has been addressed is simply this, whether when the Rutlam officials learnt of the fire between 4 and 5 A. M. they ought not at once to have sent the water tank train to fill up at Ghatla and go on to Bangrode? The railway staff have assigned a great many reasons why in existing circumstances this could not possibly have been done. All these reasons may be reduced to one, that doing what the plaintiff suggests would have so congested the traffic, already blocked and much behind time, that it could not reasonably be expected that the company would have faced all that inconvenience and loss for the sake of saving a single waggon load of the plaintiff's goods. If that were all that there is to be said on the point, I think it would be a perfectly fair answer that the defendant-company then ought to pay the plaintiff the value of his goods. If to suit their own convenience and in their own interest they did not adopt means which they might have adopted to save the plaintiff's goods, then it might be urged that they preferred their own interests to those of their bailor. But I think the real answer is much simpler. Mr. Storrer's evidence is emphatic. He declares that had the water tanks arrived all full, in the absence of force pumps and hoses, no good could have been done. The burning waggon might have been surrounded by water tanks and yet if there were no other means of utilising the water than throwing it out of hand buckets at the burning waggon, from a distance of fifteen feet, it would have been as impossible as before to get the fire under.

Once the fire had got hold of all the bales, this is probably true. For notwithstanding a fairly liberal supply of water from two engines and finally the tank of drinking water which was detached from the up-train at about 10 A. M., it is clear that the staff at Bangrode could not make the slightest impression on the fire. Now had the Station Master at Rutlam used the utmost diligence, it is impossible, I think, tha the could have sent the water train with all its tanks filled so as to reach Bangrode before 6-30 in the morning. And considering the accounts we have of the fire at 3-30 and the fact that it steadily increased in fury and at no time was held in check, it may be concluded that by 6-30 it would have been entirely beyond the control of water, however abundant, which could only be pitched at it out of buckets from a considerable distance. Mr. Storrer says that when he reached Bangrode say at 8-30, the fire was raging so that he would not have cared to go within fifteen feet of it. He did, as a fact, get much nearer, but that because he was protected by the cab of the engine.

That being so, I think the whole of the evidence about the water train and the

question whether it might and ought to have been sent straight to Bangrode after filling up at Ghatla like, most of the rest of the evidence in the case, may be entirely neglected. If, had the water train been sent, it could have given no effective help, then there was no use in sending it.

But it may be doubted whether the want of water and fire-quenching appliances at a station like Rutlam is not in itself evidence of negligence. Subsidiary to this is the consideration whether the local staff of Bangrode ought not, had they exercised proper care and vigilance, to have seen the fire long before 3-30. Once the shunting was over, say by 12-15, there can be little doubt that the station night staff took no further interest in the stabled train, and in all human probability they all went to sleep till the arrival of the 63-down at 3-30 woke them up. By that time the fire had broken out and was blazing fiercely. I think that the staff at Bangrode were right to isolate the waggon at once and to try to get as many bales of it as possible while this was being done, but I should hesitate to say, did I think anything turned upon it, whether they were equally right in not having at once applied for help to Rutlam instead of allowing a valuable hour to pass. But as there was no help available at Rutlam the point becomes immaterial.

I hope that I have not treated this part of the case too cavalierly. But let the evidence be handled how you will, the result must always be the same. It was physically possible to have despatched the water train, so that it might have reached Bangrode with all its tanks full between 6 and 7 A. M. But doing so would have caused very serious and widespread dislocation of the traffic, and would, as far as I can judge, have done no good. Nothing really turns on the laboriously accumulated details concerning the actual hours at which down trains were to leave, and in fact did leave, Rutlam. Nor can I see that anything is gained from a consideration of so much of the evidence as may be related to hypothetical conditions. If both wells at Rutlam had been kept full to the brim, the station itself might not have needed the water brought in by the water train that morning at about 8-20. But the despatch of the water train would still have blocked the section and thrown the already congested traffic into worse confusion. It may be thought strange that when Bantleman, the Station Master of Rutlam, learnt of the fire and received a call for help at say 5 A. M., he did not at once go to Parr who appears to have had the disposition of the water train and confer with him about what had best be done. Parr was, of course, asleep at the time, and the evidence is that the water train could not have been made up for despatch without his concurrence and orders. But Bantleman evidently never thought of it. Indeed he did nothing except authorise the Bangrode staff to stop the up train, which but for delays should have been at Bangrode a good deal earlier than it was, and take off the drinking tank to use in putting out the fire. Bantleman did not even mention the fire to Mr. Storrer who was leaving Rutlam between 8 and 9 A. M. for Bangrode.

But the explanation is that in all the circumstances of the case Bantleman judged that nothing effective could be done at Rutlam and so took what appeared to him to be the best course, leaving the section between Rutlam and Bangrode clear for scheduled trains in ordinary course (though all much behind time) and trusting to the arrival of the drinking water tank on the up train being in time to give the needed aid.

In all the circumstances, both at Bangrode and Rutlam, I do not think that the staff of either station is to blame. The Bangrode men all appear to have worked hard and loyally with the limited means at their disposal. And the most that can be said against Rutlam is that it ought to have had, what it had not, an efficient fire-quenching apparatus and an abundant supply of water. The consideration must always be a grave one in regard to a station of such importance as Rutlam, and it will doubtless engage the attention of the defendant-company. It is one thing to say that a railway company cannot in reason be expected to sink all possible profits in the upkeep of efficient fire brigades and apparatus at every station, however insignificant, along the whole system, and quite another to say that they are under no obligation to provide such precautionary agency at great stations where goods must constantly accumulate and be exposed to the risk of fire. Had this fire occurred at Rutlam and lacs of rupees worth

of damage been done, it may be doubted whether a Court would have listened favourably to a plea that the fire could not have been extinguished because the company does not maintain any staff to work, or apparatus to be worked, to put out fires. And indirectly, of course, the line of attack may be extended, as it has been in this case, the length of contending that had there been all that there ought to have been at Rutlam, effective use might have been made of it to extinguish the fire at Bangrode. But on that ground alone I should not have thought myself justified in holding the defendant-company liable. If they were not liable for the origin of the fire, then I do not think they would be liable at all. As to what was done at Bangrode by the local staff, a good deal of time was spent over the purely hypothetical question whether had there been a force pump in the well, water in sufficient quantity to cope with the fire, when first detected, might not have been available. The fact is that the water in the well was very low, and that there was no force pump. I think it is going too far in cases of this kind to put forward all sorts of hypothetical conditions under which loss might have been averted or minimized, and then charge the defendant-company for what loss was sustained because those conditions did not exist. The trend of sparkage cases in England certainly encourages such attacks, but I think they ought to be kept within due bounds, in view of practicalities governing the management of great systems of railway in this country. Moreover, unless there had been pressure pumps and fire hoses as well as a force pump in the well, very little more could have been done to put out the fire than was done by the Bangrode staff. It is true that so long as men were able to be on the top of the waggon, and this was possible for some time after the fire was discovered, they might have dealt with it much more effectively had the supply of water at their command been much more copious than it was. Bringing buckets of water from a well at considerable distance two at a time to throw at the fire was, of course, utterly futile. And doubtless no more could have been done in the condition of the well, while much more might have been done had there been a force pump in it. On the other hand it is unreasonable to expect the defendant-company to set up force pumps in every well at every road side station along the line and maintain them on the mere chance that some day a fire may occur there. Nor do I attach any importance to the want of any chemical preparations for extinguishing-fires. I am not in a position to say whether had there been any chemical fire extinguishers the fire might have been got under. I was referred to the late Aisgill disaster and told that chemical fire-extinguishers were used there with good results, but there is no evidence on record to prove this. Nor does the defendant-company use chemical fire-extinguishers anywhere on its whole system. Having regard to extreme proportional rarity of fires while goods are being transported by the defendant-company, I think that they are quite justified in contending that they are under no liability to incur a heavy, perhaps a ruinous, expense to guard against these uncommon contingencies. But that only applies, of course, to the part of the case with which I am dealing. I cannot too often repeat that so far from being an answer on the first part of the case, the rarity or otherwise of fires affecting goods of this quality carried under ordinary conditions rather points the conclusion I have reached against the company. If fires were of constant daily occurrence, then the method of transport would have to be re-organised; if they are of very rare occurrence, when they do occur they prove positively that something very unusual had happened. If the defendant-company say that engines passing and re-passing waggons full of pressed bales of cotton properly loaded and sheeted very seldom set them on fire, it must be because those engines do not as a rule emit dangerous sparks, or the conformation of the sheeting is such as seldom to afford lodgment to dangerous sparks when thrown upon it. None the less if one fire has been caused in that way, it becomes clear that here is a real source of danger easily preventable by taking very ordinary precautions, and the defendant-company is, in my opinion, bound to see that every reasonable precaution is invariably taken. In all the voluminous, and for the most part utterly useless, evidence got together in this case there is not a word, I believe, to show that the defendant-company either anticipate any danger from this cause or have issued orders of any kind to guard against it. It may

be a rare but it is a recurrent cause, a continuing danger to which no private owner of valuable goods would subject them if he could guard against it. To go no further than the very recent records of this Court, this is the third case I recollect within a very few years in which goods carried by a railway company have been destroyed by fire. In *Lakhichand's* case (1) the Court held that the company was not responsible for the origin of the fire which was left for ever unexplained. In the other case, which was not properly a case of goods being carried but of grass lying at a station, the Courts found that the defendant-company was liable, as the fire was due to sparks thrown out by a passing engine. Now if sparks thrown out by a passing engine can ignite grass lying on a platform or in a station yard, or plantations or bean stocks (as in two well-known English cases) beside the line of railway, it is clear or ought to be clear that they may also ignite goods in waggons which are being drawn along the line. It is merely a question of distance and the degree of protection afforded the goods by the method in which they are loaded and being carried. The distance whether danger lies in a passing engine, can never be nearly as great as in the cases I have mentioned, and I have already shown that while sheeting the goods may afford some slight protection, may make it much less likely that a flying spark should find a comfortable and dangerous resting place, this alone is not sufficient to absolve the company from taking every precaution in the management of its engines, in addition. If it could be shown that the sheets put upon the waggons were completely fire-proof (in fact they are highly inflammable), then the defendant-company might reasonably say that having so covered the goods they were entitled to ignore any risk from flying sparks thrown out by passing engines. The facts, however, do not warrant any such position. The sheets are as likely to catch fire as the cotton, if a spark falls upon them and is not immediately blown off extinguished ; sparks are constantly being emitted within range of these sheeted waggons, and occasionally they do light and dwell on and ignite the sheeting. Even in the case of a covered waggon, as in *Lakhichand's* case (1), in all human probability the fire was caused, as conjectured by Batchelor, J., by a spark from the engine falling through the narrow aperture in the roof of the carriage, and considering that, if I remember right, it was actually next the engine, I think that the defendant-company were, to say the least, unusually fortunate in having been able to convince the trial Judge and the learned Judges of appeal that the fire was due to no negligence on their part and that they had taken all the care which the law required them to take of the goods entrusted to them. This case is on an altogether different footing of fact and is much more difficult, because of the length of time and the distance covered and the incidents which happened between the commencement of the loading of the waggon at Ujjain and the fire being discovered at Bangrode. I must not be thought to be calling in question in any way the authority of the decision of the Appeal Court in *Lakichand's* case (1). I have indeed adopted the only rule approaching to a general rule of law laid down by their Lordships in that case, namely, that where the defendant-company admits that it is not aware of the cause of the loss, damage, or destruction, it is not on that mere pleading to be held answerable. But further than that I cannot go and I do not see that I am bound to go by a single word in the judgment of the learned Chief Justice in that case. I am still to consider on the evidence (if there be any relevant and material evidence) and the admitted facts whether the company has absolved itself within the meaning of section 72 of the Railways Act and sections 151 and 152 of the Contract Act. That must always be a question of fact in each case depending upon the facts of that and no other case, and here, in my opinion, the company has entirely failed to absolve itself of the responsibility cast upon it. I think it necessary to add these remarks because at the conclusion of his final address Mr. Binning said that whatever be my own view he apprehended that I should feel myself bound by the decision of the Court of Appeal. I certainly do. I have not consciously in the whole of this judgment gone a step beyond all that I can discover in the learned Chief Justice's judgment which could fairly be called a ruling of law binding on all the original Courts. I have permitted myself to comment on

Batchelor, J.'s criticism of the judgment of the Privy Council in *Choutmull Doogur* v. *The Rivers Steam Navigation Company* (3), because it seemed to me absolutely essential that I should do so if I was to make myself clearly understood. For, I am as strongly of opinion as ever that that judgment, being not only of the highest authority and, therefore, binding upon all our Indian Courts, lays down a perfectly correct and easily intelligible principle, not of law, but of proof, which is quite a different thing. And I believe that my method of dealing with this case, while it leaves the rule laid down by Scott, C. J., untouched, is strictly in accordance with what was done by their Lordships of the Privy Council in the case of *Rivers Steam Navigation Company* v. *Choutmull Doogur* (3).

I trust that I have now made good what I have said more than once in the course of this judgment, that at least ninety per cent. of the evidence is utterly useless. It will be seen that, if I am right, every fact which needs to be considered, and forms part of the legitimate reasoning up to the main conclusion, is virtually admitted. And the same can be said with almost equal correctness of the second part of the case, which I have dealt with as shortly as I possibly could in view of my first finding. It has, I am afraid, become a tradition of the Bar, founded on the far away dictum of some eminent Counsel, that the right way to conduct a case of any importance is to heap up all the bricks you possibly can within the limits stretched to their uttermost of the laws of evidence, on the off chance of making use of some of them in constructing the edifice of the final argument. Continuing that metaphor, I may say the whole field and surrounding country, upon which have been built the tiny edifices of Counsel's final arguments to me, have been made a mass of useless bricks and *debris*. In my opinion that is not the best, but the worst, way of conducting a case. I believe that had careful preparatory reasoning and reflection on both sides, with a full knowledge of what the evidence which they could call really was, been given to this case before plunging into it with an eye to the standard pattern I have previously mentioned, all the evidence that was necessary or ever likely to be referred to again could very easily have been laid before the Court in two or at most three days. But as both parties appeared as bent upon taking the somewhat tedious and profitless course that was taken, and no doubt the case will be carried to the Privy Council, I will say no more on that point. Perhaps I am wrong and the learned Counsel may prove to be right, but it will be seen that in this judgment, just as in the concluding addresses of Counsel on both sides to me, very little use indeed has been made, or (from my point of view) ever could profitably have been made, of a very great deal of the evidence, oral or documentary, which now forms the bulky record.

I find then that the railway company is liable for the origin of the fire and the entire resulting loss. I find that the defendant-company has entirely failed to show that in dealing with these goods it exercised all the care that an ordinary man would have exercised, had the goods been his own and the whole machinery of transport under his own control. And I find that the defendant-company is not liable in respect of negligence or carelessness in dealing with the fire after it was discovered.

Suit decreed.

Attorneys for the Plaintiffs: Messrs. *Captain and Vaidya.*

Attorneys for the Defendants: Messrs. *Crawford, Brown & Co.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1277 OF 1912.

March 11, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Banerji.

PITAMBAR LAL AND ANOTHER—PLAINTIFFS —APPELLANTS

versus

SITAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Debt taken by managing

In re PIONEER BANK; *In re* CHAINRAI VELERAN.

member of family to purchase property for and with consent of adult members, whether binding on family.

Where with the consent of all the adult members of a joint Hindu family the managing member of the family purchased a property for the benefit of the family and in order to secure money for the purpose of paying the price of that property he alone mortgaged a joint property:

Held, that the mortgage was a debt for which the family property was liable.

Second appeal from a decree of District Judge, Allahabad.

Messrs. *S. C. Chaudhri*, *Pearey Lal Banerji* and *Uma Shanker Bajpai*, for the Appellant.

Messrs. *Datti Lal*, *Ram Narayan* and *Damodar Das*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit on foot of two mortgages, one dated the 30th of October 1897 and the other dated the 10th of September 1901. The name of the mortgagor was Bipat. Bipat was undoubtedly the managing member of the family to which the defendants belong. He was the father of some of the defendants and grandfather of others. The Court below has granted a decree for the sale of the mortgaged property on foot of the mortgage of the 30th of October 1897, but has dismissed the suit of the plaintiff in so far as he seeks to realise the amount of the mortgage dated the 10th of September 1901. Certain facts are admitted. The mortgage was made by Bipat alone. The purpose for which the money was raised was to purchase a house which had belonged to a woman, named *Musammat* Mango. The house was in fact purchased and the present mortgage included not only the property which the plaintiff now seeks to sell but also the very house which was purchased. Later on a certain person, claiming to be the reversioner to the property which *Musammat* Mango held as a Hindu widow, brought a suit to set aside the sale to Bipat. To that suit the present defendants were made parties as well as Bipat. All these persons resisted the suit, and even after the death of Bipat the present defendants appealed, still contending that the sale was a valid sale. There is the clearest admisssion that they were interested in the sale and that the sale made by *Musammat* Mango was a sale to the whole undivided Hindu family. It is impossible to arrive at any other conclusion but that the purchase of *Musammat* Mango's house was a purchase by and for the benefit of the whole family, which was consented to by every adult member. The Court below has held that the legal necessity was not proved. This is true to this extent that it was not proved that the family could not possibly have lived without the purchase of the house. The learned Judge points out that they had managed to get on even after the loss of the house. There can be no dispute that the house was purchased by the whole family and with the consent of every adult member. Under the circumstances we consider that the mortgage which was made to secure part of the purchase-money which had to be borrowed, is a debt for which the family property is liable. The only other plea is that the rate of interest was exorbitant. We cannot say that the rate of interest is so exorbitant as to justify us in setting aside the contract of the parties. We, however, think that further interest should not be allowed. We, accordingly, allow the appeal, vary the decree of the Court below by giving a decree in respect of the claim on the bond of the 10th of September 1901 also. The plaintiff will get interest upto the date we fix for payment at the contractual rate, thereafter no interest will be allowed. We fix six months from this date for payment and we direct that the parties do abide their own costs in all Courts as regards this part of the claim.

Appeal allowed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION PETITION.

February 28, 1914.

Present:—Mr. Justice Macleod.

In re THE PIONEER BANK LIMITED.

In re CHAINRAI VELERAN—PETITIONER.

Companies Act (*VI of* 1882), *s.* 128—*Petition for winding up—Grounds to be alleged—Petition by creditor or share-holder—Distinction—Discretion of Court.*

In section 128 of the Indian Companies Act the first four grounds for winding up a company are specific, and any other ground alleged under (*e*) must be of a like nature to those given

In re PIONEER BANK; *In re* CHAINRAI VELERAN.

under headings (*a*) to (*d*). A petition by a share-holder for winding up stands on a different footing to a petition by a creditor It should be more closely scrutinized on presentation. The usual ground for a creditor's petition would be that the respondent-company is unable to pay its debt, and in such a case the company must pay the debt or submit to a winding up order. A share-holder's petition must, as a general rule, allege one of the grounds under headings (*a*), (*b*), (*c*) and (*d*) or any ground which the Court is satisfied is of a like nature to those in section 128, and if any of those grounds are alleged, the Court will, under ordinary circumstances, admit the petition. If any other grounds are alleged the petition does not satisfy the requirements of the Act.

There is nothing in the Act or Rules which deprives the Court of the discretion which it has in every other case so that the Court may, if it thinks fit, refuse to admit a petition, or, as an alternative course, give the company concerned notice that a petition has been presented, so that it may take proceedings to restrain the petitioner from proceeding with his petition.

Where the petition by a share-holder contains allegations which all relate to the internal management or mismanagement of the company's affairs, it is a matter for the share-holders themselves to deal with, and not one that would call for interference by the Court.

JUDGMENT.—This petition was presented on the 29th of November 1913 under the Indian Companies Act, VI of 1882, praying that the Pioneer Bank should be wound up. It came on for hearing before me on the 17th of January and I adjourned it in order to enable the share-holders of the Bank to meet and ascertain whether they should continue the business or pass a resolution for the voluntary winding up of the Bank. The share-holders have now decided to continue the business and, therefore, the petition stands dismissed for this reason that it does not comply with the provisions of section 131 of the Indian Companies Act, which states that the petition must allege facts which, if proved, will justify an order for winding up the Company. Section 128 enacts the circumstances under which a company may be wound-up by the Court :—

(*a*) Whenever the Company has passed a special resolution requiring the Company to be wound up by the Court;

(*b*) Whenever the Company does not commence its business within a year from its incorporation or suspends its business for the space of a whole year;

(*c*) Whenever the members are reduced in number to less than seven;

(*d*) Whenever the Company is unable to pay its debt;

(*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.

The first four grounds for winding up a Company are specific, and any other ground alleged under (*e*) must be of a like nature to those given under headings (*a*) to (*d*). The allegations in the petition all relate to the internal management or rather mismanagement of the Company's affairs and that is a matter for the share-holders themselves to deal with. It is not a matter that would call for interference by the Court; so this petition is not in accordance with the provisions of the Act, and if it had been presented to me, I should have declined to accept it. There is no obligation whatever on the Court to admit a petition merely because it is presented. In the first place it must, as I have already stated, allege facts which, if proved, would justify an order for winding up a Company and, therefore, perusal is necessary. But even if a petition does allege such facts, then the Judge has a discretion, since the admission of the petition must inevitably damage the credit of the Company concerned, to consider whether it really is a *bona fide* one. Otherwise the door would be laid open to unlimited opportunities for blackmail, especially in times of financial panic. For a discontented share-holder might cause serious, if not irreparable, damage to a Company by presenting a petition which, if the Judge were bound to accept it, would, under rule 636, have to be advertised in the newspapers fourteen days before the hearing, with the result that the Company would have to close its business for the time, as no Director would dare to authorise payments being made which he might be liable to refund in the case of a winding up order being passed.

In this case, the petitioner is a share-holder for ten shares, on which Rs. 100 have been paid up and on which there is a liability of Rs. 150. It is difficult to conceive that

the petitioner was actuated by proper motives in presenting his petition, which, if successful, would most probably result, so far as he was concerned, in his being called upon to pay another Rs. 150. A petition by a share-holder stands on a different footing to a petition by a creditor. It should be more closely scrutinized on presentation. The usual ground for a creditor's petition would be that the respondent-company is unable to pay its debts, and in such a case the company must pay the debt or submit to a winding up order. A share-holder's petition must, as a general rule, allege one of the grounds under headings (*a*), (*b*), (*c*) and (*d*) or any grounds which the Court is satisfied is of a like nature to those in section 128, and if any of those grounds are alleged, there is little doubt that the Court will, under ordinary circumstances, admit the petition. If any other grounds are alleged the petition does not satisfy the requirements of the Act. The procedure provided by the Act and the Rules on the presentation of petitions for winding up do not seem to my mind to be as clear as they ought to be, and I, therefore, take the opportunity of pointing out that, in my opinion, there is nothing in the Act or Rules which deprives the Court of the discretion which it has in every other case, so that the Court may, if it thinks fit, refuse to admit a petition, or, as an alternative course, give the company concerned notice that a petition has been presented, so that it may take proceedings to restrain the petitioner from proceeding with his petition.

In this case the company has not pressed for costs against the petitioner, as I am told such an order would be valueless to them, the petitioner not being a man of any means, and, therefore, it has consented to the petition being dismissed without costs, otherwise, I should have made the petitioner pay its costs.

Petition dismissed.

Attorneys for the Bank: Messrs. *Matubhai Jamietram & Madan.*

Attorneys for the Petitioner: Messrs. *Patel & Ezekiel.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1472 OF 1913.

July 6, 1914.

Present:—Mr. Justice Sunder Lal.

RAM KISHUN AND OTHERS—DEFENDANTS—APPELLANTS

versus

BANWARI RAI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Public highway—Special damage—Passage narrowed—Two decrees in same terms—Only one decree appealed against—Other decree, effect of.

Where a public passage of 2½ cubits width has been narrowed down to 22 inches, there is special damage inasmuch as leaving such a narrow passage as 22 inches is practically blocking the road.

Where there are two decrees in the same terms and only one of them is appealed against, the other decree would stand even if the decree appealed against is set aside.

Second appeal from the decision of the Subordinate Judge of Ghazipur, dated the 11th of August 1913.

Mr. *M. L. Agarwala*, for the Appellants.

Mr. *Haribans Sahai*, for the Respondents.

JUDGMENT.—This appeal relates to a right of way through a certain passage which has been found to be an old and ancient public passage to the house of the plaintiffs. The passage used to be over 2½ cubits in width. It has now been narrowed down to 22 inches. The Court below has made an order directing the defendants to pull down his wall so as to leave a wider passage to the extent specified in the decree. Mr. Agarwala on behalf of the appellants has argued that the passage being a public way the plaintiffs are bound to prove special damage before they can maintain the suit. The Court below has found that the plaintiffs had suffered special damage and on that view decreed the claim. It appears according to the finding of the Court below that the passage was one for men and cattle. I am not sure whether a space of 22 inches leaves enough room for passage for the purposes of which the road was usable. It has also been found that the plaintiff in order to get to his house now has to make a long detour [see *Ghisu Mal* v. *W. K. Porter*(1)]. In my opinion leaving such a narrow passage as 22 inches is practically blocking the road. In ordinary domestic life in India it is often necessary to bring baskets containing fruits or vegetables to one's house and it may be necessary for

(1) 10 Ind. Cas. 908; 8 A. L. J. 719; 33 A. 641.

the plaintiffs to bring such things. Death may occur in the family and the corpse has to be carried in the customary mode. I think under the circumstances special damage has been made out. I accept the findings of the Court below and dismiss the appeal with costs.

I may also mention that in the Court below there were two appeals in each of which a decree was made. Both of these decrees are in the same terms. Mr. Agarwala has filed an appeal against one decree only and even if one decree is set aside, the other will stand in exactly the same terms. In that view also the appeal fails.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1402 OF 1913.

June 4, 1914.

Present:—Justice Sir Asutosh Mookerji, KT., and Mr. Justice Beachcroft.

SASIBHUSHAN MOOKERJEE AND ANOTHER—PETITIONERS

versus

RADHANATH BOSE—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 47, 151—Revoking order for delivery of possession to execution purchaser, whether an order within s. 47 of the Code—Inherent power of Court, where to be exercised—Jurisdiction.

An executing Court's order under section 151, Civil Procedure Code, 1908, re-calling on the appeal of the judgment-debtor an order previously made for delivery of possession of immoveable property to the transferee from the purchaser at execution sale, is not an order falling within section 47 of the Code and, as such, is not appealable.

The Court has no power to grant such a relief to a party in the exercise of its inherent power within the meaning of section 151, Civil Procedure Code, 1908, as it is forbidden to do so by the express provisions of the Code.

Principles regulating the exercise of the inherent power of the Court discussed.

Hukum Chand v. *Kamalanand Singh*, 33 C. 927; 3 C. L. J. 67, referred to.

It would be a patent misapplication of section 151, if in the exercise of its inherent power a Court were to assume jurisdiction to grant a review where it has been expressly forbidden by the Legislature to entertain such an application.

The inherent power of a Court can only be invoked for the attainment of the ends of substantial justice for the administration of which alone the Courts exist.

Where the effect of the order of the Court would be that one of the parties would be needlessly driven to a suit for possession to which no defence is possible on behalf of the other party in whose favour the order has been passed, the Court should not exercise its inherent power.

Rule against an order of the Munsif, Baruipore, dated 9th September, 1913.

Mr. *S. P. Sinha* (with him Babus *Joges Chandra Roy*, *Atulya Charan Bose*, *Anilendra Nath Roy Chaudhuri*, *Hira Lal Chakraverty*, *Satindra Nath Mookerjee*, *Satis Chandra Munshi*), for the Petitioners.

Babus *Mohendra Nath Roy* and *Manmotha Nath Roy*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside an order by which the Court of first instance has, under section 151 of the Civil Procedure Code, 1908, recalled an order previously made for delivery of possession of immoveable property to a purchaser at an execution sale. The events, which have led up to this order, are matters of record and may be briefly recited. On the 25th May 1902, one Krishnadhan Mookerjee obtained a mortgage-decree against Radhanath Bose, now opposite party in this Rule. The decree was for Rs. 589 and was made absolute on the 27th November 1902. A payment of Rs. 200 was made in part satisfaction of the decree, and the decree-holder took out execution for the balance. The mortgaged property was sold on the 5th March 1903 and was purchased by the decree-holder for Rs. 300. The sale was confirmed on the 14th April 1903 and the application for execution was dismissed on part satisfaction, as the decree-holder took no further steps. On the 21st June 1912 Sasibhusan Mookerjee, now petitioner before this Court, applied to the Court for a certificate of sale. He alleged that his father Krishnadhan Mookerjee, who had obtained the mortgage-decree and purchased the property in execution, had died and had left him as his sole representative. On the 22nd November 1912 the Munsif, Babu Nripendra Nath Guha, ordered the issue of the sale certificate, and five days later the document, duly drawn up and signed, was made over to the applicant. On the 16th February 1913 Sasibhusan Mookerjee conveyed the property to Hemangini Dassi for a consideration of Rs. 300. On the 24th April 1913 Sasibhusan Mookerjee and Hemangini Dassi made a joint application for delivery of posses-

sion of the land sold; the application was jointly made, obviously with a view to avoid any question as to the reality of the conveyance. On the same date the Court called for the record, and two days later Babu Nripendra Nath Guha, Munsif, ordered notice to issue on the judgment-debtor to show cause why the petitioner should not be substituted in the record in place of the auction-purchaser, Krishnadhan Mookerjee. Notice was issued accordingly; and on the 3rd May 1913 Babu Saroj Kanta Banerjee, who had succeeded Babu Nripendra Nath Guha as Munsif, recorded in the order-sheet that notice had been served, made an order for substitution and directed writ of delivery of possession to issue. On the 10th May 1913 the writ was executed, and possession was delivered to the petitioners. On the 15th May an entry was made in the order-sheet that possession had been delivered and that the case had been disposed of. On the 30th May 1913 Radha Nath Basu, the judgment-debtor, applied for review of the orders of the 24th and 26th April and 3rd and 15th May 1913. This application was made to Babu Nripendra Nath Guha, Munsif, who had returned to the station on transfer of Babu Saroj Kanta Banerjee. The application for review attacked the orders as fraudulently obtained on the basis of a fraudulent execution sale brought about by the decree-holder without notice to the judgment-debtor. On the 5th June 1913 Babu Nripendra Nath Guha refused the application for review on the ground that in view of Order XLVII, rule 2, of Code of 1908, he was not competent to entertain an application for review of orders made by his predecessor. Two days later the judgment-debtor applied to Babu Nripendra Nath Guha to consider the propriety of the orders of his predecessor in the exercise of his inherent powers under section 151 of the Code. The execution-purchaser and his transferee protested that the matter could not be re-opened in this way. No heed was paid to this objection, and on the 9th September 1913 Babu Nripendra Nath Guha cancelled the order for delivery of possession made by his predecessor, on the ground that the application was manifestly barred by limitation as it had not been presented within three years of the date of confirmation of the sale. We are now invited by the execution-purchaser and his transferee to hold that the last order of Babu Nripendra Nath Guha, by which he has cancelled the order of his predecessor for delivery of possession, was made without jurisdiction. A preliminary objection has been taken on behalf of the judgment-debtor that the execution-purchaser has misconceived his remedy, that the order of the Munsif, whether rightly or wrongly made, falls within the scope of section 47 of the Code and that it should have been challenged, if the purchaser was so advised, by way of an appeal to the District Judge. We are of opinion that the order of the Munsif was not open to appeal and that the preliminary objection must be overruled.

It was observed by this Court in the case of *Raghubar Dayal* v. *Jadu Nandan* (1), following *Joytara* v. *Pran Krishna* (2) that the answer to the question, whether an order in execution proceedings is within the scope of section 47, depends upon its nature and contents. If it decides a question relating to the execution, satisfaction or discharge of the decree and if the decision has been given between the parties to the suit or their representatives-in-interest the order falls within the scope of section 47, is, consequently, a decree within the meaning of section 2 and is open to appeal under section 96. Let us test the order in the present case from this two-fold point of view. Does it decide a question relating to the execution, satisfaction or discharge of a mortgage-decree? The answer must plainly be in the negative. The mortgage-decree has been executed; the sale has taken place and has become absolute. The decree has been declared to have been satisfied in part. The position as it stood on the 14th April 1903, when the sale was confirmed and the application for execution was dismissed on part satisfaction, would not be affected in the remotest degree by the fate of the application by the purchaser for delivery of possession of the property sold to him. If the application was granted, it could not give greater validity to the order for confirmation of sale than what it possessed. On the other hand, if the application for delivery of possession was refused, it could not invalidate the sale or nullify the part satisfaction of the decree. In our opinion,

(1) 13 Ind. Cas. 365; 15 C L. J. 89; 16 C. W. N. 736.

(2) 7 Ind. Cas. 769; 13 C. L. J. 257; 15 C. W. N. 512.

it is impossible to hold that the order for delivery of possession to the purchaser in this case is an order relating to execution, discharge or satisfaction of the decree. But let us assume that, by some stretch of language, the order for delivery of possession to the purchaser may be deemed an order relating to execution of the decree. The point still remains whether the question, which arises on the application for delivery of possession, arises between the parties to the mortgage suit or their representatives. It is argued that because the purchaser happened to be the decree-holder, the question which arises between the purchaser and the judgment-debtor may be deemed to arise between the decree-holder and the judgment-debtor. This contention is clearly fallacious, for the two capacities of the petitioner, namely, that of decree-holder and of purchaser, are radically distinct. This distinction was recognised in the case of *Nana Kumar Roy* v. *Golam Chunder Dey* (3), where it was held that an order under section 312 of the Code of 1882 for reversal of an execution sale cannot be treated as an order under section 244 because the decree-holder happens to be the auction-purchaser. It was conversely held in *Hira Lal* v. *Chandra Kanta* (4) that if the question really arises between the decree-holder and the judgment-debtor, it does not lose that character merely because it also affects the auction-purchaser who is a stranger to the suit. It is plain that the judgment-debtor cannot take advantage of the circumstance that the decree-holder is the auction-purchaser with a view to make the question one under section 47, any more than the execution-purchaser can rely upon his decree-holder character for a similar purpose. It is well settled that when the purchaser is not the decree-holder, a question which may arise in the proceedings for delivery of possession between him and the judgment-debtor, does not fall within the scope of section 47: *Kishori Mohun* v. *Chunder Nath* (5), *Krishna* v. *H. Saraswatula* (6). When, however, the purchaser happens to be the decree-holder the view has sometime been taken that the question of delivery of possession falls within the scope of section 47: *Madhusudan* v. *Gobinda* (7), *Saiatoolla* v. *Raj Kumar* (8), *Ram Narain* v. *Bandi Pershad* (9), *Hari Charan* v. *Mon Mohan* (10); *Kasinatha* v. *Uthumansa* (11). This view has been carried to its logical conclusion, and it has been maintained in *Sadashiv* v. *Narayan* (12), and *Kottayat* v. *Raman* (13) that a decree-holder auction-purchaser must obtain delivery of possession by an application to the execution Court and cannot maintain a suit against the judgment-debtor for recovery of possession. The contrary view is supported by the cases of *Bhimal Das* v. *Ganesha Koer* (14); *Mahomed Mosraf* v. *Habil Mia* (15); *Jagarnath Marwari* v. *Kartick Nath* (16), and it is worthy of note that in some of the cases where the view first set out has been maintained, the Court has adopted the conclusion with reluctance and hesitation because it felt bound by previous decisions: *Kattayat* v. *Raman* (13), *Sandhu* v. *Hussain* (17). The cases were elaborately reviewed by a Full Bench of the Allahabad High Court in *Musammat Bhagwati* v. *Banwari Lal* (18), and the principle was affirmed that a decree-holder, whether holding a decree for sale under a mortgage or a simple money-decree, who purchases at a sale held in execution of such decree, property belonging to his judgment-debtor is in the same position as would be any other purchaser at an auction sale held in execution of such decree. We are of opinion that the order we are called upon to consider in the present case does not fall within the scope of section 47, and could not have been challenged by way of an appeal to the District Judge. We must, consequently, examine whether the Munsif was competent to re-call the order of his predecessor.

Rule 2 of Order XLVII of the Code makes it plain that the order of the 3rd May 1913

(3) 18 C. 422
(4) 26 C. 539, 3 C. W. N 403
(5) 14 C. 644.
(6) 31 M. 177; 3 M. L. T. 306
(7) 27 C. 34; 4 C. W. N. 417.
(8) 27 C. 709; 4 C. W. N. 681.
(9) 31 C. 737.
(10) 20 Ind. Cas. 874; 18 C. W. N. 27.
(11) 25 M. 529; 12 M. L. J. 1.
(12) 11 Ind. Cas. 987; 35 B. 452; 15 Bom. L. R. 661.
(13) 26 M. 740; 13 M. L. J. 237.
(14) 1 C. W. N. 658.
(15) 6 C. L. J. 749.
(16) 7 C. L. J. 436.
(17) 28 M. 87, 14 M. L. J. 474.
(18) 1 Ind Cas. 416; 31 A. 82; 6 A. L. J. 71; 5 M. L. T. 185.

for delivery of possession made by Babu Saroj Kanta Banerjee could not have been reviewed by his successor, Babu Nripendra Nath Guha, and the latter officer took this view very properly when he dismissed the application for review on the 5th June 1913. But he subsequently yielded to the invitation of the judgment-debtor to grant him relief in the exercise of his inherent power, which he was forbidden to grant by the express provisions of rule 2 of Order XLVII. The principles which regulate the exercise of inherent power by a Court were explained in the case of *Hukum Chand* v. *Kamalanand Singh* (19). It was pointed out that the Code of Civil Procedure binds all Courts so far as it goes; but the Code is not exhaustive and in matters with which it does not deal, the Court will exercise its inherent power to do that justice between the parties which is warranted under the circumstances and which the necessities of the case require. On any point specifically dealt with by the Code, the Court cannot disregard the letter of the enactment according to its true construction, though as the Legislature cannot anticipate and make express provisions to cover all possible contingencies it is the duty of a Judge to apply the provisions of the law not only to what appears to be regulated expressly thereby but also to all cases to which just application of them may be made and which appears to be comprehended either within the express sense of the law or within the consequences that may be gathered from it: *Hurro Chunder* v. *Shoorodhonee* (20), *Panchanan* v. *Dwarka Nath* (21). It would, in our opinion, be a patent misapplication by a Court of section 151 if it were, in the exercise of its inherent power, to assume jurisdiction to grant a review where it has been expressly forbidden by the Legislature to entertain such application. There is, however, a further objection to the exercise of the inherent power of the Court in the present case. It is well settled that the inherent power of a Court can be invoked only for the attainment of the ends of substantial justice, for the administration of which alone Courts exist. Now, what are the merits of the case before us? The mortgage-decree-holder purchased the property so far back as the 5th March 1903 and the sale was confirmed on the 14th April 1903. Notwithstanding the fact that the judgment-debtor had lost his interest in the property by the execution sale, he continued in possession. The decree-holder obtained a sale certificate and was placed in possession after notice to the judgment-debtor. Though the sale was later on alleged to be fraudulent no steps have been taken to impeach the sale and to have it set aside. Objection is subsequently taken that the application for issue of sale certificate and for delivery of possession were both barred by limitation. We need not investigate whether this objection is or is not well-founded in law; we assume that the objection is well founded. But it is plain, as repeatedly held by this Court, that the sale certificate is merely evidence of title; it does not create title: *Tantardhari* v. *Sunder Lal* (22), *Khobhari* v. *Ram Prosad* (23), *Brajo Nath* v. *Juggeswar* (24). Consequently if the execution-purchaser were to sue the judgment-debtor for declaration of title and for recovery of possession at any time within 12 years from the 14th April 1903, when the sale was confirmed and the title vested in the purchaser under section 316 of the Code of 1882, there would be no answer to the claim, as the purchaser would be entitled to establish his title by evidence independently of the sale certificate. The effect of the order of the Munsif is that the purchaser would be needlessly driven to a suit for possession to which no defence is possible on behalf of the judgment-debtor. This clearly is not a result for the attainment of which a Court should exercise its inherent power.

The result is that this Rule is made absolute, the order of the 9th September 1913 discharged and that of the 3rd May 1913 restored. The purchaser will be replaced in possession in execution of the order of this Court. He will also be entitled to his costs throughout these proceedings. We assess the hearing fee in this Court at five gold *mohurs*.

Rule made absolute.

(19) 33 C. 927; 3 C. L. J. 67.
(20) 9 W. R. 402.
(21) 3 C. L. J. 20.
(22) 7 C. L. J. 384.
(23) 7 C. L. J. 387.
(24) 1 Ind. Cas. 62; 9 C. L. J. 346.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 46 OF 1913.

July 22, 1914.

Present: —Justice Sir George Knox, KT.

RAMNATH VAYAS—PLAINTIFF—APPELLANT

versus

SRI THAKUR RASH BEHARIJI MAHARAJ—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s 86—Raja of Tipperah—Suit against Ruling Chief—Consent of Governor-General in Council.

The Raja of Tipperah is a Ruling Chief as described in section 86 of the Civil Procedure Code and no suit against him can be maintained without the consent of the Governor-General in Council.

Application for revision against a decree of the Subordinate Judge of Agra, dated 9th December 1914.

Dr. *S. N. Sen*, for the Appellant.

Dr. *Tej Bahadur Supra* (with him Mr. *Rama Mal Malviya*), for the Opposite Party.

JUDGMENT.—This application for revision of a decree passed by the Subordinate Judge of Agra and dated the 9th of December 1913 arises out of a suit brought by one Ram Nath Vayas. In the plaint the defendants are described as Sri Thakur Rash Bihariji Maharaj, enshrined in a temple known as the Tarcora Temple, situated in Bindraban, *Mohalla* Galibhut, under the Superintendence of Raja Birendra Kishore Manikya of Agartallah Tarcora in Bengal, and (2) Hari Mohan Deb, son of Har Charan Sainapat, a Bengali Brahman at present residing in Bhutwali Gali, Bindraban, Pargana Muttra, defendants.

The suit was originally instituted in the Court of the Additional Munsif of Muttra. It was a suit to recover Rs. 90, together with costs *et cetera* from the defendant No. 1 as the *mutwalli* and manager of the temple of Sri Thakur Rash Bihariji Maharaj. There was a prayer in the plaint that if for some reason or other defendant No. 1 be held by the Court to be not liable for the amount due to the plaintiff, it may be decreed against the estate of the deceased debtor who in the suit was described as representative and the *karpardaz* of the temple on behalf of defendant No. 1. The Additional Munsif of Muttra gave a decree as prayed for against defendant No. 1 only, and no mention is made of defendant No. 2. In appeal defendant No. 1 has described himself as appellant and arrayed as sole respondent Ram Nath Vayas, the original plaintiff. Hari Mohan Deb, defendant No. 2, disappears altogether.

Plaintiff does not appear to have considered himself aggrieved by no decree being passed against Hari Mohan Deb in the alternative as asked for in the plaint. If he had wished to open this question when the petition of appeal was filed, he could have put in an objection, but he did not do so and in appeal the dispute resolved itself into the one question, *viz.*, whether Raja Birendra Kishore Manikya could or could not be sued without the consent of the Governor-General in Council. It is true that the Appellate Court did record the point for determination as to whether Mathura Mohan purchased any article for the temple and had he authority to purchase articles on the credit for the temple. But this point was never determined. The Appellate Court was satisfied that a suit against the Raja was not maintainable without the consent of the Governor-General in Council. The plaintiff takes in revision two pleas: (1) that the defendant No. 1 being the idol of a temple and not a Ruling Chief the Court had jurisdiction to entertain the suit against the said idol and section 86 of the Code of Civil Procedure had no application, and (2) that defendant No. 2 was no Ruling Chief. The learned Counsel for the petitioner went into a long and interesting argument as to whether the idol in the temple was or was not a juristic person. He referred the Court to a number of rulings, the chief of which are:— *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram* (1), *Kalidas Jivram* v. *Gor Parjaram Hirji* (2), *Shri Ganesh Dharnidhar Maharajdev* v. *Keshavrav Govind Kulgavkar* (3), *Tahboonnissa Bibee* v. *Koomar Sham Kishore* (4) and *Syud Shah Alleh Ahmad* v. *Mussamut Bibee Nuseebun* (5). But this point does not really arise for decision. The lower Appellate Court has dismissed the plaintiff's claim on the ground that the plaintiff has sued a Ruling Chief without the

(1) 12 B. 247.
(2) 15 B. 309.
(3) 13 B. 625.
(4) 15 W. R. 228; 7 B. L. R. 621.
(5) 21 W. R. 415.

consent of the Governor-General in Council. No plea has been taken as to whether the idol can or cannot be made responsible for the debt which is said to have been incurred on its behalf. It was plaintiff's duty to so arrange his suit as to make it cognizable by the Civil Courts. If the idol was responsible without any manager of any kind, then the plaintiff should have sued the idol without adding to the idol the name of the Ruling Chief as *mohatmim wa mutwalli*. This he did not do, and his suit, therefore, was dismissed.

Some of the arguments in this petition turned upon the question as to whether Raja Birendra Kishore Manikya was or was not such a Ruling Chief as described under section 86 of the Civil Procedure Code. I have considered this point and am satisfied that the Court below took a proper view. Their Lordships of the Privy Council in *Neel Kisto Deb* v. *Beer Chunder* (6) held that "the Rajah of Tipperah, though in respect to (some of his) lands subject to the Laws and Courts of British India, is in fact an independent Prince with a considerable territory known as the Tipperah Hills." Aitchison in his Collection of Treaties, Engagements and Sanads, Vol. II pp. 279-283, describes the Raja as a Ruling Chief with the power of passing sentences of death and as feudatory to the Goverment of India.

The petition fails and is dismissed with costs.

Petition dismissed.

(6) 3 B. L. R. 13 (P. C); 12 W. R. 21 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 17 OF 1914.

July 14, 1914.

Present:—Mr. Justice Sunder Lal.

Lala KALYAN MAL—PLAINTIFF—APPELLANT

versus

SAMONDU AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s 58, applicability of—Mortgage of sir land—Subsequent mortgage of zemindari rights, effect of, on prior mortgage.

In 1892 *A* mortgaged a portion of his *sir* land to *D*. In 1897 he mortgaged his entire *zemindari* share to *P* who, having obtained a decree thereon, purchased in execution thereof the portion which had been mortgaged to *D*. *P* sued for ejectment of *A* without impleading *D* and got an order of ejectment. *P* now seeks to eject *D* under section 58 of the Agra Tenancy Act as a tenant of some kind:

Held, that *D* is a mortgagee of proprietary rights in the *sir* and until his mortgage is satisfied he is entitled to retain possession of the land as such and that the subsequent mortgage of the *zemindari* rights by *A* in favour of *P* did not entitle *P* to enter into possession without redeeming that mortgage.

Second appeal from the decision of the District Judge of Moradabad, dated September 22nd, 1913.

Mr. *M. L. Agarwala*, for the Appellant.

Mr. *M. Ishaq*, for the Respondents.

JUDGMENT.—This is a suit for ejectment under section 58 of the Tenancy Act. The plaintiff sought for the ejectment of the defendant from three plots of land numbered 3181, 2841 and 3214. There was no contest about the last two. The dispute related only to plot No. 3181. It was the *sir* of the then *zemindar* Abdul Rahman. In 1892 Abdul Rahman mortgaged it with possession to a certain mortgagee who is now represented by the contesting defendants in this case. Later on in 1897 he mortgaged his entire *zemindari* share to the plaintiff who, having obtained a decree thereon, purchased the share in execution thereof. They took proceedings for the ejectment of Abdul Rahman and obtained orders for the ejectment of Abdul Rahman without impleading the defendants as a party. The mortgagees were thus no parties to these proceedings. The plaintiff now seeks to eject the mortgagees as tenants of some kind under section 58 of the Tenancy Act. Both the Courts below have found that the defendants are not tenants but mortgagees. They are mortgagees of proprietary rights in the *sir* and until the mortgage is satisfied, they are entitled to retain possession of the land as such. The subsequent mortgage of the *zemindari* rights in favour of the plaintiff in 1897 did not entitle him to enter into possession of the land mortgaged in 1892 to the defendants without redeeming that mortgage. These persons, therefore, being prior mortgagees in possession, section 58 has no application. The Courts below have rightly dismissed the suit and I dismiss the appeal with costs

Appeal dismissed.

BHAWANI DAS *v.* BABU SINGH.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1407 OF 1913.

July 4, 1914.

Present:—Mr. Justice Sunder Lal.

BHAWANI DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BABU SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Power of Appellate Court to decree suit against defendant who was exempted from liability by first Court.

Where a suit against two persons is decreed against one and dismissed against the other and only the former appeals, making the latter a party to the appeal, the Appellate Court can decree the suit only against the latter, exempting the appellant altogether from liability.

Imbichunni Nair v. *Narayana Nambudri*, 21 Ind. Cas. 767; (1913) M. W. N. 1024, referred to.

Second appeal from the decision of the District Judge of Agra, dated August 19th, 1913.

Mr. *Mohan Lal Sandal*, for the Appellants.

Mr. *S. K. Dar*, for the Respondents.

JUDGMENT.—This is an appeal in a suit for the recovery of a sum of Rs. 312 which the plaintiffs claimed to recover either from Thakoor Sheopal Singh or from Babu Lal. The plaintiffs were mortgagees of the property in suit. According to their case Babu Lal had received the amount now claimed on account of rent of the mortgaged property for and on behalf of the plaintiffs. The defence of Babu Lal was that he had been collecting rent on behalf of his master, Sheopal Singh, and that he was not personally responsible for the rent so collected which was handed over to his principal. The Court of first instance held that Babu Lal was the lessee on behalf of the plaintiffs and that he was really responsible for the rent. It gave a decree against Babu Lal and exempted Sheopal Singh. Babu Lal appealed against the decree of the Court below. The plaintiffs preferred no appeal against the decree in so far as it dismissed the claim against Sheopal Singh. On appeal the Court below has found that Babu Lal was not a lessee on behalf of the plaintiffs and that he is not personally responsible for the money collected by him which he did for and on behalf of Sheopal Singh. It dismissed the claim against Babu Lal. Sheopal Singh was also a party respondent to the appeal in the Court below. He seems to have put in his appearance in that Court, and it was as against him that the finding has been arrived at that it was he who actually received the money now claimed. No decree was, however, made against him. The plaintiffs have preferred the appeal in this Court and have made both Babu Lal and Sheopal Singh parties respondents to this appeal.

Mr. Sandal on behalf of the appellants, accepting the finding of the Court below, contends that a decree ought to be made for the money claimed against Sheopal Singh. He relies upon rule 33 of Order XLI of the Code of Civil Procedure and in support of his case cites a ruling of the Madras High Court reported as *Imbichunni Nair* v. *Narayana Nambudri* (1). So far as the Courts' power to grant a decree like this against Sheopal Singh is concerned it is hardly necessary to cite any case as the illustration given to the section is a case exactly in point. The rule was adopted from Order 58, rule 4, of the Rules of the Supreme Court in England, and this case shows how necessary the rule is to meet cases where one or other of the defendants is responsible for the claim though it is not quite clear before the decision of the Court which of them was so responsible. Following the ruling of the Madras High Court, I allow the appeal and make a decree for the amount claimed against Sheopal Singh. Sheopal Singh has not appeared in this Court, but as he appeared in the Court below it is unnecessary to remand the case for any further findings, as the actual collections admitted to have been made by Babu Lal are greater than the amount claimed. I decree the claim against Sheopal Singh with costs in the Court of first instance. The plaintiffs will bear their own costs in this Court and in the Court below. They will have to pay the costs of Babu Lal in all Courts including Counsel's fee in this Court on the higher scale.

Suit decreed against Sheopal Singh.

(1) 21 Ind. Cas. 767; (1913) M. W. N. 1024.

CALCUTTA HIGH COURT.

CIVIL APPEAL FROM ORDER OF REMAND No. 517 OF 1912.

March 9, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

KATYAYANI DEBI —DEFENDANT— APPELLANT

versus

PORT CANNING AND LAND IMPROVEMENT CO.—PLAINTIFF—RESPONDENT.

Principal and agent—Principal bound by his agent's acts—Ratification—Full knowledge of transaction—Evidence—Memorandum of arrangement, whether admissible in evidence without registration—Registration—Mourasi *and* mokarari *tenure—Specified maximum rent—Enhanceability of rent.*

A memorandum embodying an arrangement for reclamation of land and the terms on which the grantees are to hold the land, does not demise any property and is neither a lease nor an agreement to lease and is, therefore, admissible in evidence without registration.

Where the memorandum contained an express recital that the tenure was *mourasi* and *mokarari* and there was no provision to enhance the rent after a certain maximum was reached·

Held, that the tenure was intended to be not enhanceable after the specified maximum was reached.

Every act done by an agent in the course of his employment on behalf of his principal and within the apparent scope of his authority binds the principal, unless the agent is in fact unauthorized to do the particular act and the person dealing with him has notice that in doing such act he is exceeding his authority.

National Bolivian Co. v. *Wilson*, 5 A. C. 176 at p. 209; 43 L. T. 60; *Duke of Beaufort* v. *Neeld*, 12 Cl. & F. 248; 9 Jur. 813; 8 E. R. 1399 and *Trickett* v. *Tomlinson*, (1862) 13 C. B. (N. S.) 663; 7 L. T. 678; 143 E. R. 263; 134 R. R. 688, relied on.

A principal cannot, on his own authority, ratify a transaction in part and repudiate it as to the rest; and hence the general rule is that where ratification is established as to a part, it operates as confirmation of the whole of that particular transaction of the agent.

Attwood v. *Small*, 6 Cl. & F. 232; 2 Jur. 200; 7 E. R. 684; 49 R. R. 115 and *Bristow* v. *Whitmore*, 9 H. L. C. 391; 31 L. J. Ch. 467; 8 Jur. (N. S.) 291; 4 L. T. 622; 9 W. R. 621; 11 E. R. 781; 131 R. R. 242, Story on Agency, section 250, followed.

But before a principal can be held bound by his ratification, he must be proved to have full knowledge or at any rate means of knowledge of all the essential facts of the transaction into which the agent has entered on his behalf.

Savery v. *King*, 5 H. L. C. 627; 25 L. J. Ch. 482; 2 Jur. (N. S.) 503; 4 W. R. 471; 10 E. R. 1046; 101 R. R. 299; *Haseler* v. *Lemoyne*, 5 C. B. (N. S.) 530; 28 L. J. C. P. 103; 4 Jur. (N. S.) 1279; 7 W. R. 14; 141 E. R. 214; 116 R. R. 753 and *Gunn* v. *Roberts*, 9 C. P. 331 at p. 335; 43 L. J. C. P. 233; 30 L. T. 424; 22 W. R. 652; 2 Asp. M. C. 250, relied on.

Appeal from an order of the District Judge of 24-Pergannahs, dated 14th August 1912, reversing that of the Sub-Judge, Alipore, dated 18th September 1911.

Babus *Nil Madhab Bose*, *Vaida Nath Dutt* and *Hiralal Chackravartty*, for the Appellant.

Dr. *Rash Behary Ghose* and Babus *Gobind Chandra Dey Roy* and *Surendra Kumar Bose*, for the Respondent.

JUDGMENT.—The substantial question in controversy in this appeal is, whether the rent of the tenure held by the defendant-appellant under the plaintiffs-respondents is enhanceable. The plaintiffs constitute a Joint Stock Company which has its head quarters in Bombay and its local office in Canning Town. On the 20th October 1876, the Company appointed one Cowasjee Edalji as their attorney to take and obtain possession of the property which includes the disputed tenure. On the 8th March 1885 Cowasji Edalji drew up a memorandum which embodied the arrangement made by him on behalf of the Company with five persons, who were teachers by profession, and constituted a company known as "Teacher and Company." The memorandum recited that with effect from the commencement of the year 1291, that is, from the 12th April 1884, Teacher and Company had taken possession of a thousand *bighas* of land in three separate parcels within defined boundaries. The jungles were to be cleared by the lessees, the lessor Company to contribute to the expenses of reclamation at the rate of Re. 1 per *bigha* in the case of two of the parcels and at the rate of Re. 1-8 per *bigha* in the case of the other parcel. The land was to be held rent-free for the first four years; in the fifth year, rent was to be paid at the rate of four annas per *bigha*; in the sixth year at 8 annas per *bigha*; in the seventh year at 12 annas and in the eighth year at Re. 1-1 per *bigha*. It was further stated that the last mentioned rate of Re. 1-1 per *bigha* was to be the maximum rate of rent in *mourasi mukarari* tenure. This memorandum was signed by Cowasji Edalji as agent of the lessor Company and also by Dwarkanath Roy, their Superintendent, and was made over to the lessees. It is not disputed that the terms of this arrangement have been carried out and in accordance therewith the lessees have constructed the usual embankments and culverts, have reclaimed the land and have been in occupation thereof. A few years after the memorandum, the land was divided amicably amongst

lessees, and in 1898 the representatives of two of them obtained *mourasi mukarari* leases formally executed in their favour by the lessors. The defendant-appellant is the daughter and representative-in-interest of one of the five original grantees. On the 11th March 1910, that is 25 years after the date of the memorandum of arrangement, the Company instituted the present suit for enhancement of rent of the tenure. The Court of first instance held that the rent was not liable to enhancement, but that the Company was entitled to have the rent re-adjusted by assessment of excess lands, if any. Upon appeal the District Judge has held that the tenure was enhanceable and has remitted the case to the Court of first instance for an inquiry as to the fair rent payable. The present appeal is directed against the order of remand.

The first and the most vital question for consideration is, what was the nature of the tenancy? It has not been disputed that if the memorandum of arrangement is a genuine instrument and is admissible in evidence, the tenure was *mourasi* and *mukarari*. In the Court of first instance, objection was taken to the reception of this document in evidence on the ground that it was neither stamped nor registered as required by law. This objection was overruled and the Subordinate Judge also expressed a doubt as to its genuineness. Upon appeal, no question of admissibility of the document was raised before the Judge who pronounced in favour of its genuineness, and the case has been decided on the assumption that the document had been properly received in evidence. In this Court an earnest endeavour has been made on behalf of the Company respondent to support the position that the document is not admissible in evidence. It has been argued that the document is an agreement to lease, if not a lease, and that in either view the document was compulsorily registrable under section 17 of the Indian Registration Act, read with the definition of the term 'lease' given in section 3. Reference has been made to the cases of *Lall Jha* v. *Negroo* (1), *Purmanand Das* v. *Dharsey* (2), *Ramaswamy Ayyar* v. *Tirupathi* (3), *Champaklatika* v. *Nafar Chandra Naik* (4) and *Mahipal Singh* v. *Lalji Singh* (5) to support the argument that there was a present demise made by the memorandum which was consequently either a lease or an agreement to lease. We are not prepared to accept this contention as well-founded. The document does not demise any property and is neither a lease nor an agreement to lease. It is what it purports to be on the face of it, namely, a memorandum of the arrangement which had been made with the grantees by the agent of the Company on their behalf, under which they had taken possession with effect from the 12th April 1884. In this view the document was rightly admitted by the Court of first instance. We may add that in that Court defendant called upon the Company to produce the counter part of the memorandum. Her case was that the memorandum had been drawn up in duplicate, that one copy was given to her predecessor-in-interest and that the other copy was retained by the Company. On behalf of the Company it was stated that the counter part had been lost; but it has been explained before us that this did not mean that the Company admitted the genuineness of the document produced by the defendant but merely indicated that no trace of a counter part could be found in their office. The Company, however, produced a book which contained an abstract of this memorandum, entered some years after the date when the original was executed. This is plain from the circumstance that at the foot of the entry there is a note that the land had been partitioned and the shares of the grantees as arranged amongst themselves are stated in detail. It may be taken then that the entry in the book produced by the Company was not contemporaneous with the execution of the memorandum of arrangement. Even if we confine our attention to this entry it is plain that the tenure was intended to be *mourasi* and *mukarari*. The entry is to the effect that the land would be held rent-free for the first four years, and that during the next four years the rent would be progressive, namely, four annas, eight annas, twelve annas and seventeen annas in successive years. But there is no statement as to who was to reclaim the jungle. This indicates conclusively that the entry was not intended to be an absolutely full and accurate copy of

(1) 7 C. 717.
(2) 10 B. 101.
(3) 27 M. 43; 13 M. L. J. 356.
(4) 8 Ind. Cas. 44; 13 C. L. J. 300; 15 C. W. N. 536.
(5) 16 Ind. Cas. 705; 17 C. W. N. 166 at p. 168.

the original memorandum: it was in essence an abstract of the terms as arranged between the agent of the Company and the grantees. If, now, we confine ourselves to the abstract as contained in the book and bear in mind the principle recognised in the cases of *Soorasoondaree Debia* v. *Golamali* (6), *Rajaa Suttosurrun Ghosal* v. *Moheshchunder Mitter* (7); *Dhunput Singh* v. *Gooman Singh* (8); *Huro Prasad Roy Chaudhuri* v. *Chundee Churn Boyragee* (9) and *Robert Watson & Co. Ld.* v. *Radha Nath Singh* (10), it becomes plain that the tenure was never intended to be enhanceable; and we are fortified in this view when we find further that no attempt has been made to enhance the rent during a period of at least 17 years. The land was obviously let out for purposes of reclamation, to be effected by the lessees at their expense though the lessor also undertook to make a contribution thereto. It was to be held during the first four years without payment of rent. The rent was thereafter to be progressive till the maximum mentioned was reached, and there was no provision for a further rise. The reasonable inference to draw from these circumstances is that the parties intended that when the specified maximum had been reached, there would be no further increase. As was well observed by Mr. Justice Wilson in *Huro Prasad* v. *Chundee Churn* (9), if the contrary view were adopted, the inference would follow that after the maximum had been reached, the lessors might, in the very next year, seek to enhance the rent payable, which could hardly have been the intention of the parties. Whether, therefore, we look to the memorandum produced by the defendant which contains an express recital that the tenure was *mourasi* and *mukarari* or confine our attention to the entry in the book produced by the Company, which, though merely an abstract, sets out the material terms with sufficient fulness, there is no room for doubt that the tenure was intended to be not enhanceable.

The question next arises, whether the Manager of the Company was competent to grant a *mourasi* and *mukarari* lease of this description. The extent of his authority depends primarily upon a power-of-attorney dated the 20th October 1876. It has been strenuously argued before us on behalf of the Company that the terms of this power must be strictly construed; and reference has been made in support of this view to the rule recognised in *Bryant* v. *La Banque du Peuple* (11), *Roy Radha Kissen* v. *Nauratan Lal* (12) and *Bindubashini Dasi* v. *Giridhari Lal Roy* (13). Our attention has been invited specially to the passage in the power-of-attorney which authorises the agent to accept *kabuliats* or counter parts of *mourasi* leases granted by the Company to *raiyats* and it has been argued that in view of the well-known distinction between *mourasi* and *mukarari* leases [*Munrunjun Singh* v. *Leelanand Singh* (14)] the agent must thus be deemed to have been authorised to grant only *mourasi* or hereditary leases and not *mukarari* leases, that is, leases by which rent is fixed in perpetuity. The appellant has, on the other hand, contended with considerable plausibility that the term '*mourasi*' has been used in the power-of-attorney, as it is familiarly used in popular language, as equivalent to '*mourasi* and *mukarari*,' and that the agent was intended to be vested with authority to grant *mourasi* and *mukarari* leases, specially in view of the well-known fact that, for purposes of reclamation, *mourasi* and *mukarari* leases are ordinarily granted to lessees who have to bear the burden, wholly or partially, of the costs of reclamation. Reference has also been made to the terms of a lease granted to the representative of one of the original grantees on the 25th April 1908 after the land had been partitioned amongst the lessees. This lease is described in its commencement as a *mourasi pattah* and the concluding paragraph states that, under the conditions previously mentioned, a *mukarari pattah* is granted to the lessees named. An examination of the terms of the lease, however, shows plainly that what is granted is a *mourasi* and *mukarari pattah*. It has been argued with some force on behalf of the appellant that in so far as this Company at any rate were concerned the term "*mourasi*" was used by them as equivalent to "*mourasi* and *mukarari*". In reply it has been argued on

(6) 15 B. L. R. (P. C.) 125 *note*, 19 W. R. 141.

(7) 12 M. I. A. 263; 2 B. L. R. (P. C.) 23; 11 W. R. (P. C.) 10; 2 Suth. P. C. J. 180; 2 Sar. P. C. J. 420; 20 Eng. Rep. 338.

(8) 11 M. I. A. 433; 9 W. R. (P. C.) 3; 2 Suth. P. C. J. 92; 2 Sar. P. C. J. 309; 20 Eng. Rep. 161.

(9) 9 C. 505; 12 C. L. R. 251.

(10) 1 C. L. J. 572.

(11) (1893) A. C. 170; 62 L. J. P. C. 68, 1 R. 336; 68 L. T. 546; 41 W. R. 600.

(12) 6 C. L. J. 490 at p. 500.

(13) 3 Ind. Cas. 330; 12 C. L. J. 115.

(14) 3 W. R. 84.

behalf of the respondent that reference cannot rightly be made to a document of subsequent date to explain the terms of the power-of-attorney which had been executed more than 20 years before [*Bhagwat Buksh* v. *Sheo Pershad* (15), *Kamaleswari Pershad* v. *Kunai Singh* (16)]. In our opinion, the appellant need not rely upon the argument mentioned, and it is not material for the purposes of this appeal to hold that the term "*mourasi*" in the power-of-attorney was used in a loose or popular sense as equivalent to "*mourasi* and *mukarari*". The decision of the case must depend upon two fundamental questions, namely, *first*, was the lease granted by the agent within the apparent scope of his authority; and, *secondly*, was the tenancy created by him ratified by the Company?

In so far as the first of these questions is concerned it is plain that the lease granted was within the apparent scope of the authority of the agent. It has been admitted in this Court and the statements is fully borne out by the evidence on the record that Cowasji Edalji was appointed the first agent of the Company in this part of the country on the 20th October 1876. He was their chief representative here, and there is no indication whatever that in the management of this property, he acted under the direction of any superior authority. He was in the service of the Company for a long series of years and retired in 1903. There is also no suggestion that when this particular grant was made, Cowasji Edalji committed an act of fraud, or that he was, in any way, not entirely faithful in the discharge of his duties, or that he betrayed the trust reposed in him by his employers. The fact cannot be, and has not been, disputed that the agent, at any rate, was under the impression that he had authority to grant a *mourasi mukarari* lease on the terms already described. The grantees also were under the same impression. There is further evidence to show that Cowasji Edalji did, as a matter of fact, grant *mourasi* and *mukarari* leases to other persons in respect of land which had to be reclaimed and brought under cultivation. This was, no doubt, sought to be qualified by one of the witnesses, who suggested that when a *mourasi mukarari* lease was granted by the agent, he obtained permission from the Directors in Bombay. But there is nothing to show that the lessees were ever apprised of this fact. It cannot be disputed that every act done by an agent in the course of his employment on behalf of his principal, and within the apparent scope of his authority, binds the principal, unless the agent is in fact unauthorised to do the particular act and the person dealing with him has notice that in doing such act he is exceeding his authority [*National Bolivian Co.* v. *Wilson* (17), *Duke of Beaufort* v. *Neeld* (18), *Trickett* v. *Tomlinson*(19)]. The grantees, in the case before us, would be entitled to presume that the agent, who had admittedly authority to grant reclamation leases, had acted with regularity and within the scope of his authority [*Royal British Bank* v. *Turquand* (20), *Agar* v. *Athenæum Life Assurance Society* (21), *Bargate* v. *Shortridge* (22), *Montreal & St. Lawrence Light Ry. Co.* v. *Robert* (23)]. In the circumstances of the present case, it is plain that the act done by the agent was within the apparent scope of his authority and is binding upon his principals. The first ground upon which the appellant seeks to hold the Company bound by the lease must be maintained.

In so far as the second question is concerned, it has been argued on behalf of the appellant that the tenancy was ratified by the Company, and that as it was ratified, it could be ratified only in its entirety; in other words, that even if the Company be assumed to be entitled to repudiate the unauthorised act of their agent, they could not adopt it in part and repudiate it as to the remainder that is, if they acquiesced in the arrangement made by their agent, they could accept the grantees as tenants only on all the conditions settled by him, the transaction could be confirmed either in its entirety or not at all. This contention is supported by the

(15) 21 Ind. Cas. 481; 18 C. L. J. 277 at p. 303; 18 C. W. N. 297.

(16) 20 Ind. Cas. 171; 17 C. W. N. 1159; 19 C. L. J. 348.

(17) 5 A. C. 176 at p. 209; 43 L. T. 60.

(18) 12 Cl. & F. 248; 9 Jur. 813; 8 E. R. 1399.

(19) (1863) 13 C. B. (N. S.) 663; 7 L. T. 678; 143 E. R. 263; 134 R. R. 688.

(20) 6 E. & B. 327; 24 L. J. Q. B. 327; 1 Jur. (N. S.) 1086; 119 E. R. 886, 103 R. R. 461.

(21) 3 C. B. (N. S.) 725; 27 L. J. C. P. 95; 4 Jur. (N. S.) 211; 6 W. R. 277; 140 E. R. 927; 111 R. R 817.

(22) 5 H. L. C. 297; 24 L. J. Ch. 457; 10 E. R. 914; 101 R. R. 163.

(23) (1906) A. C. 196; 75 L. J. P. C. 33; 94 L. T. 229; 13 Manson 184.

principle recognised in *Attwood* v. *Small* (24) and *Bristow* v. *Whitmore* (25) and enunciated by Story in his classical treatise on Agency (section 250) in the following terms: "The principal cannot, on his own mere authority, ratify a transaction in part and repudiate it as to the rest, and hence the general rule is deduced that where a ratification is established as to a part, it operates as a confirmation of the whole of that particular transaction of the agent". In view of this elementary doctrine it has not been, and it cannot be, disputed on behalf of the Company respondents that if there was ratification, the transaction must be deemed to have been ratified in its entirety. But it has been argued, and very properly argued, that before the Company can be held bound by ratification they must be proved to have had full knowledge, or, at any rate, means of knowledge of all the essential facts of the transaction into which their agent had entered on their behalf [*Savery* v. *King* (26), *Haseler* v. *Lemoyne* (27), *Gunn* v. *Roberts* (28)]. In our opinion, there is ample material on the record to show that the Company had such means of knowledge in the very book produced by them. The book, evidently kept in the regular course of business, contains a large number of entries similar to the one exhibited in this case. It is in fact a book in which entries were systematically made and a record was kept of transactions relating to settlements of land made by the agent on behalf of the Company. An examination of the entries in the book would have disclosed to a Director of the Company, or to any person entitled to exercise powers of supervision over the agent, the nature of the settlement made by him. We hold accordingly that the Company must be deemed to have ratified the particular transaction now before the Court. The second ground upon which the appellant seeks to hold the Company bound by the lease must consequently prevail.

The result is that the appeal must be allowed, the order of the District Judge set aside and the decree of the Court of first instance restored. This order will carry costs both here and in the Court of Appeal below. We assess the hearing fee in this Court at three gold *mohurs*.

Appeal allowed.

(24) 6 Cl. & F. 232; 2 Jur. 200; 7 E. R. 684; 49 R.R. 115.

(25) 9 H. L. C. 391; 31 L. J. Ch. 467; 8 Jur. (N. S.) 291; 4 L.T. 622; 9 W.R. 621; 11 E.R 781; 131 R.R. 242.

(26) 5 H. L. C. 627; 25 L. J. Ch. 482; 2 Jur. (N. S.) 503; 4 W. R. 471; 10 E. R. 1046; 101 R. R. 299.

(27) 5 C. B. (N. S.) 530; 28 L. J. C. P. 103; 4 Jur. (N. S.) 1279; 7 W. R. 14; 141 E. R. 214; 116 R. R. 753.

(28) 9 C. P. 331 at p. 335; 43 L. J. C. P. 233; 30 L. T. 424; 22 W. R. 652; 2 Asp. M. C. 250.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 168 OF 1912.

July 15, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Scott-Smith.

IMAM DIN—DEFENDANT—APPELLANT

versus

DULO—PLAINTIFF—RESPONDENT.

Joint family, Muhammadan—No presumption of joint funds—Second appeal—Concurrent findings of fact—Power of High Court to interfere—Findings not based on evidence.

In a Muhammadan joint family there is no presumption as to the jointness of funds and in this connection Hindu and Muhammadan joint families are quite different.

The rule that the High Court will not interfere to upset concurrent findings of fact is inapplicable to a case where the findings are not based on evidence but on a wrong presumption

Second appeal from the decree of the Additional Divisional Judge, Lahore, dated the 20th November 1911, confirming that of the Subordinate Judge, First Class, Lahore, dated the 20th November 1911, decreeing the suit.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Appellant.

Rai Bahadur Pandit *Sheo Narain* and Mr. *Roshan Lal*, for the Respondent.

JUDGMENT.—The following pedigree-table, with the remarks following it, make it clear that in this case there is really only one question to be decided:—

PIR BAKHSH

Karm, O. S. P.	Nizam Din, dead	Imam Din, defendant.	Chiragh, dead
			Musammat Mehtab Bibi.
Dulo, plaintiff.	Mehr, O. S. P.		

Karm, Nizam Din and Chiragh all died before their father. Plaintiff sued, partly by way of declaration and partly in the form of claim for possession, for one half of the entire estate left by Pir Bakhsh. Defendant resisted the claim on many grounds: that it is time-barred, that the parties follow

Muhammadan Law and so Imam Din defendant is sole heir of Pir Bakhsh, that at least Chiragh's ⅓rd share now belongs to him as *Musammat* Mehtab Bibi transferred it to him for valuable consideration (Rs. 600 cash) and that in any case defendant is entitled to be reimbursed for personal outlay on estate improvements and on the maintenance and marriage of plaintiff. To these pleas plaintiff demurred, saying, as to the transfer by *Musammat* Mehtab Bibi, that the Rs. 600 was paid by defendant out of joint family funds and so the transfer, though on paper by fraud in favour of defendant alone, must be taken as a relinquishment in favour of plaintiff also.

The first Court found that the suit was not time-barred; that the parties, being Arains, do not follow Muhammadan Law but ordinary agricultural custom which fully recognises the right of representation; that inasmuch as the family estate was joint and defendant was its manager, it must be taken that the Rs. 600 came out of joint funds and that the transfer by *Musammat* Mehtab Bibi was really in favour of the family and not of defendant alone, though no fraud was proved; and that defendant had not proved any personal outlay. The result was a decree in full for the plaintiff.

Defendant appealed, his Counsel confining his claim to the matter of the share of Chiragh and his daughter. The learned Divisional Judge held that the parties follow custom, that the suit is not time-barred, and that defendant having acquired Chiragh's share from family funds, acquired it not for himself alone but for plaintiff also.

In further appeal Mr. Shafi waives time-bar and fraud and the question *Custom* versus *Personal Law*, and confines himself to the matter of the nature of the transaction between defendant and *Musammat* Mehtab Bibi. In our opinion the appeal must succeed as regards Chiragh's share.

The transaction took place in 1907, when plaintiff was already of age. It is quite clear that plaintiff has all along admitted *Musammat* Mehtab Bibi's right to a ⅓rd share in her grandfather's estate. In paragraphs 5 and 6 of the plaint he affirmed that the transfer was in favour of himself as well as of defendant and based his claim to half of the lady's share on that ground; and, though some words in other parts of the plaint seem to ignore her rights, the evidence of plaintiff's own witnesses, Chanan Din and Allah Bakhsh, makes it clear that his case was fully to recognise her rights. In the deed of relinquishment or transfer the lady distinctly says she has received Rs. 600 from defendant and that she is renouncing her rights *in his favour* in consideration of that payment; and thus inasmuch as plaintiff admitted her rights, though his learned Counsel before us struggles to show that he made no such admission, it follows that she had the *power* to make the transfer to defendant alone and that the onus of proving that she intended to favour both plaintiff and defendant lies heavily on plaintiff, who must show that this was her intention and that the Rs. 600 was family money. Defendant went into the witness-box and swore that it was not family money, while plaintiff neither entered the witness-box nor produced a particle of evidence on the point. His Counsel has to concede this much; but he goes on to argue that as the family was joint, though Muhammadan, and as defendant was manager, much the same presumption arises as to the nature of the funds as would arise in the case of a joint undivided Hindu family. He also urges that this Court should not interfere to upset concurrent findings of fact.

As to the latter contention we need only point out that the said findings are not based on evidence, but on a wrong presumption and such findings have no validity. And the former contention will not hold water. The facts and opinion stated by us above make it clear that such rulings as Mr. Sheo Narain relies on, *e. g.*, *Khunni Lal* v. *Gobind Krishna Narain* (1) *Musammat Hiran Bibi* v. *Musammat Sohan Bibi* (2), *Jadu Nath Poddar* v. *Rup Lal Poddar* (3) and *Nur Mahomed* v. *Amina* (4), are really beside the mark. And in conclusion we need only refer to *Karim Bakhsh* v. *Rahim Bakhsh* (5) and say that Hindu and Muhammadan joint families are in this connection quite different and that plaintiff had to prove by positive evidence

(1) 10 Ind. Cas. 477; 33 A. 356 (P. C.); 15 C. W. N. 545; 8 A. L. J. 552; 13 Bom. L. R. 427; 13 C. L. J. 575; 10 M. L. T. 25; 21 M. L. J. 645; (1911) M. W. N. 432, 38 I. A. 8.

(2) 24 Ind. Cas. 309; 18 C. W. N. 929; 27 M. L. J. 149; 1 L. W. 648.

(3) 33 C. 937 at p. 938, 4 C. L. J. 22; 10 C. W. N. 659.

(4) 91 P. R. 1907; 191 P. L. R. 1908.

(5) P. L. R. 1900 p. 81.

that the Rs. 600 was family money. This he has not proved. No doubt to raise the money or some of it defendant mortgaged the ancestral house; but this house was in his separate possession just as certain other family property was admittedly in plaintiff's possession and admittedly actually sold by him in 1906 to Mr. Davison for his own benefit and just as certain other property was in *Musammat* Mehtab Bibi's possession—see paragraph 15 of plaint—and was by her disposed of, and defendant could similarly mortgage even the ancestral house for his own benefit and did so.

We accept the appeal and dismiss plaintiff's suit in so far as it relates to the property of *Musammat* Mehtab Bibi transferred by her to defendant, who will have his costs in this Court against plaintiff and also in the lower Appellate Court. He will, however, pay plaintiff's costs in the first Court.

Appeal accepted.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1135 OF 1913.

July 24, 1914.

Present:—Mr. Justice Rafique.

JUGAL KISHORE—DEFENDANT—APPELLANT

versus

Musammat GOMTI KUAR—PLAINTIFF—RESPONDENT.

Hindu law—Widow's estate—Permission given by widow to plant grove, whether binding on reversioner—Pleadings—Relief.

In a plaint one of the reliefs was for possession. Both parties understood perfectly well the point in dispute and gave evidence accordingly:

Held, that the plaintiff was entitled to possession and the fact that the pleadings subsequent to the filing of the plaint and the evidence in the case disclosed facts at variance with those mentioned in the plaint was immaterial.

Abdul Ghani v. Musam-mat Babui, 25 A. 256; *Balmakud* v. *Dalu*, 25 A. 498, referred to.

The permission given by a Hindu female, having life-estate in a property, to plant groves upon a piece of land without fixing the rent of the land, is not binding on reversioners.

Second appeal from the decision of the Subordinate Judge of Bareilly, dated the 17th July 1913.

Mr. *M. L. Agarwala*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondent.

JUDGMENT.—The two appeals Nos. 1135 and 1529 of 1913 arise out of a suit brought by *Musammat* Gomti Kuar against Jugal Kishore. It appears that one Mulchand was a co-sharer in the villages of Mehdi, Husanpur and Dinarpur. He died some time ago leaving him surviving his widow called *Musammat* Plaunda and a daughter named *Musammat* Dhanwanti. *Musammat* Plaunda remained in possession of her husband's property up to her death. On her death *Musammat* Dhanwanti entered in possession and remained in possession till her death in 1907. After her death Khader Mal and Shama Charan succeeded to the estate of Mulchand as his reversioners. They executed a deed of sale in favour of Beni Lal and Ramcharan Lal in respect of the estate of Mulchand. On the 27th of March 1911 the purchasers instituted the suit out of which these two appeals have arisen in the Court of the Munsif of Aoula Faridpur against Jugal Kishore. It was alleged in the plaint that Jugal Kishore used to realize rents of Mehdi, Hasanpur and Dinarpur on behalf of *Musammat* Dhanwanti and that during the time that he was acting for her, he without her knowledge and without any right got his name entered in respect of 25 *bighas* 8 *biswas* of land. But inspite of that entry *Musammat* Dhanwanti remained in possession of the land until her death. In April 1907 the plaintiffs, after the purchase of the interests of Khader Mal and Shama Charan got possession of the estate of Mulchand in Mehdi, Hasanpur and Dinarpur, including the land in question. The defendant subsequently interfered with the plaintiffs' title and possession by taking fruit from some of the trees of the groves situate on the land in suit and by instigating some of the tenants not to pay rent to the plaintiffs. The latter, therefore, claimed two reliefs, *viz.*, (1) a perpetual injunction restraining the defendant from interfering with the title and the possession of the plaintiffs and (2) if the acts of the defendant mentioned above be considered to amount to dispossession of the plaintiffs, then a decree for possession of the land in suit by the ejectment of the defendant. Jugal Kishore contested the suit on various grounds. He denied that the land in suit was sold by the reversioners to the plaintiffs or that the latter had ever been in possession of it He

said that the grove No. 2036 belonged to him and that he had been in possession of it for a number of years. As to the other grove he said that he had planted it with the permission of *Musammat* Dhanwanti and *Musammat* Mohan Kuar, another co-sharer. He pleaded that he was a tenant grove-holder and hence the suit was not maintainable in a Civil Court. During the pendency of the suit *Musammat* Gomti Kuar filed an application stating that she was the real purchaser and that Beni Lal and Ramcharan Lal were *benamidars*. She was accordingly brought on the record as plaintiff. The learned Munsif found that the land in suit was given by *Musammat* Dhanwanti to her husband Ram Prasad, and his nephew, Jugal Kishore, at different times for the planting of groves and that two groves were planted on it by them. The grant by her of the land in suit could not be questioned as the planting of groves improved the property. The plaintiff or her vendors never having obtained possession over the groves or the land, the acts of the defendant referred to in the plaint could not amount to the dispossession of the plaintiff. The latter was not, therefore, entitled to either of the two reliefs asked by her. The claim was accordingly dismissed. On appeal the learned Subordinate Judge disagreed with the Munsif. He held that *Musammat* Dhanwanti Kuar having a life-estate only could not deal with the property so as to effect adversely the rights of the reversioners. She had reserved no rent on the land given to the defendant and his uncle for planting of the groves and hence the reversioners' rights were injuriously affected. The finding that the plaint disclosed no cause of action for recovery of possession was also not accepted by the learned Subordinate Judge. He decreed the claim for possession with the permission to the defendant to remove groves and such trees as bore no fruit. Both Jugal Kishore and *Musammat* Gomti Kuar have filed separate appeals in this Court. The appeal of the latter relates to the qualification in the decree permitting Jugal Kishore to remove grass and timber, while Jugal Kishore has appealed from the decree for possession passed against him.

This is the appeal for Jugal Kishore. He attacks the decree on three grounds *viz.* :—(1) that the plaintiff made no specific assertion in the plaint that she had been dispossessed and if so, at what date, or that she had ever been in possession over the land in suit, (2) that the facts stated in the plaint have been found to be untrue, and (3) that *Musammat* Dhanwanti Kuar could grant land to the defendant and his uncles to plant groves and that such a grant is binding on the reversioners of Mulchand. In support of the first contention the case of *Kashi Nath Biswas* v. *Ram Narinjan Chaube* (1) is relied upon. I do not think that the case of Kashi Nath is in point. In that case the plaintiff made no specific assertion that he had been dispossessed or, if so, at what date had such dispossession taken place. In the present case it was distinctly stated in the plaint that the defendant had appropriated fruit of some of the trees of the groves and had instigated some of the tenants not to pay rents to the plaintiff. That was a specific assertion of dispossession of the plaintiff. The argument in support of the second contention is that the plaintiff has come into Court on the allegation that Jugal Kishore fraudulently got his name entered in the revenue registers in respect of the land in suit without the consent and knowledge of *Musammat* Dhanwanti and taking advantage of that entry was interfering with the possession of the plaintiff. The lower Court has found that allegation to be untrue. The plaintiff is, therefore, entitled to no relief. It seems that the pleadings subsequent to the filing of the plaint disclosed the true circumstances under which the land in suit came to be in the possession of the defendant. The issue between the parties on the pleadings in the case was the right of the plaintiff to recover possession of the land in suit or, to put it differently, whether the grant of the land in suit to Ram Prasad and Jugal Kishore for planting of groves by *Musammat* Dhanwanti Kuar who held a life-estate only, was binding on the reversioners of her father. Both parties understood perfectly well the point in dispute and gave evidence accordingly. It is immaterial that the pleading subsequent to the filing of the plaint and the evidence in the cases disclosed facts at variance with those men-

(1) A. W. N. (1902) 35.

tioned in the plaint. The defendant was not placed at a disadvantage as he knew the real issue in the case. The plaintiff can, in my opinion, be granted the relief for possession. This view is supported by two Full Bench cases of this Court, vide *Abdul Ghani* v. *Musammat Babui* (2) and *Balmakund* v. *Dalu* (3).

The third contention for the defendant has also no force. It is not denied that *Musammat* Dhanwanti had only a life-estate in the land in suit. She could not deal with it to the injury of the reversioners' interests. No rent was fixed for the land on which the groves in question were planted. The reversioners lost the rent which the land in suit could fetch. They are, therefore, not bound by the permission of *Musammat* Dhanwanti. In support of the view that such permission is of no avail against the reversioners, reference may be made to the case of *Ganap* v. *Subbi* (4). The appeal of Jugal Kishore, therefore, fails. The appeal of *Musammat* Gomti Kuar must also fail. It has not been shown that she has a right to retain the grass and timber trees grown by the defendant. This appeal is dismissed with costs.

Appeal dismissed.

(2) 25 A. 256 (F. B.); A. W. N. (1903) 18.
(3) 25 A. 498 (F. B.); A. W. N. (1903) 112.
(4) 32 B. 577; 10 Bom. L. R. 927.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION NO. 747 OF 1911.

February 20, 1913.

Present:—Justice Sir Ralph Benson, KT., and Mr. Justice Sundara Aiyar.

LAKSHMINARAYANA PANIGRAHI—PLAINTIFF—PETITIONER

versus

PASUPUREDDI GOPI—DEFENDANT—RESPONDENT.

Vizagapatam Agency Rules, Rules 17 and 20—Agent refusing to admit special appeal, whether decree.

Rule 17 of the Vizagapatam Agency Rules cannot be regarded as conferring on the party concerned a limited right of appeal. He has no right of appeal at all except with the leave of the Agent. The Agent's order refusing to admit an appeal against an appellate judgment of a Special Assistant Agent cannot be held to be a decree and, therefore, Rule No. 20 is inapplicable to it.

Petition praying that the High Court may be pleased to direct the Agent to the Governor at Vizagapatam to review his order in D. Disposal No. 669 of 1910, against the decree of the Court of the Special Assistant Agent, Parvatipur, in Civil Appeal No. 25 of 1910, preferred against the decree of the Court of the Agency District Munsif, Gunupur, in Original Suit No. 72 of 1910.

Mr. *V. Ramesam*, for the Petitioner.

Mr. *Narayanamurti*, for the Respondent.

ORDER.—This is a petition under Rule No. 20 of the Vizagapatam Agency Rules asking us to direct the Agent to review his order refusing to admit an appeal presented to him against an appellate judgment of a Special Assistant Agent reversing the judgment of the Agency District Munsif of Gunupur. The appeal against the Munsif's judgment was preferred under Rule No. 16. Rule No. 17 provided that the appellate decision of Divisional Assistants shall be final provided that the Agent shall be at liberty, for special reasons to be recorded, to admit a special appeal in his Court within the time prescribed for the admission of a regular appeal. Rule No. 20 gives this Court the power to direct the Agent to review his judgment in the case of decrees passed by him in appeals from the decrees of the subordinates. We do not think that the Agent's order in this case can be regarded as a decree. Mr. Ramesam contends that the Agent's order was one disposing of an appeal against the appellate decree of the Divisional Assistant and that it is, therefore, a decree, but Rule No. 17 expressly provides that the decision of a Divisional Assistant in an appeal shall be final. Rule No. 17 cannot, therefore, be read as giving a right of appeal against such a decision. The Rule, no doubt, empowers the Agent for special reasons to admit a special appeal. The meaning of this must, in our opinion, be taken to be that, if the Agent thinks fit, the party should have a right of appeal. In other words a second appeal will lie with the Agent's leave. This is the only way of reading the latter part of Rule No. 17 consistently with the former part making the appellate decisions of Divisional Assistant Agents final. Rule No. 17 cannot be regarded as conferring on the party concerned a limited right of appeal. He has no right of appeal at all, except with the leave of the

Agent. The Agent's order, therefore, was one refusing leave to appeal as there were no special grounds for giving it. Such an order cannot be held to be a decree. Rule No. 20 is, therefore, inapplicable. We dismiss the petition with costs.

Petition dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 201 OF 1909.

April 17, 1913.

Present:—Justice Sir Ralph Benson, KT., and Mr. Justice Sundara Aiyar.

TANGIRALA CHIRANJIVI, MINOR, BY HIS MOTHER AND NEXT FRIEND, LAKSHMAMMA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAJA MANIKYA RAO RAJYA LAKSHMAMMA AND OTHERS—DEFENDANTS—RESPONDENTS.

Temple—Trustees—Inam *granted to* vritikars *to recite the* Vedas *by* zemindar *and confirmed by Government—Power of resumption in Government alone—Powers of trustees—Burden of proving that minor, female, or person not learned in* Vedas *cannot perform service of reciting the* Vedas.

Where the lands in question were granted by a *zemindar* to certain *vritikars* for reciting the *Vedas* in a temple and the *inam* was confirmed by the British Government the right of resumption is in Government, and the trustees of the temple have no right to take possession of the lands.

The question whether in the case of such a grant the trustees would have the right to dismiss the *vritikars*, is one to be tried and not to be decided on any assumption.

There is no basis for the assumption that a minor, a female, or a person unlearned in the *Vedas* would lose the right to the service (of reciting the *Vedas*) in the temple; the onus would be on the *dharmkartas* to prove any such disqualification.

Appeal from the decree of the District Court of Guntur in Original Suit No. 28 of 1905.

JUDGMENT.—The District Judge does not seem to have appreciated the real questions arising for decision in the case. The lands in question were admittedly granted to certain *vritikars* for reciting the *Vedas* in a temple. The *inam* title-deed, Exhibit A, was granted to the *vritikars*. It does not appear that the temple had any right of property in the lands. The *inam* being a conditional one granted by a *zemindar* and confirmed by the British Government, the right of resumption would be in Government. The trustees did not state how they had any right to take possession of the lands. Again, the Judge seems to have assumed that the trustees had the right to dismiss the *vritikars*. We express no opinion on the question whether in the case of such a grant the trustees would have such a right. But the matter was one which should have been tried and could not be decided on any assumption. Again, the District Judge has assumed that a minor, a female and a person unlearned in the *Vedas* would lose the right to the service in the temple. There is no basis for the assumption. The onus would be on the *dharmakartas* to prove any such disqualification. Services in temples are often performed by proxies.

Again, the Judge did not try the question whether the plaintiffs neglected or refused to have the services properly performed. Further, unless the *dharmakartas* could prove their right to take possession of the lands, the plaintiff's suit must succeed, even if they failed to perform the services or forfeited their right to the services, the right of resumption of the *inam* being *prima facie* in Government alone. As the case has not been properly tried, we set aside the decree of the lower Court and remand the suit for fresh disposal according to law after recording all the evidence that either party may adduce. The costs of this appeal will abide the result.

Decree set aside.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 356 OF 1913.

May 15, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

BHAGWATI SARAN MAN TEWARI—PLAINTIFF—APPELLANT

versus

PARMESHAR DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption suit—Alternative claim for possession as full owner—Pleadings—Inconsistent pleadings—Practice.

A suit for pre-emption is maintainable even if the pre-emptor claims a right of possession as full owner of the suit property.

Gandharp Singh v. *Sahib Singh*, 7 A. 184 (F. B); A. W. N. (1884) 326, followed.

First appeal from a decree of the Additional Judge, Gorakhpur.

Mr. *Haribans Sahai*, for the Appellant.

Messrs. *Iswar Saran* and *Benode Bihari*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption. It appears that Janki Saran, the father of the plaintiff, purchased a certain share in the village from one *Musammat* Moti Rani, a Hindu widow. A further share was acquired by Janki Saran by auction-purchase in a sale in execution of a decree against the same *Musammat* Moti Rani. After the death of Moti Rani a person claiming to be the reversioner (Dwarka Das) sold the property to one Parmeshar, ignoring the sale by the widow and the auction-sale in execution of the decree. Then the plaintiff instituted the present suit, claiming, *first*, a declaration that he was entitled to possession by virtue of the sale by Moti Rani and the auction-purchase and, *secondly*, to pre-empt the property by virtue of a custom of pre-emption.

Janki Saran is the father of the plaintiff and they apparently are members of a joint Hindu family. Another suit for pre-emption was brought by Sheobaran alleging himself to be a co-sharer having a right of pre-emption under the custom. Each of the two pre-emptors was made defendant to the suit by his rival. In the meanwhile Parmeshar Das brought a suit for possession of the property against Janki Saran and his sons and that suit has been decreed. But the question of pre-emption was not decided.

The Court below has dismissed the plaintiff's suit on the sole ground that the plaintiff cannot maintain the suit for pre-emption because he claimed a right of possession as full owner.

In our opinion this decision was wrong. There was no reason why the plaintiff should not put his case in the alternative. Had he not done so, it might strongly be urged that he was bound to put forward every ground of attack available. In *Gandharp Singh* v. *Sahib Singh* (1) a sale was made to certain members of a joint Hindu family some of whom were not recorded as co-sharers. A suit for pre-emption was brought by a person claiming to be a co-sharer who alleged that the vendees were strangers. A Full Bench held that the vendors (being members of a joint Hindu family, which joint Hindu family was entitled to a share in the village) must be regarded as co-sharers, and not as strangers, and the suit of the plaintiff was dismissed. In the present case it is admitted that the family to which the plaintiff belongs owned a three-anna share. Consequently if we apply the principle laid down in the case referred to above, the plaintiff is a co-sharer and would be entitled to pre-empt the property, provided that no one else has a preferential right. If his right of pre-emption is equal, he would be entitled to a decree in part. All these matters must be decided by the Court below. We accordingly set aside the decree of the learned Additional District Judge and remand the case with directions to re-admit the appeal and proceed to hear and determine the same according to law, having regard to what we have stated above. The costs here and heretofore will be costs in the cause.

Decree set aside, Cause remanded.

(1) 7 A. 184(F. B.); A. W. N. (1884) 326.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1043 OF 1909.

April 18, 1914.

Present:—Mr. Justice Tudball.

MUHAMMAD ABDUL HAMID—

DEFENDANT—APPELLANT

versus

HEDAYETUNNISSA BIBI AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, Exp. IV—Suit to enforce recurring charges—Certain properties not included in former suit—Amendment of plaint before decree—No notice to defendant—Decree absolute—Defendant given notice—Second suit including those properties—Res judicata.

In a former suit to recover recurring charges the plaintiff omitted to include certain properties of the defendant, who was served with notice but did not appear. The other defendants in the suit raised a plea that these properties were also liable. Subsequently before the passing of the decree in the suit the plaintiff applied for amendment of the plaint so as to include the properties of the defendant. No notice of this application was served upon the defendant. A preliminary decree for sale of the properties including these properties was passed. The plaintiff later on applied for an order absolute under section 89 of the Transfer of Property Act. Notice of this was served on the defendant, but he again did not appear. In the present suit in respect of charges

MUHAMMAD ABDUL HAMID *v.* HEDAYETUNNISSA BIBI.

for other years the defendant raised the plea that his properties were not liable for charges:

Held, that as the defendant with full knowledge of the preliminary decree allowed the final decree to be passed without taking any objection, he was barred by the rule of *res judicata* to raise this plea now.

Second appeal from a decree of the District Judge of Allahabad.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Appellant.

Mr. *Rahmatullah*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-respondents to recover a certain sum of money charged upon certain properties. The appellant-defendant is a person who is the owner of three of the various properties against which the plaintiffs have sued. These properties are in the villages Godhna, Kursand and Gaddupur. In respect to Kursand and Gaddupur the defendant-appellant pleaded that they were not liable to the charge. The Court of first instance decreed the suit. The defendant appealed and the lower Appellate Court dismissed the appeal holding that the point in issueis *res judicata*.

The sole point for decision in the present appeal is whether or not this point is *res judicata*. The charge is a recurring charge and the present suit is to recover what has fallen due from December 31st, 1903 to June 30th, 1907. Prior to the present suit in the year 1904 a similar suit was brought by the plaintiffs to recover the charge as against the present defendant and the other defendants to the suit. Along with the plaint in the former suit, the plaintiffs filed a list B of those properties against which they sought to enforce the charge. In that list was entered the village of Godhna, but not the villages of Kursand and Gaddupur. The defendant had notice of that suit, but he did not appear and defend it. Other defendants, however, did and one point which they raised in their written statement was that the plaintiffs had omitted to sue as against some four villages of which Kursand and Gaddupur were two. An issue was framed on the point. The defence raised was that the other properties, Kursand, Gaddupur etc., were equally liable to the charge. The suit was decreed on September 9th, 1904. On September 6th, that is three days prior to the decision, the plaintiffs filed an application asking the Court to allow them to amend list B attached to the plaint and enter the villages Kursand and Gaddupur and also another village. In other words, the plaintiffs admitted that the defence on the point was good and they sought to be allowed to enforce their charge as against Gaddupur and Kursand. The Court ordered notice of the application to be given to the Pleader of those defendants who were defending the suit. Muhammad Abdul Hamid not being present and the proceedings against him being *ex parte*, no information apparently was given to him of this application. The Court decided the suit and delivered judgment and ordered the plaint to be amended by the entry of the two villages Kursand and Gaddupur in list B. The order was formally passed and carried out on the date on which judgment was delivered, and apparently after delivery of judgment the Court granted a decree for the recovery of the money by sale of the properties entered in list B, including Kursand and Gaddupur. The money not having been paid the plaintiffs on March 23rd, 1905, applied for an order absolute under section 89 of the Transfer of Property Act. Notice was issued to the defendant, Abdul Hamid, and it was served on him on March 28th, 1905. He again did not appear, no objections were taken and on May 13th, 1905, the Court passed the final decree under section 89 of the Transfer of Property Act. When the present suit was brought Muhammad Abdul Hamid raised the plea, as I have noted above, that the villages of Kursand and Gaddupur were not liable for this recurring charge. The question is whether this plea might and ought to have been made a ground of defence by him in the former suit. It is strongly urged on his behalf that as the former suit was originally brought he had no reason to defend it, that the village of Godhna was liable to the charge and the plaintiffs did not seek to enforce their charge against Kursand and Gaddupur, that the order of amendment was passed immediately after judgment had been delivered (it was probably passed at the time that the judgment was delivered), that, therefore, the appellant had no opportunity of raising the point and that, therefore, it cannot now be *res judicata* in the present suit. It seems to me, however, that after the preliminary decree had been passed and before the final decree in the suit had been

made, Muhammad Abdul Hamid received clear notice of the preliminary decree which had been passed in the case, that when he had knowledge that a preliminary decree had been passed as against the villages of Kursand and Gaddupur it was open to him to re-open the point either by way of review or by way of appeal so as to enable him to put forward his defence, that is, the present one which he has put forward in the present suit. Instead of that, with full knowledge of the preliminary decree, he allowed the final decree to be passed against him allowing the charge to be enforced against Kursand and Gaddupur without taking any objection. He at least could have asked the Court to review its decision on the ground that he had no notice of the amendment. Over and above that, if he had attended to his interests properly in the suit of which he had full notice, he would have (at a very early stage) become aware of the plea taken by his co-defendants and also become aware of the change of position taken up by the plaintiffs. It is clear that if he could have raised the defence in the fromer suit he ought to have raised it; and, in my opinion, in view of the facts stated above, he could have raised it in the first suit and most certainly ought to have done so. It is too late for him now, in the present suit, to raise the plea after he had allowed judgment to go against him in the former suit. Under the circumstances, I must hold that the decision of the Court below is correct. This is the only point raised in this appeal. It, therefore, fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1860 OF 1910.

May 26, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

RAJAH MAKUND DEB—PLAINTIFF—APPELLANT

versus

GOPI NATH SAHU AND OTHERS—DEFENDANTS—RESPONDENTS.

Document, construction of—Words, meaning and effect of—Question of fact or law—Appeal, second.

The expression "construction" as applied to a document includes two things, *first*, the meaning of the words and, *secondly*, their legal effect. The meaning of the word is a question of fact in all cases, the effect of the word is a question of law.

Consequently, where a document is of such a character that it does not create, modify, or extinguish the rights and obligations of the parties or otherwise affect their status, no question of its legal effect arises and, therefore, the construction of such a piece of documentary evidence does not raise a question of law.

Lachman Lal v. *Kanhaya Lal*, 22 I. A. 51; 22 C. 609 (P. C); *Mayandi Chettiar* v. *Chokalingam Pillai*, 8 C. W. N. 545, 19 M. L. J. 200 (P.C.); 31 I. A. 83; 27 M. 291; *Chokalingam Pillai* v. *Mayandi Chettiar*, 19 M. 485; 6 M. L. J. 247, *Lala Fateh Chand* v. *Rani Kishen Kaur*, 16 Ind. Cas. 67; 39 I. A. 247 at p. 255; 17 C. L. J. 1 (P. C.); 16 C. W. N. 1033; 23 M. L. J. 330; 12 M. L. T. 413; (1912) M. W. N. 1065; 10 A. L. J. 335; 14 Bom. L. R. 1090; 34 A. 579; *Kishen Kunwar* v. *Fateh Chand*, 29 A. 203; 4 A.L.J. 38; A.W.N. (1906) 307; *Muhammad Imam Ali Khan* v. *Husain Khan*, 25 I. A. 161 at p 169; 26 C. 81 (P. C.); 2 C W. N. 737; *Parbati* v *Chandrapal*, 4 Ind. Cas 25; 36 I. A. 125, 31 A. 457; 10 C L. J. 216; 13 C. W. N. 1073; 6 A. L. J. 767; 11 Bom. L. R. 890; 12 O. C. 304; 19 M. L. J. 605, 5 M. L. T. 427 (P. C.); *Thakur Amrit Singh* v *Thakur Durga Singh*, 6 Ind. Cas. 787; 37 I. A. 191; 32 A. 363; 12 C. L. J. 36, 14 C. W. N. 770; 7 A. L. J. 704; 12 Bom. L. R. 504, 8 M L. T. 79, 20 M. L. J. 604; 13 O. C 163 (P. C.), (1910) M. W N. 324, *Lala* v. *Muthdhar*, 33 I A 92; 28 A. 488; 3 A. L J. 415; 10 C. W. N. 730, 8 Bom. L. R 402, 3 C. L J 594; 1 M. L. T. 171, *Lachmeshwar Singh* v *Manowar Hossein*, 19 I A. 48 (P. C.); 19 C. 253; *Rungopal* v *Shamshaton*, 19 I. A. 228; 20 C. 93 (P. C.), *Moharam Sheikh* v. *Tajimuddin*, 13 Ind. Cas 606; 15 C. L J 220; 16 C. W. N. 567; *Krishna Kishore* v. *Mir Mahomed Ali*, 3 C. W. N. 255; *Sulatu Das* v. *Jadu Nath*, 8 C W. N. 774 (F B.); *Maruti* v. *Banubai*, 4 Bom. L. R. 801; *Rajaram* v. *Ganesh Hari*, 21 B. 91, followed.

Unless there is a question of the legal effect of a deed which may be treated as a document of title or embodies a contract or is the foundation of the suit, a second appeal does not lie. A second appeal is not admissible merely because some portion of the evidence is in writing of which the meaning has been mistaken by the lower Appellate Court.

Pertap Chunder Ghosh v. *Mohendra Nath*, 16 I. A. 233; 13 Ind. Jur. 370; 9 Sar. P. C. J. 444; 17 C. 291 (P. C.); *Durga* v. *Jowahir Singh*, 17 I. A. 122; 18 C. 23 (P. C.); *Ramratan* v. *Nandu*, 19 I. A. 1; 19 C. 249 (P. C.); *Lachman* v. *Kanhaya*, 22 I. A. 51; 22 C. 609 (P. C.); *Shivabasava* v. *Sangappa*, 31 I. A. 154; 29 B 1; 6 Bom. L. R. 770; 8 C. W. N. 865; 1 A. L. J. 637 (P. C.), *Hari Mohun* v. *Surendra Narayan Singh*, 34 I A. 133; 34 C. 718, 2 M. L. T. 399; 11 C. W. N. 794; 4 A. L. J. 497; 6 C. L. J. 19; 9 Bom. L. R. 750; 17 M. L. J. 361 (P. C.), referred to.

Appeal against the decree of the District Judge, Cuttack, dated 19th February 1910, affirming that of the Sub-Judge, Cuttack, dated 21st September 1908.

Mr. *B. Chakravarti*, with Babus *Narendra Chandra Bose*, *Suresh Chandra Chakravarti* and *Charu Chandra Biswas*, for the Appellant.

Babu *Ram Chandra Majumdar*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit for declaration of title to land and for ejectment of the defendants or, in the alternative, for assessment of fair rent payable by them. Defendants resisted the claim for ejectment and contended that as they were permanent tenure-holders under the plaintiff, the rent was not liable to enhancement. The Courts below have concurrently dismissed the suit. The District Judge has held that there was a strong body of documentary evidence to show that the defendants and their predecessors had been continuously recognised as holders of a permanent tenure from before 1837 and that there was no relevant evidence inconsistent with the existence of the tenure. The nature of the documentary evidence, upon which the Courts below have relied, may be briefly described. The first piece of documentary evidence in order of time is a Settlement field book dated the 10th February 1837, in which it is recorded that village Satrapur, now in dispute, was held by the predecessors of the defendants as *mokaddamis*. The term *mokadlami* is applied to the interest of those who collected rent under Muhammadan Rulers. The use of the word in the particular document in this sense is confirmed by the descriptions of the predecessors of the defendants as *malguzardar* or *sarbarakar* in a Settlement *robakari* dated the 30th April 1841. The Courts below have concurrently held that these documents, prepared at a time when there was apparently no dispute between the parties, furnished valuable evidence of a *mokaddami* tenure in the village in suit, which was in existence 70 years before the commencement of this litigation and was held at the time by persons now represented by the defendants. The Courts below have also relied on two judgments, original and appellate, dated the 28th May and 20th November, 1839, respectively, passed in a suit in which the existence of the *mokaddami* tenure was asserted though unsuccessfully. The next document is a sale certificate dated the 11th August 1853 by which the *sarbarakari* tenure was sold in execution of a decree and was purchased by the ancestor of the defendants. Next year, the predecessor of the plaintiff, in execution of a decree for arrears of rent against the original holders of the *sarbarakari* tenure, attached the property and got a sale proclamation issued on the 27th April 1854. The sale was apparently averted by the purchaser at the prior execution sale, and he and his successors continued in occupation of the tenure by payment of rent to the predecessors of the plaintiff. In 1894 the holders of the tenure effected a partition of the lands under an award of arbitrators dated the 28th December 1894. The tenure was divided into two unequal shares with different rentals, and this sub-division was sanctioned by a *robakari* dated the 7th September 1896, signed by the manager of the plaintiff landlord. Lastly, in 1897, the defendants, who are the present holders of the two fragments of the original tenure, were recorded on the settlement proceedings as *sarbarakars*. On a review of this evidence supplemented by oral evidence of possession and payment of rent the Courts below have held that the tenure set up by the defendants had a lawful origin and a real existence from before 1837, and that they are not trespassers but permanent tenure holders. On second appeal an earnest endeavour has been made to assail this finding on the ground that it is based on an erroneous construction of the documentary evidence on the record. In our opinion, no question of construction of documents such as may be raised and examined in an appeal from appellate decree arises in the present case, but as the contrary view has been strenuously supported, it is desirable to reiterate the principle applicable to cases of this charactor.

In the case of *Nowbut Singh* v. *Chutter Dharee Singh* (1) Sir Richard Couch, C. J., laid down the fundamental principle that the misconstruction of a document which is the foundation of the suit, being in the nature of a contract or a document of title, is a ground of special appeal; but special appeal does not lie because of a mistake as to the meaning of some portion of the evidence which is in writing, if it is connected with other evidence affecting its construction. This view was possibly not quite in harmony

(1) 19 W. R. 222.

with that indicated in *Lalla Imrit Lall* v. *Mahomed Lallzamah* (2), but is in accord with the rule laid down in *Udit Narain* v. *Maheswar Bux* (3), *Himmat Ali* v. *Nyamutoolla* (4) and *Bungshee Dhur* v. *Madhoo Soodun* (5). No useful purpose would be served by a detailed examination of all the cases in which the rule laid down by Sir Richard Couch has been strictly applied, but reference may be made, amongst other cases, to the decisions in *Shib Chandra* v. *Chandra Narain*(6), *Ananda Chandra* v. *Parbati Nath* (7), *Darsun Singh* v. *Durbijoy Singh* (8), *Braja Mohun* v. *Thakur Das* (9), *Buzlul Karim* v. *Satish Chandra Giri* (10), *Rai Benode Behari* v. *Rai Pasupati Nath* (11) and *Madan Mohan* v. *Manmatha Nath* (12), where an unsuccessful attempt was made to obtain a reversal of the decision of the lower Appellate Court on the ground that it was based on a misconstruction of documentary evidence. On the other hand, in the case of *Hara Sundar* v. *Basunta Kumar* (13) where a question arose as to the legal effect of a deed of dedication of endowed property, namely, whether the property became the absolute *debutter* of the deity or retained its secular character in the hands of the *shebait*, though subject to a religious charge, the matter was treated as one of law. There can, in our opinion, be no room for controversy as to the correctness of the principle which was accurately formulated by Sir Richard Couch, though there may have been occasionally a loose application of the rule. As Lindley, J., put it in *Chatenay* v. *Brazilian Submarine Telegraph Co.* (14), the expression "construction" as applied to a document includes two things, *first*, the meaning of the words and, *secondly*, their legal effect or the effect which is to be given to them. The meaning of the words is a question of fact in all cases, whether we are dealing with a poem or a legal document, the effect of the words is a question of law. Consequently where the document is of such a character that it does not create, modify or extinguish the rights and obligations of the parties or otherwise affect their status, no question of its legal effect arises and consequently the construction of such a piece of documentary evidence does not raise a question of law. This is well illustrated by several cases decided by their Lordships of the Judicial Committee. In *Lachman Lal* v. *Kanhaya Lal* (15) documentary evidence was adduced to prove the factum of an adoption. Lord Shand held that the question was not one of construction of one or more deeds which would be a question of law, but was a question as to the effect to be given to decrees, leases and other documents as evidence of the fact of adoption and its consequences. Again, in *Mayandi Chettiar* v. *Chokalingam Pillai* (16), where their Lordships reversed the decisions of the Madras High Court in *Chokalingam Pillai* v. *Mayandi Chettiar* (17), the question was raised whether the transaction evidenced by a *muchilika*-deed was a new grant or a confirmation with modification of a previous grant. Sir Andrew Scoble held that this was a question of the legal effect of the deed on which the title of the parties rested and was a question of law, upon which their Lordships disagreed with the Judges of the High Court. In the case of *Lala Fateh Chand* v. *Rani Kishen Kaur* (18) where the question in controversy was, whether the plaintiff had a proprietary title to the lands in suit, the construction of a *Wajib-ul-arz*, which had been prepared by the Settlement Authorities and which contained a Record of the Rights of the proprietors and the tenants, was treated as a question of law, on which their Lordships agreed with the Judges of the High Court: *Kishen Kunwar* v. *Fateh Chand*(19). This case may possibly be regarded as just on the border-line, because in proof of their title,

(2) 18 W. R. 447.
(3) Agra H. C. R. (F. B.) 32.
(4) 23 W. R. 250.
(5) 23 W. R. 406.
(6) 32 C. 719; 1 C. L. J. 232.
(7) 4 C. L. J. 198.
(8) 1 Ind. Cas. 530; 9 C. L. J. 623.
(9) 4 Ind. Cas. 732; 10 C. L. J 593
(10) 10 Ind. Cas. 325; 13 C. L. J. 418; 15 C. W. N. 752.
(11) 4 Ind. Cas. 329; 13 C. W. N 105
(12) 13 Ind. Cas. 425.
(13) 9 C. W. N. 154.
(14) (1891) 1 Q. B. 79 at p. 85; 60 L. J. Q. B. 295; 63 L. T. 739; 39 W. R. 65.
(15) 22 I. A. 51; 22 C. 609 (P.C.).
(16) 31 I. A. 83; 27 M. 291; 8 C. W. N. 545; 19 M. L. J. 200 (P. C.).
(17) 19 M. 485; 6 M. L. J 217.
(18) 16 Ind. Cas. 67; 39 I. A. 247 at p. 255; 17 C. L. J 1 (P. C.), 16 C. W. N. 1033; 23 M. L. J. 330; 12 M. L. T. 413; (1912) M. W. N. 1065; 10 A. L. J. 335; 14 Bom. L. R. 1090; 34 A. 579.
(19) 29 A. 203; 4 A. L. J. 38; A. W. N. (1906) 307.

the plaintiff relied not only on the *Wajib-ul-urz*, but also on other documentary evidence which could not be properly called documents of title. Besides, the earlier decisions of the Judicial Committee in *Muhammad Imam Ali Khan* v. *Husain Khan* (20), *Parbati* v. *Chandrapal* (21), *Thakur Anant Singh* v. *Thakur Durga Singh* (22) and *Lali* v. *Murlidhar* (23) indicate that as to some of the entries, at any rate, in a *Wajib-ul-urz* the question may be, not of construction in the strict sense, but only of evidentiary value. The case of *Nilmoni Singh* v. *Kirti Chunder* (24) is clearly distinguishable, as the question there related to the limits of the powers of the Judicial Committee in the hearing of an appeal when there are concurrent findings of fact by two Indian Courts; such powers, though artificially restricted by well-recognised rules of practice, are still wider than those of a Court of second appeal. To put the matter briefly, if there is a question of the legal effect of a deed or of a legal inference to be drawn from the facts found, there is a good ground of second appeal. This is conclusively shown by the decisions in *Sevaji* v. *Chinna Nayana Chetti* (25), where the question arose whether a transaction could be treated as a mortgage when its alleged character as a sale had not been established, *Lachmeshwar Singh* v. *Manowar Hossein* (26) and *Ramgopal* v. *Shamaskhaton* (27), where the question arose whether the possession was of an adverse character, *Rampal Singh* v. *Balbhadar Singh* (28), where the question arose whether knowledge of facts on the part of an agent could be imputed to the principal, *Mohoram Sheikh* v. *Telamuddin* (29), *Krishna Kishore* v. *Mir Mahomed Ali* (30), *Sulatu Das* v. *Jadu Nath* (31), *Maruti* v. *Bannbai* (32), where the question arose whether a tenant was of a temporary or of a permanent character, and *Girdhar Das* v. *Ram Autar Singh* (33) where the question arose whether a prior charge had been kept alive or extinguished. The case of *Rajaram* v. *Ganesh Hari* (34), where the question arose whether existence of title could be inferred from acts of ownership, which was treated as a mixed question of law and fact, may possibly be deemed to lie on the border line. We hold, accordingly, that unless there is a question of the legal effect of a deed which may be treated as a document of title or embodies a contract or is the foundation of the suit, a second appeal does not lie. A second appeal is not admissible merely because some portion of the evidence is in writing of which the meaning has been mistaken by the lower Appellate Court: *Pertap Chunder* v. *Mohendra Nath* (35), *Durga Chowdhrani* v. *Jowahir Singh* (36), *Ramratan* v. *Nandu* (37), *Lachman Lal* v. *Kanahaya Lal* (15), *Shivabasava* v. *Sangappa* (38) and *Hari Mohun* v. *Surendra Narayan Singh* (39). In our opinion, the decision of the District Judge does not involve any error of law and there is no ground for this second appeal.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(20) 25 I. A. 161 at p. 169; 26 C. 81 (P. C.); 2 C. W. N. 737.
(21) 4 Ind. Cas. 25; 36 I. A. 125; 31 A. 457; 10 C. L. J. 216; 13 C. W. N. 1073; 6 A. L. J. 767; 11 Bom. L. R. 890, 12 O. C. 304; 19 M. L. J. 605; 5 M. L. T. 427 (P. C.).
(22) 6 Ind. Cas. 787; 37 I. A. 191; 32 A. 363; 12 C. L. J. 36; 14 C. W. N. 770; 7 A. L. J. 704; 12 Bom. L. R. 504; 8 M. L. T. 79; 20 M. L. J. 604; 13 O. C. 163 (P. C.); (1910) M. W. N. 324.
(23) 33 I. A. 97; 28 A. 488; 3 A. L. J. 415; 10 C. W. N. 730; 8 Bom. L. R. 402; 3 C. L. J. 594; 1 M. L. T. 171.
(24) 20 I. A. 95; 20 C. 847 (P. C.).
(25) 10 M. I. A. 151 at p. 164; 2 Sar. P. C. J. 88; 19 E. R. 929.
(26) 19 I. A. 48 (P. C.); 19 C. 253.
(27) 19 I. A. 228; 20 C. 93 (P. C.).
(28) 29 I. A. 203; 25 A. 1; 4 Bom. L. R. 832; 6 C. W. N. 849 (P. C.).
(29) 13 Ind. Cas. 606; 15 C. L. J. 220; 16 C. W. N. 567.
(30) 3 C. W. N. 255.
(31) 8 C. W. N. 774 (F. B.).
(32) 4 Bom. L. R. 801.
(33) 8 C. W. N. 690.
(34) 21 B. 91.
(35) 16 I. A. 233; 17 C. 291 (P. C.); 13 Ind. Jur. 370; 5 Sar. P. C. J. 444.
(36) 17 I. A. 122; 18 C. 23 (P. C.).
(37) 19 I. A. 1; 19 C. 249 (P. C.).
(38) 31 I. A. 154; 29 B. 1; 6 Bom. L. R. 770; 8 C. W. N. 865; 1 A. L. J. 637 (P. C.)
(39) 34 I. A. 133; 34 C. 718; 2 M. L. T. 399; 11 C. W. N. 794; 4 A. L. J. 497; 6 C. L. J. 19; 9 Bom. L. R. 750; 17 M. L. J. 361 (P. C.).

RAMCHANDRA MARTAND WAIKAR *v.* VINAYAK VENKATESH KOTHEKAR.

PRIVY COUNCIL.

APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.

June 29, 1914.

Present:—Lord Moulton, Lord Parker of Waddington, Sir John Edge and Mr. Ameer Ali.

RAMCHANDRA MARTAND WAIKAR AND OTHERS—APPELLANTS

versus

VINAYAK VENKATESH KOTHEKAR AND ANOTHER—RESPONDENTS.

Hindu Law—Mitakshara—*Inheritance*—Bandhu—Sapinda—Bhinna-gotra sapinda *beyond 5th degree, whether entitled to inherit—Interpretation of Hindu Law.*

The *sapinda* relationship (according to the *Mitakshara* school), on which the heritable right of collaterals is founded, ceases in the case of the *bhinna-gotra sapinda* with the fifth degree from the *propositus* and in order to entitle a man to succeed to the inheritance of another, he must be so related to the latter that they are *sapindas* of each other.

In the *Mitakshara* the word *bandhu* signifies the *bhinna-gotra sapindas, i. e.*, the *sapindas* belonging to a different family *gotra*.

Sapinda-relationship explained.

The Hindu Law contains its own principles of exposition. Therefore, the questions arising under it cannot be determined on abstract reasoning or analogies borrowed from other systems of law, but must depend for their decision on the rules and doctrines enunciated by its own law-givers and recognised expounders.

Gridhari Lal Roy v. *The Government of Bengal*, 12 M. I. A. 448, 10 W. R. (P. C.) 31; 1 B. L. R. (P. C.) 44; 2 Suth. P. C. J. 159; 2 Sar. P. C. J. 382; 20 Eng. Rep. 408, which laid down that the enumeration of *bandhus* was not exhaustive but merely illustrative explained.

Babu Lal v. *Nanku Ram*, 22 C. 339; *Lallubhai* v. *Mankuvarbhai*, 2 B. 388; 7 I. A. 112; *Umaid Bahadur* v. *Udoi Chand*, 6 C. 119 (F. B.); 6 C. L. R. 500; 5 Ind. Jur. 585; 3 Shome L. R. 146, referred to.

[Authorities on Hindu Law reviewed:—Mayne's Hindu Law, West & Buhler's Digest of Hindu Law, Vol. I, pages 119, 120, Saravadhikari's Tagore Law Lectures, Shastri Gulab Chunder Sarkar's Translation of Viramitrodaya, Rao Vishwanath Mandlik's Translation of Yajnavalkya, Commentary on Hindu Law by J. N. Bhattacharya].

Appeal from a judgment and decree of the Court of the Judicial Commissioner of the Central Provinces, dated March 23rd, 1910, affirming those of the Court of the District Judge of Bhalaghat, dated February 26th, 1907.

FACTS are sufficiently set out in their Lordships' judgment.

Mr. *De Gruyther, K. C.*, with him Mr. *Parekh*, for the Appellants, contended that under the *Mitakshara* Law the limit of the *sapinda* relationship *ex* (*parte*) *materna* was seven degrees and that the appellants were entitled to succeed as *matri-bandhus*, their mother being within five degrees as in the *Acharkand* of the *Mitakshara* for the purposes of marriage.

[MR. AMEER ALI:—You say there is no limitation to the word *sapinda*].

The term *sapinda* means blood and blood relatives only.

[LORD MOULTON:—In the Courts below both parties took it for granted that some limitation to *sapindaship* should be applied].

A *sapinda* for one purpose was not necessarily a *sapinda* for another, as *sapinda* for adoption extended to seven degrees in adoptor's family. It has different meanings for different purposes. All *Sanskrit* writers had differently used the word *sapinda*. You cannot apply the principle of prohibited degrees of relationship to inheritance as in that case son would succeed and father would not (Mandlik's Mayukha and Yajnavalkya).

[LORD MOULTON:—There may be one rule for one thing and another for another thing].

In Viramitrodaya, a commentary on *Mitakshara*, Chapter 3, part 7, sections 4, 5 and 6, the value of which was regarded as authoritative on the Hindu Law in *Gridhari Lal Roy* v. *The Government of Bengal* (1), supported by *Mitakshara*, Chapter 2, section 6, paragraph 2, the same was laid down on *bandhu*.

[MR. AMEER ALI:—Your argument is that your client does not come under those who are mentioned in text books but you wish it to be extended on the ground that the Privy Council has done so in several cases].

[LORD MOULTON:—Limitation may not be reversible. You say whatever may be the limitation, it is reversible].

There must be some principle of determination other than prohibited degree. *Umaid Bahadur* v. *Udoi Chand* (2) was no authority for applying prohibited degree.

[MR. AMEER ALI:—There must be mutuality in inheritance. You have made out that authors are not against you].

Golab Chunder Shastri had clearly enunciated the law that when inheritance was claimed through a mother, *sapinda*-relationship extended to seven degrees or at least to six degrees. Apararka, a commentator

(1) 12 M. I. A. 448; 10 W. R. (P. C.) 31; 1 B. L. R. (P. C.) 44; 2 Suth. P. C. J. 159; 2 Sar. P. C. J. 382; 20 Eng. Rep. 408.

(2) 6 C. 119 (F. B.); 6 C. L. R. 500; 5 Ind. Jur. 585; 3 Shome L. R. 146.

on the Yajnavalkya, supported the view of *Mitakshara* that in the case of females too *sapindaship* extended to six degrees.

Reference was made to *Mitakshara*, Chapters 1 and 2, sections 1 and 3, paragraphs 5, 4, section 5, paragraphs 2, 6; Mandlik's Hindu Law, page 169, Chapter Gotra; Shama Charan Sarkar's Vyavastha Chandrika, page 192; Viramitrodaya, Chapter 3, part 7, sections 4, 5 and 6; West and Buhler's Digest of Hindu Law, page 17; Mayne's Hindu Law, pages 683, 685; Ghosh's Hindu Law, page 53; Golap Chandra Shashtri's Hindu Law, pages 74, 76, 291, 296; *Umaid Bahadur* v. *Udoi Chand* (2); *Babu Lal* v. *Nanku Ram*(3); *Lallubhai* v. *Mankuvarbai*(4); *Gridhari Lal Roy* v. *The Government of Bengal* (1).

Messrs. *Ross*, *K. C.*, and *Lowndes*, for the Respondents, contended that the appellants were not heirs according to Hindu Law of Laxman Rao. A *sapinda* of the *propositus*, to be capable of inheritance, must satisfy a further condition, *viz.*, that he must be so related to the *propositus* that the latter was also his *sapinda* either directly or through the father or the mother. There must be mutuality between the *propositus* and the heritable *sapinda*. This was laid down in Manu, Chapter IX, verse187, and cited in *Mitakshara*, Chapter II, section 3, as intrepreted by Balambhatta and Visweswara Bhutt.

The relationship by *sapindaship* as given by Vijnaneswara and Nilakantha was the same for inheritance as for marriage. It had been so regarded in West and Buhler, page 434, which also laid down (Volume I) that in the mother's line *sapindaship* ceased with the fifth person. The same was mentioned in Saravadhikari's Tagore Law Lectures 1884, page 702.

Reference was made to Manu, Chapter 9, verse 153, Chapter 3, verse 216; West and Bhuler, *Mitakshara*, Chapter 2, section 1, verse 6, section 2, verse 6; *Umaid Bahadur* v. *Udoi Chand* (2); *Babu Lal* v. *Nanku Ram* (3).

Mr. *De Gruyther* in reply.

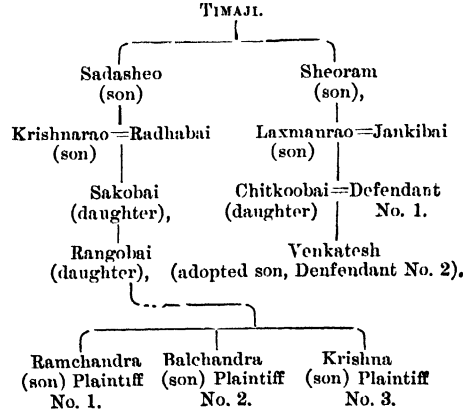
JUDGMENT.

MR. AMEER ALI.—The suit that has given rise to the present appeal was brought by the plaintiffs in the Court of the District Judge of Balaghat, in the Central Provinces of India, for possession of certain properties which originally belonged to one Laxmanrao, whose next-of-kin or *bandhus* they claim to be under the law of the *Mitakshara*.

Laxmanrao died in 1851, leaving him surviving his widow Jankibai and a daughter Chitkoobai, both since deceased. The defendant Venkatesh is Chitkoobai's husband. On Laxmanrao's death without male issue his inheritance devolved on Jankibai. She held possession of the properties in suit as a Hindu widow until her death in 1883, when Chitkoobai succeeded to her father's estate. She died on the 7th of May 1894, leaving the first defendant, her husband. The second defendant is a son adopted by him after Chitkoobai's decease.

The present action was not instituted until March 1906. The plaintiffs claim that the inheritance to Laxmanrao opened to them on the death of Chitkoobai, and that they are entitled to recover possession of the properties from the defendants who have no right of succession to Laxmanrao's estate.

The following genealogical table will explain the relative position of the parties and the exact nature of the claim:—



The defendants resisted the claim mainly on two grounds. They alleged, *firstly*, that the ancestors of the parties had migrated to the Central Provinces from Asirgarh situated within the Mahratta country, where the law in force conferred on the daughter succeeding to her father's inheritance an absolute estate descendible to her own heirs; that the family of Timaji was still subject to that law, and that accordingly the estate which Chitkoobai had acquired passed on her

(3) 22 C. 339.
(4) 2 B. 388.

death without issue to the first defendant, her husband. In the second place, they urged that the plaintiffs had no heritable right or interest in Laxmanrao's estate as they did not come within the category of *bandhus* entitled to succeed to his inheritance.

The Courts in India have overruled the first plea and have held that on settling in the Central Provinces the family of Timaji adopted the *lex loci* and are now governed by the rules of the *Mitakshara* generally in force in that Province.

But they have given effect to the defendants' second contention: they have held in substance that the *Mitakshara* lays down a well-defined limit where the kinship entitling *bandhus* to succession ceases, and that the plaintiffs are beyond that limit. They have accordingly dismissed the suit.

The plaintiffs have appealed to His Majesty in Council, and the case has on both sides been argued with considerable ability and learning.

In dealing with the arguments addressed to this Board on behalf of the appellants their Lordships cannot help noticing one circumstance, *viz.*, that in the Courts below, so far as appears from the record, it was not denied that there was a limit to the heritable right of *bandhus*, the only contention being whether it was seven degrees from the *propositus* or five as urged by the defendants. Before this Board, on the other hand, it has been strenuously contended that there is no limit to the succession of *bandhus*. Their Lordships do not wish, however, to draw any inference from this change of ground, for what they have to determine in this appeal is whether the term *bandhu* is to be construed, as the plaintiffs argue, in the broadest sense, or whether it is subject to any limitation, and in the latter case what that limitation is according to the law by which the parties are governed.

In the Hindu Law the succession of heirs individually specified does not present much difficulty; the controversies and divergences amongst Hindu lawyers are chiefly concerned with collateral succession. Manu, the ancient sage, whose identity is lost in the mist of ages but whose word is regarded as divine, after giving the rules regarding the succession of lineal male descendants and male ascendants, declares: "The property of a near *sapinda* shall be that of a near *sapinda*".* Sir William Jones in his translation of Manu's Institutes has rendered the passage somewhat differently, but for the purposes of the present judgment it is of little importance.

It is upon this enunciation that all the schools base the right of collaterals to succeed to the inheritance of a deceased person. This refers only to the succession of one male to another, for females inherit by express rules. The right of collaterals, therefore, is dependent on the existence of the *sapinda*-relationship between the *propositus* and the claimant. The contest that has arisen in the several schools is with regard to the meaning to be attached to the term *sapinda*, in other words, what does *sapinda*-relationship imply, and what is the true test for determining whether a particular person is a *sapinda* to the deceased or not? Jimutavahana, the author of the *Dayabhaga*, the guiding authority in the Bengal or *Gauriya* school, considers it to mean "community in the offering of funeral oblations". He draws his argument from the word *pinda*, which literally signifies a ball of rice offered at the performance of obsequial rites. Mr. Lowndes is probably right that in early times the right of inheritance was dependent on the right to participate in the offering of funeral oblations, a doctrine which is part and parcel of the *Dayabhaga* rules.

But it is also clear that Vijnaveswara, the author of the *Mitakshara*, who appears to have flourished towards the end of the 11th and the beginning of the 12th century of the Christian era, some five centuries before Jimutavahana, abandoned the ancient doctrine and construed *sapinda*-relationship to arise from community of blood, or to use the quaint language of Hindu writers, "community of particles of the same body." His legal conception in this respect will appear clearly from a passage of the *Mitakshara*, Book I, Chapter on Marriage, not included in Mr. Colebrooke's Translation. To this passage their Lordships will have to refer later on in the course of this judgment.

Messrs. West and Buhler, in their "Digest

*Chapter IX, v. 187. This is the translation given by Mr. Justice Banerjee in *Babu Lall* v. *Nanku Ram*, 22 C. 339.

of the Hindu Law," whose merit and authority have been recognised by eminent Hindu lawyers, have examined in detail the doctrines of the *Mitakshara* on this point, and their general conclusion as to Vijnaneswara's legal conception of *sapinda*-relationship is summed up in the following words, that he based it "not on the presentation of funeral oblations but on descent from a common ancestor, and in the case of females also on marriage with descendants from a common ancestor." Mr. Colebrooke in his rendering of the *Mitakshara* has paraphrased *sapinda* as a relation "connected by funeral oblations," which resulted in virtually obliterating one of the main distinctions between the Benares and the Bengal schools. But it is now recognised that his paraphrase was erroneous, and that the true theory of *sapinda*-relationship propounded by Vijnaneswara was based on community of blood. It is on this theory of Vijnaneswara that the learned Counsel for the appellants place their chief reliance. The plaintiffs, it is urged, are unquestionably related to Laxmanrao by tie of blood; they are, therefore, his *sapindas*, and consequently, in the absence of nearer kinsmen, entitled to his inheritance. It is to be remarked, as has been observed in previous cases before this Board, that the Hindu Law contains its own principles of exposition and that questions arising under it cannot be determined on abstract reasoning or analogies borrowed from other systems of law, but must depend for their decision on the rules and doctrines enunciated by its own law-givers and recognised expounders.

The *Mitakshara* purports to be a commentary on the work of Yajnavalkya, who is supposed to have lived about the second century of the Christian era, about a thousand years before Vijnaneswara. In the *Mitakshara* he is spoken of in terms of deep veneration; and his doctrines, developed by Vijnaneswara, certainly show a marked advance over the legal conceptions of his predecessors. So far as their Lordships have been able to ascertain, the *bandhus*, or distant kinsmen related to the deceased through females, make their appearance as heirs first in Yajnavalkya's enunciations. Mr. Borradaile, in the first volume of his Reports of the Bombay Sudder Dewany Adalut Decisions, has given a translation of the Index to the *Mitakshara*, which furnishes a general idea of the scheme of this great and important work of Hindu Law. It consists of two books: the first, called the *Acharadhyaya*, "On Established Rules of Conduct or Ordinances"; the second, the *Vyavaharadhyaya*: "On the Laws and Customs of the People." Both books, however, are so inter-related that the rules of the one can scarcely be construed without reference to the other.

It is to be noted that in the *Vyavastha Chandrika* the Book on "Established Rules of Conduct" is cited as the *Acharadhyaya* ("Chapter or Book on Established Rules of Conduct"), whilst in the decisions of the Indian Courts and recent works on Hindu Law, it is referred to under the name of the *Acharakanda* ("Division or Part relating to Established Rules of Conduct").

In the third Chapter of the *Acharakanda* Vijnaneswara lays down the rules relating to the forbidden degrees of kindred, and here he defines his theory of relationship. A translation of this passage is to be found in the "Digest of Hindu Law,"* by West and Buhler, and also in the judgment of the Bombay High Court in *Lallubhai* v. *Mankuvarbai*(4), which came an appeal to His Majesty in Council and was affirmed by this Board, *Lallubai* v. *Vassibai* (5).

That passage runs thus:—

"(He should marry a girl) who is non-*sapinda i. e.*, a *sapinda* (with himself). She is called his *sapinda* who has (particles of) the body (of some ancestor) in common (with him). Non-*sapinda* means not his *sapinda*. Such a one (he should marry). *Sapinda*-relationship arises between two people through their being connected by particles of one body. Thus the son stands in *sapinda*-relationship to his father, because of particles of his father's body having entered (his). In like (manner stands the grandson in *sapinda*-relationship) to his paternal grandfather and the rest, because through his father, particles of his (grandfather's) body have entered into (his own). Just so is (the son a *sapinda*-relation) of his mother, because particles of his mother's body have entered (into his). Likewise (the grandson stands in *sapinda*-relationship) to his maternal grandfather, and the rest through his mother. So also (is the nephew) a *sapinda*-relation of his maternal aunts and uncles and the rest, because particles of the

(5) 7 I. A. 212; 5 B. 110, 7 C. L. R. 445.

* Volume I, page 120.

same body (the paternal grandfather) have entered into (his and theirs); likewise (does he stand in *sapinda*-relationship) with paternal uncles and aunts, and the rest. So also the wife and the husband are *sapinda*-relations to each other, because they together beget one body (the son). In like manner brothers' wives also are (*sapinda*-relations to each other) because they produce one body (the son), with those (severally) who have sprung from one body (*i.e.*, because they bring forth sons by their union with the offspring of one person, and thus their husbands' father is the common bond which connects them). Therefore, one ought to know that wherever the word *sapinda* is used, there exists (between the persons to whom it is applied) a connection with one body, either immediately or by descent."

Then after refuting certain objections to his explanation of the word *sapinda*, Vijnaneswara proceeds thus:—

"In the explanation of the word '*asapindam*' (non-*sapinda*, verse 52), it has been said that *sapinda*-relation arises from the circumstance that particles of one body have entered into (the bodies of the person thus related) either immediately or through (transmission by) descent. But inasmuch as (this definition) would be too wide, since such a relationship exists in the eternal circle of births, in some manner or other, between all men, therefore, the author (Yajnavalkya) says:—

"Verse 53: 'After the fifth ancestor on the mother's and after the seventh on the father's side.'

"On the mother's side in the mother's line, after the fifth, on the father's side in the father's line, after the seventh (ancestor), the *sapinda*-relationship ceases; these latter two words must be understood; and, therefore, the word *sapinda*, which on account of its (etymological) import (connected by having in common) particles (of one body) would apply to all men, is restricted in its signification, just as the word *pankaja* (which etymologically means 'growing in the mud,' and, therefore, would apply to all plants growing in the mud, designates the lotus only) and the like; and thus the six descendants, beginning with the son, and one's self (counted) as the seventh (in each case), are *sapinda*-relations*."

* West and Buhler, Vol. I, page 120.

The rendering of the above passages by Pandit Rajkumar Sarvadhikari though apparently more free is certainly instructive and interesting, and deserves quotation as showing what a learned Hindu scholar considered was in the mind of Vijnaneswara when defining the word *sapinda*:

"The *Mitakshara* then explains the following words in the next verse of Yajnavalkya, beyond the fifth and seventh degrees on the mother's side and the father's side respectively.

"It has been already explained, that the relation of *sapinda* exists by reason of the connection of the parts of the same body, both directly and indirectly. But such a relationship is possible everywhere, in some way or other, between all men in this wide, wide world without a beginning. So the definition would be too wide. It is for this reason that the sage limits it thus, beyond the fifth, &c.

"The meaning is 'on the mother's side', *i.e.*, in the line of the mother, after the fifth degree: 'on the father's side,' *i.e.*, in the line of the father, after the seventh degree, the relation of *sapinda* ceases.

"Although the word *sapinda*, therefore, may be applied in its etymological sense almost to all men it is, there can be no doubt, limited in its signification to certain definite individuals; just as the word mud-born is applied only to a lotus.

"Thus the father and the other ascendants are six *sapindas*; and the son and the other descendants are six; and the man himself is the seventh. In case of the division of a line also, the enumeration should be made until the seventh degree, commencing from whence the direction of the line changes. This rule should be applied in every case."*

Their Lordships have no manner of doubt that in the passages quoted above, Vijnaneswara was laying down rules for the limitation of *sapinda*-relationship generally.

It has been suggested in argument that this limitation is with regard to marriage only; that it defines the prohibited degrees within which a man cannot marry. A similar contention was put forward in *Lallubhai* v. *Mankuvarbai* (4). The observations on this point of the learned Judges, one

* Sarvadhikari's Tagore Law Lectures, page 603.

of whom was the distinguished jurist Mr. Justice West (co-author of the Digest and afterwards Sir Raymond West) appear to their Lordships as extremely apposite to the present case.

Chief Justice Westropp in that case [*Lallubai* v. *Mankuvarbai* (4)] at page 426 said as follows :—

"It has been contended for the plaintiffs that in the above extracts from the Achara Kanda and the Sanskara Mayukha the respective authors were dealing with *sapinda*-relationship in its ceremonial aspect only, and that, when they wrote upon *sapinda*-relationship with reference to inheritance, they may be regarded as viewing *sapinda*-relationship in the same light as the author of the Dayabhaga and certain other commentators on Hindu Law. But we think that the burden rests upon the plaintiffs to show that Vijnaneswara and Nilakantha regarded *sapinda*-relationship as resting on a different basis for the purpose of inheritance from that on which, dogmatically perhaps, but most distinctly, the one has placed it in the Achara Kanda and the other in the Sanskara Mayukha. We do not think that the learned Counsel for the plaintiffs have given any good reason for assuming that the authors intended to make any such difference, nor is it likely that they did.

"The religious and ceremonial law of the Hindus as prevailing amongst castes, or in particular localities, is, generally speaking, almost inseparably blended with their law of succession in the same castes or localities, an opposite condition being exceptional."

As a matter of fact, as Messrs. West and Buhler point out, Vijnaneswara expressly says, "wherever the word *sapinda* is used there exists (between the persons to whom it is applicable) a connection with one body either immediately or by descent."

In *Umaid Bahadur* v. *Udoi Chand* (2) the learned Judges of the Full Bench (one of whom was a Hindu Judge of great eminence) express themselves on this point in the following terms :—

"Having taken great pains in accurately defining the word *sapinda* in the beginning of his work, and having said in clear words in the passage in question that 'one ought to know that wherever the word *sapinda* is used there exists (between the persons to whom it is applied) a connection with one body either immediately or by descent,' it is hardly reasonable to suppose that the author used the word in another part of the same work in a different sense. It is a well-understood rule of construction amongst the authors of the Institutes of Hindu Law, that the same word must be taken to have been used in one and the same sense throughout a work, unless the contrary is expressedly indicated."

Nor have the learned Counsel for the appellants been in a position in this case to refer to any authority excepting one, which their Lordships will notice later on, in support of their proposition that the limitations of Vijnaneswara on *sapinda*-relationship are confined to marriage, impurity, and exequial rites, and do not relate to inheritance.

The law of inheritance in the *Mitakshara* translated by Mr. Colebrooke occurs in Book II, and forms Chapter VI of that part of the work. It is entitled "*Dayavibhaga*," or "Partition of Heritage." It is unnecessary to refer to Chapter I of Mr. Colebrooke's translation, or to the earlier sections of Chapter II, as they deal with subjects which do not come within the purview of this judgment. It is with sections V, VI, and VII of Chapter II that their Lordships are principally concerned. The rendering of the word *sapinda* as "relations connected by funeral oblations" runs throughout Mr. Colebrooke's translation. His arrangement of the matter is also different from the original where the subject of inheritance appears to be dealt with in a consecutive form in Chapter VI. Mr. Colebrooke has split it up into two chapters, divided into sections. (This circumstance is noticed in the Bombay judgment). Section V, Chapter II (in Mr. Colebrooke's Translation), deals with the succession of the *gotraja*, on failure of "brother's sons." Although *gotraja* is explained by the term *gentiles* borrowed from the Roman system, to which, no doubt, the Hindu system bears a remarkable analogy, it would be more convenient to adhere to the definition given in the *Mitakshara* itself. Omitting the English equivalents introduced into the translation, and retaining the Sanskrit expressions, the paragraphs run as follows:—

"3. On failure of the paternal grandmother, *gotraja-sapindas*, namely, the paternal grandfather and the rest, inherit the estate.

"For *bhinna-gotra sapindas* are indicated by the term *bandhu*.

"4. Here, on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons.

"5. On failure of the paternal grandfather's line, the paternal great-grandmother, the great-grandfather, his sons and their issue inherit. In this manner must be understood the succession of the *samana-gotra sapindas*.

"6. If there be none such, the succession devolves on *samanodakas*, and they must be understood to reach the seven degrees beyond *sapindas*, or else as far as the limit of knowledge and name extend. Accordingly, Vrihat Manu says: 'The relation of the *sapindas* ceases with the seventh person, and that of *samanodakas* extends to the fourteenth degree, or, as some affirm, it reaches as far as the memory of birth and name extends. This is signified by *gotra*.'"

Their Lordships have preferred to adopt for the purposes of this judgment the translation which was before this Board in *Lallubhai's* case (5).

It is to be observed that the rule in paragraph 3 is thus stated in the *Viramitrodaya**: "On failure of the paternal grandmother, the paternal grandfather and the other *sapindas* of the same *gotra* are heirs; since the *sapindas* (or persons connected through the *pinda* or body) of a different *gotra* are included under the term *bandhu* or 'cognates.'"

The earliest expounders appear sometimes to have used the terms *bhandhu* to signify a *sapinda* without any idea of including cognates. This is clear from a passage of the Viramitrodaya,† where, after quoting the rule as to the succession of collaterals given by Vishnu who places the *bandhus* immediately after brothers' sons, it says as follows:—"Here the term *bandhu* (kinsman) signifies a *sapinda*, and the term *sakulya* (distant kinsman) means a *sagotra*, or one descended from a common ancestor in the male line (other than a *sapinda*); if by the term *bandhu* the cognates of the father were comprised, then there would be a conflict with the order mentioned by Jogiswara, the Contemplative Saint," *i. e.*, Yajnavalkya. Yajnavalkya himself employs the expression indiscriminately in various places to signify connections and friends. But in Chapter II of his *Dharmasastram*, he distinctly introduces *bandhus* as acquiring a heritable right on failure of the *gotraja*. The passage in Rao Vishwanath Mandlik's Translation* is as follows:—"The wife, daughters, both parents, brothers, and likewise their sons, *gotrajas* (gentiles), *bandhus* (cognates), a pupil and a fellow-student. Of these, on failure of the preceding, the next following in order is heir to the estate of one who has departed for heaven leaving no *putra* (lineal male descendants)."

Learned Counsel for the respondents urges that this inclusion of *bandhus* or cognates forms a marked extension of the right of inheritance to people who until then were not regarded as heirs, and he contends that it is hardly likely this remarkable change should have been made without any limitation, considering that the *sapinda*-relationship was subject to a limit.

To determine how far this contention is well-founded, it is necessary to examine a little more closely the doctrines of the *Mitakshara* relating to the succession of collaterals. Vijnaneswara in reality seems to have shaped the rules which govern this branch of the law of inheritance in force in the Benares school. In paragraph 3, section V (Colebrooke's translation), in describing the *gotraja-sapinda* or consanguineous relations sprung from the same stock, he emphasises the fact of their being members of the same family by the specific statement that the *sapindas* belonging to a different family (*gotra*)—the *bhinna-gotra*—are included under the designation of *bandhus*. This is clearly borne out by the passage of the Viramitrodaya already referred to. Henceforth the word *bandhu*, therefore, has, in the system of the *Mitakshara*, a distinctive and technical meaning, in other words it signifies the *bhinna-gotra-sapinda*.

*Shastri Golap Chunder Sarkar's Translation, page 199.

†*Ibid*, page 142

*Page 220.

In paragraph 5 for the word *gotraja-sapinda* is substituted the more definite term of *samana-gotra sapinda*. With regard to this Messrs. West and Buhler observe that "The substitution of *samana-gotra* for *gotraja*, as well as the employment of *bhinna-gotra* to designate the opposite of the term, both show that Vijnaneswara took *gotraja* in the sense of belonging to the same family." Commenting on the passage relating to the succession of the *gotraja sapinda*, the Viramitrodaya, which is regarded as one of the most important commentaries on the *Mitakshara*, says: "similarly to the seventh (degree) the *sapindas* of the same *gotra* take the estate of a person without male issue."*

This limitation of the seventh degree appears in Yajnavalkya's Institutes, Chapter I, paragraphs 52, 53, in these words :—"A man should marry a girl . . . . who is not a *sapinda* of him . . . . who is descended from one whose *gotra* and *pravara* are different from him; and who is removed five degrees on the mother's and seven on the father's side."† The comment of Vijnaneswara on this text of Yajnavalkya has already been given *in extenso* in a previous part of this judgment, but the following lines may be quoted again with advantage :—"On the mother's side, in the mother's line, after the fifth; on the father's side, in the father's line, after the seventh (ancestor), the *sapinda*-relationship ceases."‡

The translation by Golap Chunder Shastri of the passage, in which these words occur, is important, as he is the authority on whose expositions the appellants chiefly rely. It runs thus :—

"While explaining the term non-*spinda*, the *sapinda* relationship is stated to be directly or mediately through connection with one body, but that relationship of all persons may, in one way or other, be traced with all other persons in this world of eternal transmigrations of the soul with its minute body, and so it would include persons that are not intended to be included; hence it is ordained :—

'and is beyond the fifth and seventh from the mother and from the father (respectively).'

"The purport is, that *sapinda*-relationship ceases beyond the fifth from the mother, *i.e.*, in the mother's line, and beyond the seventh from the father, *i.e.*, in the father's line."*

It is quite clear, therefore, that the limitation of the seventh degree with regard to the *samana-gotra sapindas* given by Mitra Misra in the Viramitrodaya is taken from the rule enunciated by Vijnaneswara on Yajnavalkya in the *Acharakanda* in respect of the cessation of *sapinda*-relationship.

Now, a *bhinna-gotra sapinda* is a *bandhu* according to Vijnaneswara. The classification contained in section VI, Chapter II, (Colebrooke's Translation) shows clearly who the *bandhus* are whom Vijnaneswara treats as *bhinna-gotra sapindas* entitled to succession on failure of the *gotraja*. The passage as translated by Mr. Colebrooke runs thus :—

"1. On failure of gentiles, the cognates are heirs. Cognates are of three kinds : related to the person himself, to his father, or to his mother, as is declared by the following text: 'The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle, must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncles, must be reckoned his mother's cognate kindred.'

"2. Here, by reason of near affinity, the cognate kindred of the deceased himself, are his successors in the first instance, on failure of them, his father's cognate kindred, or if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended."

Here Mr. Colebrooke renders the word *gotraja* into gentiles, and *bandhus* into cognates. He also paraphrases the three

*See page 199.

†Rao Vishwanath Mandlik's Translation, page 167.

‡West and Buhler page 119; Mayne's Hindu Law (7th Ed.), page 691, paragraph 516.

*Hindu Law page 54.

classes under which Vijnaneswara groups the technical *bandhus*, *viz.*, the *atma bandhus*, the *pitri bandhus* and the *matri bandhus* as "cognates related to the person himself, to his father, or to his mother."

Their Lordships have little doubt, reading these passages by the light of the comments in the Viramitrodaya,* that Vijnaneswara was using the term *bandhu* in a restricted and technical sense, as implying a relation belonging to a different family but united by *sapinda*-relationship. In fact he expressly says so (paragraph 3, section V, Chapter II).

It is not disputed that the plaintiffs do not come within the three categories mentioned above. But it is urged on the authority of *Gridharilal Roy* v. *The Government of Bengal* (1) that the enumeration is not exhaustive but merely illustrative.

In that case the question for decision was whether a maternal uncle not being specifically included in the enumeration of *bandhus* in the *Mitakshara* was excluded from succession. Answering that proposition in the negative, and holding that although not expressly mentioned he was entitled to succeed as a *bandhu*, this Board observed that the text did not purport to be an exhaustive enumeration of all *bandhus* "who are capable of inheriting," nor was it cited as such for that purpose by the author; and that it was used simply as a proof or illustration of his proposition that there are three kinds or classes of *bandhus*. These remarks hardly warrant the contention, which is attempted to be based on them, that the classes specified by Vijnaneswara can be added to.

In the present case, however, it does not seem necessary to their Lordships to enter upon the determination of the question whether the classes can be extended, for the point at issue can be decided on other grounds.

The limitation of five degrees clearly applies, and can only apply, to the *bhinna-gotra sapindas*. But it is contended that this limitation is confined to prohibition in respect of marriage. As has already been observed, a part of the limitation appears to have been applied to the succession of *samana-gotra sapindas*; their Lordships are unable to see on what principle can it be said that the other part relative to kinsmen, who are equally *sapindas* but belong to a different *gotra* or gens, must be restricted to matrimonial affinity.

Considerable reliance has been placed on the statement of the law by Shastri Golap Chunder Sarkar in his work on Hindu Law. Great respect is due to the opinions of that learned lawyer. But it seems to their Lordships that their weight is considerably discounted by his desire, in order to prevent the deceased's property becoming so to speak derelict and thus escheating to the Crown, to bring in the caste-people of the deceased also as *bandhus*; and the somewhat uncertain note of his conclusion*, where he says:—

"The conclusion, therefore, which appears to legitimately follow from the foregoing consideration, is that the word *bandhu* in the *Mitakshara* means and includes either all cognate relations without any restriction, or, at any rate, all cognates within seven degrees on both the father's as well as on the mother's side."

Again, his attempt to widen the signification of the word *sapinda* by employing the English equivalent of *relation* does not seem to be supported by the definition of *sapinda*-relationship in the *Mitakshara* itself.

Reference has also been made to certain passages in Rao Vishwanath Mandlik's valuable work, in which he says that the *sapinda*-relationship for inheritance is not always the same as for marriage or impurity (arising from birth or death). That may or may not be; but in one part of his work to which the Judicial Commissioner has referred in his judgment, the learned translator of Yajnavalkya distinctly says that *sapinda* connection in general is "co-extensive with that for marriage purposes." Nor in this connection, their Lordships think, can the following passage in the Viramitrodaya be overlooked:

"And the text, 'The *sapinda*-relationship, however, ceases in the seventh generation'—is to be explained consistently with the text of Yajnavalkya, namely, (after) the fifth and the seventh from the mother and the father

*Page 200.

* Page 74.

(respectively) to mean that it remains in the seventh but ceases in the eighth generation. Hence, as in the case of the unmarried females, the *sapinda*-relationship extending over three generations, as is declared in the chapter on impurity (occasioned by death, etc.,) is considered to be with reference to that alone; so it is to be deemed that this *sapinda*-relationship (extending to the fourth degree) is relative to succession alone."*

In the absence of any authoritative text their Lordships do not see their way merely on abstract reasoning to displace a view of the law which has received the recognition of the Courts in India and which the District Judge, an officer of great experience and learning, says is accepted by "public opinion." As has already been observed, the right of inheritance is founded on *sapinda*-relationship, which, under the *Mitakshara*, means consanguinity, in a distinct legal sense clearly explained by the author. This bond comes to an end with the fifth degree when the descent is through a female. It seems difficult to conceive that the right to inherit should continue after the relationship on which it is founded, and which gives it birth, has come to an end.

In the case of *Umaid Bahadur* v. *Udoi Chand* (2) one of the tests employed for determining whether the defendant in that case was a *sapinda* of the *propositus* was the mutuality of *sapinda*-relationship. The doctrine of mutuality is based on the rule enunciated by Manu, and is fully explained by Rajkumar Sarvadhikari in his Lectures at page 690. Another well-known Hindu writer of the present day speaks thus of the above rule:—

"It is to be observed here that the wealth of a *sapinda* is taken by his nearest *sapinda* according to the well-known text of Manu. From that text it follows that the relation of *sapindaship* must be mutual. Among agnates the relation of *sapindaship* is always mutual; but among cognates it is not so in a few cases. In order to determine whether any persons are heritable cognates of the *propositus*, 'it is necessary to see whether they are related as *sapindas* to each other,' *Umaid Bahadur* v. *Udoi Chand* (2). Unless *sapindaship* is mutual, one cannot be the heir of the other.*"

In *Babu Lal* v. *Nanku Ram* (3) the rule of the *Mitakshara* enunciated in the *Acharakanda* relative to *sapinda*-relationship in respect of marriage is assumed as applicable to inheritance. In fact the judgment proceeds on that basis; and the order of *sapinda*-relationship with its limitations in Rajkumar Sarvadhikari's Tagore Law Lectures is adopted as representing a correct exposition of the *Mitakshara* Law. The doctrine of mutuality is also explained in clear terms:—

"Again, a *sapinda* of the *propositus* to be capable of inheriting must satisfy a further condition, namely, that he must be so related to the *propositus* that the *propositus* is also a *sapinda* of him either directly or through the father or the mother. This mutuality of *sapinda*-relationship between the *propositus* and his heritable *sapindas* is assumed as a necessary condition in the case of *Umaid Bahadur* v. *Udoi Chand* (2) and the authority for this is to be found in the text of Manu (Chapter IX, 187) cited in the *Mitakshara*, Chapter II, section III, verse 3, as interpreted by Balambhatta and Visweswara Bhutta, the two leading commentators on the *Mitakshara*. The text according to these commentators means this: 'The property of a near *sapinda* shall be that of a near *sapinda*.' From this it is clear that a man in order *to* be a heritable *sapinda* of the *propositus* must be so related to him that they are *sapindas* of each other."

These two decisions of the Calcutta High Court have been challenged on the ground that they represent *Dayabhaga* views rather than the doctrines of the *Mitakshara*. To their Lordships the objection seems hypothetical and without any basis excepting the criticisms of Golap Chunder Shastri. One of the learned Judges who decided *Babu Lal's* case (3) was the distinguished Judge and erudite Sanskrit scholar, Mr. Justice Gurudas Banerjee, who was not likely to allow his mind to be confused by *Dayabhaga* conceptions in determining a case under the *Mitakshara* Law.

The general conclusion to which a close examination of the authorities leads their Lordships may be briefly stated as follows:

*Viramitrodaya, page 157.

* Commentary on Hindu Law by J. N. Bhattacharya, page 459.

(*a*) that the *sapinda*-relationship, on which the heritable right of collaterals is founded, ceases in the case of the *bhinna-gotra sapinda* with the fifth degree from the *propositus*; (*b*) that in order to entitle a man to succeed to the inheritance of another he must be so related to the latter that they are *sapindas* of each other, which is only a paraphrase of Manu's rule.

In the present case the plaintiffs are Laxmanrao's paternal grandfather's son's son's daughter's daughter's sons. They are his *bhinna-gotra* beyond the fifth degree, and, as the District Judge points out, the element of mutuality is wanting between them and Laxmanrao.

Two considerations were strongly pressed on behalf of the appellants to induce their Lordships to extend the application of the *sapinda*-relation in the case of *bandhus* beyond the fifth degree mentioned in the *Mitakshara*. It was urged that it is hardly likely Vijnaneswara would give a right of inheritance to a spiritual preceptor or *guru* before kinsmen, however remotely connected. This argument appears to ignore the peculiar and intimate relationship which their Lordships understand exists in the Hindu system between the pupil and the *guru* who has to initiate him into the mysteries of the Vedic laws and rites, and under whose roof he has to pass many years of his life. It is easy to suppose that in such circumstances the mystical relationship between a spiritual preceptor and a pupil should be regarded as creating a far closer tie than remote relationship of blood.

As regards the other consideration which is based on the possibility of the Crown becoming a claimant in the presence of remote *bhinna-gotra* their Lordships need only observe that whether such a claim would be justified or even be likely to be advanced, it does not seem necessary to express an opinion in the present case.

Here the defendant is in possession of Laxmanrao's estate claiming as heir to his wife, Laxmanrao's daughter. The plaintiffs' suit is an action in ejectment, and they must, in order to succeed, strictly prove their title.

It is a matter of satisfaction to their Lordships that they find themselves in complete agreement with the learned Judges in the Courts below. The District Judge is himself a Hindu, versed in Sanskrit, and has examined the authorities in original. His decision is entitled to great weight and consideration.

On the whole their Lordships are of opinion that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

The appellants must pay the costs of this appeal.

Appeal dismissed.

Solicitor for the Appellant: Mr. *E. Delgado.*

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

CALCUTTA HIGH COURT.

CIVIL APPEAL FROM ORDER OF REMAND

No. 546 OF 1912.

March 6, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

MADHU SUDAN SARKAR—PLAINTIFF—APPELLANT

versus

KALI DAS *alias* KALA CHAND DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Occupancy holding—Non-transferable—Purchaser, rights acquired by—Landlord recognising subsequent purchaser as tenant—Representative-in-interest—Estopped.

A purchaser acquires no title by purchase of a non-transferable occupancy holding which the landlord could be called upon to recognise. The vendor or persons deriving title from him might be estopped from raising the question of the validity of the transfer, but the landlord is entitled to ignore the transfer and create a new tenancy in favour of another.

A subsequent transferee of a portion of a non-transferable occupancy holding, who pays rent to the landlord and is recognized by him as a tenant, is a representative-in-interest of the landlord and is not estopped from raising the question of non-transferability of the land in a suit by a prior transferee for possession.

Appeal from the order of the Sub-Judge, Murshidabad, dated 11th July 1912, reversing that of the Munsif, first Court at Jangipur, dated 12th August 1911.

Babu *Ram Chandra Majumdar*, for the Appellant.

Babu *Bepin Behary Ghose*, for the Respondent.

JUDGMENT.—The subject-matter of this litigation is an occupancy holding, held by Bonomali Mondal as tenant under Kali Brahma Bhattacharya. After the death of

the tenant his three sons, who are defendants in this suit, transferred their interest to the plaintiff on the 1st April 1910. On the 3rd May 1910, the second defendant transferred the holding to the first defendant on the allegation that he was the tenant in respect thereof. The first defendant subsequently, in December 1910, went to the landlord, paid him rent, got his name registered in his books and has ever since cultivated the land. On the 17th February 1911, the plaintiff commenced this litigation to eject the first defendant on the ground that his vendor had no concern with the land and that he had consequently derived no title by his purchase. The Court of first instance found in favour of the plaintiff and gave him a decree, without deciding whether the holding was non-transferable as alleged by the first defendant. Upon appeal the Subordinate Judge has set aside the decree of the Court of first instance and remanded the case for determination of the character of the holding. The present appeal is directed against the order of remand and is based on the ground that the first defendant was not competent to raise the question of transferability of the holding. In support of this proposition reliance has been placed upon the cases of *Radha Kant Chakravarti* v. *Ramanauda Shaha* (1) and *Rahimjan Bibi* v. *Imamjan Bibi* (2). In our opinion, there is no force in the contention of the appellant.

The first defendant did not acquire any title to the holding if, as is alleged by the plaintiff, his vendor, the second defendant, had no concern with the land. Consequently when the first defendant was accepted as tenant by the superior landlord, a new tenancy was created in his favour. Did this create a valid title in him? The answer must depend upon the determination of the question, was the landlord free at that time to grant a tenancy to the first defendant? If the holding is non-transferable, as alleged by the defence, the plaintiff had acquired no title by his purchase which the landlord could be called upon to recognise. It may be that, by the application of the doctrine of estoppel, the vendor of the plaintiff or persons deriving title from him might be estopped from raising the question of the validity of the transfer. But, in so far as the superior landlord was concerned, he was entitled to ignore the transfer in favour of the plaintiff. Consequently he was free to create a new tenancy in favour of the first defendant. From this point of view, the first defendant is the representative-in-interest of the landlord and as such is entitled to raise the question of transferability. The case of *Radha Kant Chakravarti* v. *Ramanauda Shaha* (1) is clearly distinguishable. There it was held that a transferee of a part of a non-transferable holding was bound by the same rule of estoppel as his vendor in respect of a mortgage created by the latter, although the transferee had subsequently been recognised by the landlord. The case before us is clearly of a different description. Here if the allegation of the plaintiff is true, the first defendant did not acquire any title at all by his purchase from the second defendant, and if he has any title, it must be attributed to one source only, namely, the superior landlord. The case of *Rahimjan Bibi* v. *Imamjan Bibi* (2) is also of no assistance to the appellant.

In this view the order made by the Subordinate Judge is clearly correct and must be affirmed with costs. We assess the hearing fee at one gold *mohur*.

Appeal disallowed.

(1) 13 Ind. Cas. 698; 15 C. L. J. 369; 39 C. 513; 16 C. W. N. 475.

(2) 15 Ind. Cas. 698; 17 C. L. J. 173.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1436 OF 1912.

May 4, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

GHANSAM—PLAINTIFF—APPELLANT

versus

BIRANCHI LAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Wajib-ul-arz—*Contract or custom.*

Prima facie references in *Wajib-ul-araiz* to pre-emption are to be taken as references to customs rather than to contracts.

The mere fact that a *Wajib-ul-arz* is for a settlement which is to continue only for a certain number of years, does not prevent the co-sharers from recording therein their customs.

Second appeal from a decree of the Subordinate Judge of Banda.

GOPAL SINGH *v.* KARAN SINGH.

Mr. *Brajnath Vyas*, for the Appellant.

Dr. *S. C. Banerji*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The Munsif decided that a custom of pre-emption did exist and decreed the plaintiff's suit. On appeal the learned District Judge held that there was no custom of pre-emption and accordingly dismissed the plaintiff's suit without deciding the other issue, namely, what was the sale price. In support of the allegation that a custom of pre-emption prevailed, the plaintiff produced an extract from the *Wajib-ul-arz* of 1879 and also two judgments, one of which was between the same parties as in the present suit. As against this the defendant produced no evidence except an extract from the *Wajib-ul-arz* of 1833. This admittedly proves nothing either way. At that time Government had taken over the *zemindari* evidently for non-payment of revenue. The learned Subordinate Judge in dealing with the *Wajib-ul-arz* of 1879 points out that it was only to remain in force from 1879 to 1900, and states that this fact clearly shows that the reference to pre-emption must be a reference to an arrangement between the co-sharers, and is not and cannot be a record of a custom. In our opinion this is wrong. The mere fact that the *Wajib-ul-arz* was for a settlement which was to continue only from 1879 to 1900 did not prevent the co-sharers from recording therein their customs. A reference to the document will show that it purports to be a record not only of contracts but also of customs and when referring to pre-emption, it actually speaks of the 'custom of pre-emption.' *Prima facie* (according to the rulings of this Court) references to pre-emption are to be taken as references to customs rather than to contracts. The *Wajib-ul-arz* of 1879 is supported by two judgments. Even if the judgment in Suit No. 397 of 1911 be not regarded as *res judicata*, it is very strong evidence in the present case because it was between the same parties and about property situate in the same *mahal*. The custom was alleged and not even denied, and it also appears that the final result of the case was that pre-emption was decreed. It seems to us that the evidence in the present case was all the one way and that the learned Subordinate Judge was wrong in setting aside the decree of the Court of first instance. Before, however, finally deciding the appeal we must remand an issue to the Court below as to the real consideration. We, accordingly, refer the following issue, namely, what was the true sale consideration? The Court will decide this matter upon the evidence already on the record. The case will be put up on return of the finding. The usual 10 days will be allowed for filing objections.

On return of the findings the appeal was decreed.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 84 OF 1912.

December 5, 1912.

Present:—Mr. Kanhaiya Lal, A. J. C.

GOPAL SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KARAN SINGH—DEFENDANT—RESPONDENT.

Mortgage—Redemption—Absence of stipulation restraining redemption before certain period, effect of—Redemption, postponement of, for specified period as expressed in deed—Principal and interest at specified rate paid out of profits—Contract, essence of.

In cases where there is no stipulation restraining redemption before a certain period, but only a period is fixed for payment or within which the mortgage-money is likely to be satisfied from the usufruct, the term fixed for payment can only be regarded as a protection for the debtor till the contrary intention is shown In the absence of such an intention the mortgagor may redeem at any time before or at the end of the term.

Chengaya v. *Pichayya*, 17 M. L. J. 177; *Bhagwat Das* v. *Prasad Singh*, 10 A. 602; A. W. N. (1888) 263; *Rose Ammal* v. *Rajarathnam Ammal*, 23 M. 33, referred to.

In each case the important thing is to find out whether it was the intention of the parties as expressed in the deed to postpone redemption till the mortgagee had enjoyed the usufruct for the full period named. Such term may not form an essence of the contract, where the mortgagee is only to take interest at a specified rate from the profits of the mortgaged property and to credit the rest towards the principal money.

Purna Chandra Sarma v. *Peary Mohan Pal Das*, 15 Ind. Cas. 287; 39 C. 828; 17 C. W. N. 149, *Rose Ammal* v. *Rajarathnam Ammal*, 23 M. 33, referred to.

Appeal against the decree of the Subordinate Judge, Tahsil Biswan, dated 27th May 1912.

GOPAL SINGH *v.* KARAN SINGH.

Babus *Basudev Lal*, for the Appellants.

Babus *Ram Chandra* and *Chail Behari Lal*, for the Respondent.

JUDGMENT.—This appeal and the cross-appeal No. 116 of 1912 arise out of a suit for redemption and surplus mesne-profits brought by the plaintiffs-appellants in respect of three mortgage-deeds executed by their father, Bhawani Din Singh, in favour of Karan Singh, the defendant-respondent. The plaintiffs' allegation was that the mortgage-debts were satisfied from the usufruct in 1318 *Fasli*. The plaintiffs prayed in the alternative that if any amount was found due to the mortgagee, a decree for redemption might be passed subject to its payment. The defendant pleaded that the plaintiffs had no right to redeem prior to the expiry of the period of 27 years fixed by the mortage-deeds and that a sum of Rs. 8,977-7-6 was still due to the mortgagee.

The learned Subordinate Judge found that Rs. 6,427-12-3 were due to the mortgagee at the end of 1318 *Fasli* and that the plaintiffs' suit for redemption was premature.

The main questions for consideration in these appeals are, whether the mortgage-deeds in question were paid up from the usufruct of the mortgaged property; if not, how much money remained due to the defendant at the end of 1318 *Fasli* and whether a suit for redemption was maintainable.

The mortgage-deeds in question were executed in lieu of an aggregate sum of Rs. 8,700 re-payable with interest at 10 annas per cent. per mensem in 27 years, and provided that the mortgagee shall remain in possession of the mortgaged property from *Asarh* 1296 *Fasli* till the close of 1323 *Fasli* in lieu of the principal money and interest due on the said deeds and shall pay Rs. 266 on account of revenue and other charges annually to the Government out of the gross rental, which was declared to amount to Rs. 1,050-8 per annum, and appropriate the balance of Rs. 784-8 per year towards the money due to him under the said deeds. They further stipulated that if there was any excess in the net profits, that excess shall be credited towards the mortgage-money and redemption would be accelerated in proportion; that if there was any enhancement in revenue or other charges payable to the Government, the mortgagee shall be liable for the same with interest at 10 annas per cent. per mensem, that if there was a deficiency in the profits in any year, the mortgagor shall similarly pay it with interest at the same rate, and that till the whole of the mortgage-money was paid the mortgagee shall remain in possession of the mortgaged property without regard to the term of 27 years fixed for redemption, which in that event shall be deemed to be annulled.

The parties admit that the accounts were adjusted between them till 1302 *Fasli* when a supplementary mortgage-bond for Rs. 1,600 was executed by the mortgagor in favour of the defendant on the 14th March 1896, whereby the mortgagor took a further loan of Rs. 315 and credited Rs. 1,114-9 principal and Rs. 170-7 interest towards the balance of profits due for the first six years on the mortgage-deeds in suit. There was an enhancement of revenue from Rs. 266 to Rs. 285-8 in 1306 *Fasli* and further enhancements to Rs. 334 in 1308 *Fasli*, Rs. 416 in 1313 *Fasli* and Rs. 484-9-6 in 1318 *Fasli* while the gross-rental including the *sewai* income amounted, according to the *Patwari's* papers, to Rs. 17,700-15-9 from 1303 *Fasli* to 1318 *Fasli*. The defendant alleges that he was not able to realize the whole of the said amount, but there is nothing in the evidence to show that he was not able to realize the same. If he neglected to realize any portion of it or allowed the arrears to become barred by limitation, he is only himself to blame. The mortgage-deeds stated that the gross rental of the property mortgaged on the date of the mortgages amounted to Rs. 1,050-8 per year and it lies upon the mortgagee to show that the rental income, which admittedly amounted to Rs. 1,050-8 up to 1302 *Fasli*, fell after that date for reasons for which he was not responsible and that the net profits available to him after payment of the Government revenue had consequently become deficient. It was his business to manage the property with prudent care and to keep and render proper accounts, but he has not sufficiently discharged that burden and I see no reason why he should not be debited with the whole of the rental, which was capable of realization from the mortgaged property. If any arrears are still due for the period in question, there is nothing to prevent the

mortgagee from realizing the same from the tenants by suit or otherwise. The Court below allowed a deduction of Rs. 12 per cent. from the total demand without any apparent justification. The evidence produced by the plaintiffs to prove the *sewai* income in excess of what was entered in the *patwari* papers is too vague to be accepted. The mortgage-deeds did not provide for the deduction of any charges for collection, and the system of accounts described in the mortgage-deeds did not contemplate it.

Calculating by the above method a sum of Rs. 2,523-1-7 was due to the mortgagee at the end of 1318 *Fasli* and the plaintiffs are not, therefore, entitled to redeem the mortgages without the payment of the said amount.

There is nothing in the mortgage-deeds to prevent the mortgagor from redeeming the mortgages prior to the expiry of 27 years if the mortgage-money is otherwise repaid. The mortgages were not made for 27 years certain. According to the method of computation adopted in the mortgage-deeds, the parties concluded that the mortgage debt will be satisfied from the usufruct in 27 years. A provision was accordingly made that the mortgagee shall remain in possession from 1296 *Fasli* till 1323 *Fasli* subject to the proviso that if there was any deficiency in the profits, the mortgagor shall pay the same with interest at the stipulated rate or else allow the mortgagee to remain in possession till such payment irrespective of the said term of 27 years and that if there was any excess, redemption of the mortgage shall *pro tanto* be accelerated. The extension or curtailment of the term of 27 years was, therefore, dependent upon the eventuality of the mortgage-money being satisfied later or earlier, and if redemption could be effected on the mortgage-money being satisfied earlier from the usufruct, there is no reason why the mortgagor or his representatives should be prevented from seeking redemption earlier by paying the balance that may be found due to the mortgagee from their other income. The time when the principal money becomes payable is the time when payment ceases to be optional or becomes obligatory on the mortgagor on the risk of its being enforced. The debtor is free to discharge the debt earlier unless the terms of the deed clearly forbid it. In cases where there is no stipulation restraining redemption before a certain period, but only a period is fixed for payment or within which the mortgage-money is likely to be satisfied from the usufruct, the term fixed for payment can only be regarded as a protection for the debtor till a contrary intention is shown. In the absence of such an intention, the mortgagor may redeem at any time before or at the end of the term [*Chengaya* v. *Pichayya* (1), *Bhagwant Das* v. *Parshad Singh* (2) and *Rose Ammal* v. *Rajarathnam Ammal* (3)]. In each case the important thing is to find out whether it was the intention of the parties as expressed in the deed to postpone redemption till the mortgagee had enjoyed the usufruct for the period named. Such term may not form an essence of the contract where the mortgagee is only to take interest at a specific rate from the profits of the mortgaged property and to credit the rest towards the principal money. The period of 27 years mentioned in the mortgage-deeds was only tentatively fixed and did not apparently form an essence of the contract and, as held in *Purna Chandra Sarma* v. *Peary Mohan Pal* (4) and *Rose Ammal* v. *Rajarathnam Ammal* (3), the plaintiffs are entitled to redeem subject to the payment of the amount mentioned above.

The appeal is, therefore, allowed and the plaintiffs' claim decreed for the redemption of the mortgaged property on payment of Rs. 2,523-1-7 which were due to the defendant at the end of 1318 *Fasli* subject to the addition or deduction of such amount as may be due by or to the plaintiffs on account of any deficiency or excess in the profits of the mortgaged property subsequent to 1318 *Fasli* till redemption, the account of which will be gone into and determined by the Court below at the time of preparing a final decree. Six months' time is allowed for the payment of the said amount. A decree will be prepared in terms of Order XXXIV, rule 7, of the Code of Civil Procedure. In default of payment the mortgagee will be entitled to an order for sale. The rest of the claim is disallowed. The plaintiffs will get their proportionate costs

(1) 17 M. L. J. 177.
(2) 10 A. 602; A. W. N. (1888) 263.
(3) 23 M. 33.
(4) 15 Ind. Cas. 287; 39 C. 828; 17 C. W. N. 149.

from the defendant here and the defendant shall bear his own costs throughout.

Appeal allowed.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

June 18, 1914.

Present:—Lord Dunedin, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

RAVI VEERARAGHAVULU AND OTHERS—DEFENDANTS—APPELLANTS

versus

Sri Raja BOMMA DEVARA VENKATA NARASIMHA NAIDU BAHADUR, ZEMINDAR GARU—PLAINTIFF—RESPONDENT.

Madras Rent Recovery Act (VIII of 1865), ss. 9, 69—Civil Procedure Code (Act VIII of 1859), s. 372—Decree of Collector affirmed by District Judge on appeal—Second appeal to High Court, whether lies—Practice of High Court of long-standing—Interference with such practice by Privy Council—Civil Procedure Code (Act XIV of 1882), ss. 584, 585—Second appeal—Concurrent findings of fact by two inferior Courts, whether High Court competent to interfere with.

A second appeal lies to the High Court from a decree passed by a District Judge in appeal from the decision of a Collector under the Madras Rent Recovery Act (VIII of 1865).

Veerasamy v. *Manager, Pittapur Estate*, 26 M. 518; 13 M. L. J. 296, approved.

The Judicial Committee would not interfere with a long-standing practice of a High Court even if there is an implied rule of law against such practice.

Where in a suit under section 9 of the Madras Rent Recovery Act (VIII of 1865), the Collector found an arrangement as to rent to be permanent and the District Judge affirmed that finding on appeal:

Held, that the High Court was not competent, under section 584 of the Civil Procedure Code (Act XIV of 1882), to set aside the finding of fact which had been concurrently arrived at by the two inferior Courts.

Parthasarathi Appa Row v. *Chevandra Venkata Narasaya*, 6 Ind. Cas. 988; 37 I. A. 110; 33 M. 177; 14 C. W. N. 938; 20 M. L. J. 596; 8 M. L. T. 141; 12 C. L. J. 233; (1910) M. W. N. 466; 12 Bom. L. R. 648 (P. C.); *Musammat Durga Chowdhrani* v. *Jewahir Singh Chowdhuri*, 17 I. A. 122; 18 C. 23, approved.

Consolidated appeals from the judgment and decrees of the Madras High Court, dated October 13th, 1908, reversing those of the District Judge of Kistna, dated March 13th, 1907, which had affirmed those of the Head Assistant Collector, Bezwada Division, Kistna District, dated August 24th, 1906.

FACTS.—The facts of the case are sufficiently set forth in their Lordships' judgment.

Messrs. *De Gruyther, K. C.*, and *Parikh*, for the Appellants, contended that the Courts below had held that produce rent could not be demanded. The payment of cash rent fixed in perpetuity was a question of fact. The High Court had no power to enforce on the appellants produce rent. There was no right of appeal to the High Court by the Rent Recovery Act.

[LORD MOULTON:—We have heard all other grounds, but the one which is based upon fundamental grounds.]

Everything depended upon the Act of 1865. By section 3 a *pattah* executed by the landlord and a *muchilika* by the tenant were necessary, to enforce which, in case either party did not agree, section 65 empowered the Collector to try the claim by summary proceedings. There might be a suit in the Civil Court for the arrears of revenue, but such Court would be bound by the provisions of this Act, section 87. Section 69 expressly provided that there would be an appeal to the District Judge and was silent on there being an appeal to the High Court.

[MR. AMEER ALI:—In *Parthasarathi Appa Row* v. *Chevandra Venkata Narasayya* (1) you were for the appellant and exactly the same question was argued.]

[LORD MOULTON:—The same point was raised in that case and you had won in the first two Courts.]

[MR. AMEER ALI:—In that case respondent was not represented.]

There was no further appeal from the District Judge.

[MR. AMEER ALI:—Was this point raised in any Court?]

No, in neither Court this point was taken. There was a standing oral contract deducible from two agreements.

[LORD DUNEDIN:—How could you call it a permanent arrangement?]

In view of previous agreements it was presumed.

(1) 6 Ind. Cas. 988; 37 I. A. 110; 33 M. 177; 14 C. W. N. 938; 20 M. L. J. 596; 8 M. L. T. 141; 12 C. L. J. 233; (1910) M. W. N. 466; 12 Bom. L. 648 (P. C.).

[LORD DUNEDIN:—If an arrangement existed, it was a legal document; but if an oral arrangement is made and proved, then it is a different matter.]

[MR. AMEER ALI:—You say there was an oral arrangement and was given effect to every year in writing.]

[LORD MOULTON:—This is an issue of fact and we cannot deal with it.]

There was express undertaking with regard to subsequent years. It was difficult to show express agreement, but there was an inference.

[MR. AMEER ALI:—Where there is a *pattah* the presumption is that there is no implied contract.]

Reference was made to *Minakshi Naidu* v. *Subramanya Sastri* (2); *Rangoon Botatoung Co.* v. *Collector of Rangoon* (3); *Musammat Durga Chowdhrani* v. *Jewahir Singh Chowdhuri* (4) and Madras Rent Recovery Act VIII of 1865.

Sir *Erle Richards*, *K. C.*, and Mr. *Kenworthy Brown*, for the Respondent, contended that there was no contract as to the rates payable on lands cultivated with wet crops and, therefore, the Court must, in order to determine the rate, proceed to apply the rules contained in section 11 and in applying them, they rightly held that the *pattahs* tendered by the *zemindar* were proper *pattahs*. They were in accordance with the *varam* which was the established rate for dividing the crop between the landlord and cultivator. There were many cases, notably *Veeraswamy* v. *Manager, Pittapur Estate* (5), which decided that there lay second appeal to the High Court which had inherent jurisdiction under section 372 of Act VIII of 1859 to hear regular appeals both on facts and law from all subordinate Courts. The Sudder Court which existed in place of the present High Court heard appeals from the Zillah Court.

Reference was made to Act VIII of 1859, section 372, and *Veerasamy* v. *Manager, Pittapur Estate* (5).

Mr. *De Gruyther*, in reply.

(2) 14 I. A. 160; 11 M. 26.
(3) 16 Ird. Cas. 188; 39 I. A. 197; 16 C. W. N. 961; 6 L. B. R. 150; 12 M. L. T. 195; (1912) M. W. N. 781; 16 C. L. J. 245; 23 M. L. J. 276; 14 Bom. L. R. 833; 10 A. L. J. 271; 5 Bur. L. T. 205 and 207; 40 C. 21.
(4) 17 I. A. 122; 18 C. 23.
(5) 26 M. 518; 13 M. L. J. 296.

JUDGMENT.

MR. AMEER ALI.—These consolidated appeals from certain decrees of the High Court of Madras arise out of a number of suits brought by the plaintiff-respondent in the Court of the Head Assistant Collector of the Bezwada Division, under the provisions of section 9 of the Madras Rent Recovery Act (VIII of 1865). The object of all the actions was to enforce by legal process the acceptance by the defendants of the *pattahs* or leases he had tendered to them.

The scope of the material sections of Madras Act VIII of 1865 was considered by their Lordships in *Parthasarathi Appa Row* v. *Chevandra Venkata Narasaya* (1). It is sufficient, therefore, to say in this case that under this Act the landlords are required to enter into written engagements with their tenants, in default of which no suit is maintainable to enforce the terms of the tenancy, and that in case of the refusal by the tenant to accept a *pattah* "such as the landlord is entitled to impose," the landlord can proceed under section 9 to enforce the acceptance by a summary suit before the Collector.

It has to be remarked that in the Madras Presidency, or certain parts thereof, irrigated lands on which are grown what are called "wet crops," are generally subject to a higher rate of rent, either in kind or in cash, than those which yield only "dry crops," and that it is usual for the *zemindars* to enter into yearly engagements by tendering *pattahs* from year to year and obtaining *muchilikas* or counterparts executed by the tenants evidencing the acceptance of the terms of the lease.

Shortly stated, the respondent's case as made in his plaint, is that the *ryots*, the defendants in the suits, prior to *Fasli* 1283 (approximately corresponding to 1876), paid rent for the lands in their occupation on the *asara* or produce-sharing system, that in that year an arrangement was come to between them and the *zemindar* by which a money payment "was substituted for the share of the produce," that this arrangement, however, was subject to the condition that whenever "the lands were fit for wet cultivation the wet rates would be settled." And he went on to add in paragraph 3 of the plaint:—

"The lands mentioned in the tendered

pattah hereunto annexed having been newly brought under wet cultivation, and on the plaintiff's officials demanding defendant to accept the agreement as in the surrounding villages in respect of wet crop *cist*, he (the defendant) having refused to do so, the *asara pattah* with the rates prevailing under the immemorial system of sharing the grain heap (*palambaram* system) was tendered for the wet land cultivated by him (defendant) for this year. As the defendant, taking advantage of this, refused to come to any agreement in respect of the dry land also for which there was no dispute at all, the rates and *babats* in respect not only of the said wet land, but also of the remaining dry land, were as usual entered in the said *pattah*. All the terms of the tendered *pattah* so far as they are connected with the *asara* system are applicable to the *asara* system, and the remaining ones to the *veesabadi* system."

The *ryots* in their defence alleged that the arrangement introducing the *veesabadi* or cash system into their villages was intended to be and was in fact permanent in character; that some years later (*Fasli* 1292) when the money rates were revised, the *veesabadi* system was accepted as the basis of the new settlement; that recently they had been able, without any assistance or contribution from the plaintiff, to make their lands irrigable and fit for wet cultivation, and that the plaintiff was not entitled to revert to the sharing system and thus indirectly to enhance their rents without the interposition of the Collector's Court.

On these allegations of fact the parties went to trial. The issues framed by the Head Assistant Collector are not very clearly worded, but they sufficiently indicate the main points for determination, *viz.*, whether the substitution of the *veesabadi* for the *asara* system in the defendant's villages was permanent in its character or, in other words, was the plaintiff *zemindar* entitled to revert to the sharing system on the lands being made irrigable by the tenants.

The Collector on the evidence held in substance that the conversion of the *asara* rates into cash payment in 1283, which was confirmed in 1292, and had been acted upon ever since, was a permanent arrangement, and that the plaintiff was not entitled to impose on the tenants *pattahs* on the *asara* basis. He accordingly dismissed the plaintiff's suits without entering into the questions raised in the latter part of paragraph 3 of his plaint.

On appeal by the *zemindar* the District Judge affirmed the decrees of the Collector in respect of the finding of fact relative to the character of the arrangement of 1283, and upheld the orders dismissing the suits.

From the decrees of the District Judge the plaintiff preferred second appeals to the High Court of Madras. It is necessary to set out that portion of the High Court's judgment which forms, in their Lordships' opinion, the key to the decision of the learned Judges. They say:

"Till *Fasli* 1283 the *asara* system was in force. In *Fasli* 1284 money rents were introduced and the rates of such rents were permanently fixed in *Fasli* 1292. At that time all the lands were dry. Wet cultivation began in *Fasli* 1314, and the *pattahs* now in dispute were then tendered, as the tenants refused to pay more than the rates fixed in 1292 which they had previously been paying for the lands as dry. Nothing had been done by the plaintiff to provide facilities for irrigation. In the *muchilikas* executed by the tenants for *Faslis* prior to 1314 there are clauses to the effect that the plaintiff may make an extra charge if wet or garden crops are raised on dry lands. The amount of such extra charge is not, however, stated. If the plaintiff is entitled to demand *asara* rates, the rates mentioned in the *pattahs* tendered are correct. The Courts below have taken the view that the plaintiff has tendered *asara pattahs* as a means of enhancing the rent and that as he has not done anything to justify an enhancement of the rent and has not obtained the sanction of the Collector for the enhancement, he is only entitled to the rents fixed in *Fasli* 1292.

"For the plaintiff it is contended that inasmuch as there is no contract as to the rates of rent payable on lands cultivated with wet crops, he is entitled under clause 3 of section 11 of Act VIII of 1865 to claim *varam* rates, it being admitted that no money assessment has been fixed under clause 2 of that section.

"That there is no contract as to the rates of rent payable for wet cultivation is clear from the admitted *muchilikas*, the material clauses of which have already been referred

to. The only rates fixed were for dry cultivation. The rates to be charged for wet cultivation were left undetermined. This being so, the contention for the plaintiff seems to be well-founded."

They accordingly set aside the orders of the District Judge, and holding that "the *pattahs* tendered by the plaintiff were proper *pattahs* and that the defendants must accept them," they decreed the second appeals with costs in all the Courts.

On an applicantion for review of judgment, the learned Judges appear, however, to have thought that "the contract between the parties is contained in the admitted *muchilikas* and must be gathered from the construction of those *muchilikas*." They, therefore, rejected the application for review.

The *ryot* defendants have appealed to His Majesty in Council, and two points have been urged on their behalf against the validity of the judgment of the High Court.

It is contended, in the first place, that no appeal lay to the High Court under section 69 of the Act which provides for one appeal only from the order of the Collector to the *Zillah* Judge. This contention, however, ignores the provisions of section 372 of Act VIII of 1859 which, at the time the Madras Rent Recovery Act of 1865 was enacted, was the law regulating the procedure of the Civil Courts in India outside the presidency towns. Under that section a special appeal lay to the Sudder Court from all decisions passed in regular appeal by the Courts subordinate to the Sudder Court. It is not disputed that the *Zillah* Judge's Court was subordinate to the Sudder Court, nor that the appeal to the *Zillah* Judge from the Collector's Court was a "regular appeal"—an appeal on law and facts. Later legislation substituted the High Court for the Sudder Court, and the District Judge for the *Zillah* Judge, but the subordination of the one to the other was maintained. The provisions of Act XIV of 1882, the law in force at the time when these suits were instituted, are clear on the point that an appeal lies from the order of the District Judge to the High Court, unless that right is taken away by express legislation or by some express provision of law.

The point that a second appeal lies to the High Court in cases arising under Act VIII of 1865, has been expressly decided in *Veeraswamy* v. *Manager, Pittapur Estate* (5), and the practice appears to have been ever since the passing of the Act for such appeals to be preferred to the High Court. Their Lordships would not be disposed to interfere with such a long-standing practice, even if they thought there was an implied rule against second appeals lying from the decisions of the District Judge with respect to adjudications under the Act by the Collector. Their Lordships must, therefore, overrule the first objection.

In the second place, it is contended for the appellants that the High Court was not competent under section 584 of the Civil Procedure Code (Act XIV of 1882) to set aside a finding of fact which had been concurrently arrived at by the two inferior Courts.

Sections 584 and 585 of the Civil Procedure Code are in these terms :—

"584. Unless, when otherwise provided by this Code or by any other law, from all decrees passed in appeal by any Court subordinate to a High Court, an appeal shall lie to the High Court on any of the following grounds, namely :—

"(*a*) The decision being contrary to some specified law or usage having the force of law;

"(*b*) the decision having failed to determine some material issue of law or usage having the force of law;

"(*c*) a substantial error or defect in the procedure as prescribed by this Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits."

"585. No second appeal shall lie except on the grounds mentioned in section 584."

This distinctly prohibits second appeals on questions of fact and confines the competency of the High Court to deal with questions of law and procedure.

In the present case the sole question for determination was whether the arrangement entered into in 1283, and confirmed in 1292, was permanent. The plaintiff's allegation was that he was entitled under the circumstances to revert to the system that existed prior to 1283. The Collecter and the first Appellate Court, who alone were competent to deal with the facts, came to the conclusion

that the arrangement was permanent. The *muchilikas* were only a part of the evidence on which they acted. It seems to their Lordships that the learned Judges, acting in inadvertence of section 584 of the Code, assumed a jurisdiction which they did not possess. The rule relative to second appeals which was laid down by this Board in *Mussumat Durga Chowdrani* v. *Jewahir Singh Chaudari* (4), is clearly applicable to the present cases.

On the whole their Lordships are of opinion that the judgment and decrees of the High Court cannot stand. Sir Erle Richards has, however, submitted that the simple dismissal of the suits would seriously prejudice the rights of the *zemindar* with regard to the matters referred to in paragraph 3 of the plaint which were not dealt with by the Collector.

Their Lordships are of opinion that the best course under the circumstances would be to set aside the judgment and decrees of the High Court with a declaration that the plaintiff is not entitled to enforce the acceptance by the tenants of the *pattahs* tendered by him, and that the cases should be sent back to be remitted to the Collector's Court for the drawing up of proper decrees and dealing with any other questions that may be outstanding in these actions between the parties. And their Lordships will humbly advise His Majesty accordingly.

The plaintiff-respondent will pay the costs of this appeal and of the proceedings in the Courts of India.

Decrees set aside; *Case remanded.*

Solicitor for the Appellants: Mr. *E. Dalgado.*

Solicitors for the Respondent: Mr. *Douglas Grant.*

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

July 20, 1914.

Present:—Lord Dunedin, Lord Atkinson, Lord Sumner, Sir John Edge and Mr. Ameer Ali.

Maharaja SURJA KANTA ACHARJYA BAHADUR—APPELLANT

versus

SARAT CHANDRA ROY CHOWDHURI —RESPONDENT.

Bengal Land Revenue Sales Act (XI of 1859), s. 3—Khas mahal—Failure to pay Government assessment—Determination of interest of defaulter—Sale of mahal *by Government—Suit for recovery of possession of* mahal *by purchaser—Limitation—Adverse possession—Revenue Officers, value and weight of proceedings of—Estoppel—Privy Council Practice—Concurrent finding of Courts below on questions of fact, when can be disturbed.*

On the failure of an owner of a *khas mahal* to pay the Government assessment his estate or interest in the law is determined and if the *mahal* is then sold under Act XI of 1859, what is sold is, not the interest of the defaulting owner, but the interest of the Crown, subject to the payment of the Government assessment; and, therefore, the limitation to recover possession of the *mahal* by the purchaser commences to run from the date of the sale and not from an earlier date, inasmuch as under the provisions of Act XI of 1859, adverse possession is only an incumbrance on the *mahal* purchased and on sale the *mahal* vests in the purchaser free from all incumbrances.

Proceedings of Revenue Officers are determinations by public officials of the matters in dispute between the parties to those proceedings, if all the parties interested are given the opportunity of making their claims, raising their objections and producing their evidence. But the parties to such proceedings are not estopped by the decisions arrived at, as they would be in regular proceedings in Courts of Law, but those determinations are of high authority, and when acquiesced in by all the parties interested for a length of time, and made the basis of important transactions, should not be disturbed unless upon the clearest proof that they are erroneous.

The Judicial Committee of the Privy Council will not disturb the concurrent findings of the Courts below on an issue of fact, unless it has been established that their judgments were clearly wrong.

Allen v. Quebec Warehouse Company, 12 A. C. 101; 56 L. J. P. C 6; 56 L. T. 30, approved and followed.

Appeal from a judgment and decree of the Calcutta High Court, dated May 22nd, 1908, affirming those of the Subordinate Judge of Rajshahye, dated March 27th, 1905.

FACTS.—The Permanent Settlement of 1793 of *Pargana* Sersahabad was made with one Chandra Narayan Roy. In order to avoid paying the revenue, he claimed the lands in dispute as *debutter* (religious endowment). Under Regulation II of 1819, the Government instituted proceedings for the resumption of the said lands. A decree was obtained in 1834 which was confirmed by the Special Commissioner in 1836. Being offered in Settlement to the *zemindar* of Sersahabad who declined it, one Shib Chandra Chatterji was given an *ijara* for a term of twenty years. The boundary was fixed by the Deputy Collector (Mr. Bell) in presence of some landlords of the neighbourhood in 1840. Eight years after a revenue

survey was made of the *Parganna* Sersahabad. In 1859 the *mahal* was permanently settled with Jogendro Narayan Roy. Sheikh Enayatullah *Amin* together with other *Amins* were deputed to measure the *mahal* and they found some discrepancies in the survey map of 1848. A further survey was made in 1867. In 1891 the *mahal* was sold for arrears of Government revenue. The purchaser, the respondent, then claimed the *mahal*. This was contested by the appellant. Hence a suit was brought in the Court of the Subordinate Judge of Rajshahye which decided in favour of the respondent. The High Court affirmed the decision of the lower Court. An appeal to His Majesty in Council was then preferred.

Mr. *De Gruyther, K. C.*, with him Mr. *Dube*, for the Appellant, contended that the appellant had remained in possession of the *mahal* in question since 1859 and, therefore, the claim of the respondent was barred by limitation. Both Courts in India had concurrently held that appellant was in possession of the *mahal* for over forty years. The title acquired by prescription could not be regarded as an encumbrance within the meaning of section 37 of Act XI of 1859. The rights of the parties ought to be governed by the map of 1867 which was a final survey made by the Government. The map of 1848 was inaccurate and a map could not be taken as conclusive against a party. Article 144 of the Limitation Act of 1877 applied and the period of limitation began running from 1859.

Reference was made to *Jagadindra Nath Roy* v. *Secretary of State for India* (1); Act XI of 1859 and the Indian Limitation Act of 1877, sections 121 and 144.

Sir *Earl Richards, K. C.*, and Mr. *Dunne*, for the Respondent, contended that both Courts in India had concurrently found that appellant's predecessor had no possession of the lands in question until after 1859, the date of the Permanent Settlement.

The survey maps were correct and had always been acted on and accepted by all parties as being correct and the Permanent Settlement was made on the basis of those maps. The appellant's possession was subsequent to the Permanent Settlement of 1859 and, therefore, was an incumbrance liable to be set aside under section 30 of Act XI of 1859. Article 121 of the Indian Limitation Act of 1877 applied.

Reference was made to *Jagadindra Nath Roy* v. *Secretary of State for India* (1) and Indian Limitation Act, 1877, section 121.

Mr. *De Gruyther* in reply referred to Regulation I of 1893 and Regulation II of 1819, section 11, and to *Felix Lopez* v. *Muddun Mohun Thakoor* (2).

JUDGMENT.

LORD ATKINSON.—This is an appeal from the judgment and decree, dated the 22nd May 1908, of the High Court of Judicature at Fort William in Bengal, affirming a judgment and decree of the 27th March 1905 of the Court of the Subordinate Judge of Rajshahye.

The action out of which the appeal arises was brought by the respondent as purchaser at a sale held under Act XI of 1859 in consequence of the non-payment by the owner of the Government assessment of the *khas mahal* Shyampur Paharpur situate within the Pargana Sersahabad, and No. 218 on the *Touzi* of the Maldah Collectorate, to recover possession of about 2,720 *bighas* of the *Mouzah* Nij Shampur alleged to form portion of the said *khas mahal*, the possession of which was withheld by the appellant, and for damages for mesne profits and further relief.

This sale was held on the 14th of January 1891 and duly confirmed on the 15th of March following.

The appellant relied upon two defences:—*First*, that the land, the possession of which was sought to be recovered, styled for convenience the land in dispute, did not form any portion of the *mahal* so purchased by the respondent, and, *secondly*, that even if it did, the appellant and those through whom he claimed had held possession of this land adversely to all persons having claims upon it continuously since, if not before, the year 1859 up to the present time, and that the respondent's claim was, therefore, barred by the Limitation Act. In anticipation of this second defence the respondent, in his plaint, alleged that this adverse possession, even if proved, was under

(1) 30 I. A. 44; 5 Bom. L. R. 1; 7 C. W. N. 193; 8 C. 291 (P. C.).

(2) 13 M. I. A. 467; 5 B. L. R. 521; 14 W. R. (P. C.) 11; 20 Eng. Rep. 625; 2 Suth. P. C. J. 336; 2 Sar. P. C. J. 594.

the provisions of Act XI of 1859 only an incumbrance on the *mahal* purchased, that on sale this latter was vested in him free from all incumbrances, including the incumbrance thus created, and that consequently his right to recover possession was not barred by the Limitation Act.

It was admitted by Mr. De Gruyther, on behalf of the appellants, that on the failure of an owner to pay the Government assessment, his estate or interest in the land is forfeited, or rather, determined, and that under such a sale as that which took place in this case, what was sold was not the interest of the defaulting owner, but the interest of the Crown, subject to the payment of the Government assessment, and that, therefore, the time limited by the Limitation Act only commenced to run from the date of the sale, in this case the 14th of January 1891. If this be so, then, as the action was instituted on the 23rd of December 1902, the statutory period of twelve years had not elapsed before the latter date, and the claim of the respondent to recover was unaffected. This defence may be accordingly put aside. There remains the part and parcel question.

In order to appreciate the respective contentions of the parties litigant, and the rulings of the Courts below upon this question, it is necessary to refer shortly to the history of those properties of which the land in dispute is alleged to have formed part.

It was not, their Lordships think, disputed that at the time of the Decennial Settlement of Bengal, one Chandra Narayan Roy was the *zemindar* of the *Parganah* Sersahabad, and that the Permanent Settlement of 1793 was made with him in respect of that *parganah*. Neither was it disputed that at the time of this Settlement Chandra Narayan Roy improperly returned as *debutter* lands, *i.e.*, lands devoted to religious purposes, and, therefore, unassessable to Government revenue, portions of eight *manzahs* or villages forming portion of the *Parganah* Sersahabad. The Crown being misled by this untrue statement subsequently instituted proceedings, under Regulation II of 1819 dealing with such matters, to deprive by way of resumption Chandra Narayan Roy and his successor of the land so untruly described. The Crown represented by the Indian Government obtained a decree for resumption of this latter land on the 24th of December 1834, which was on appeal confirmed by the Special Commissioner on the 18th of June 1836. Possession of the misdescribed land having been thus obtained by the Government, they unified it and constituted it a *khas mahal*.

The main contention of the appellant has been that as Chandra Narayan Roy was the owner under the Permanent Settlement of the entire *parganah* of which the land so resumed formed part, the burden of proving that the land in dispute formed portion of the land so resumed rested upon the respondent, and that in so far as he failed to discharge that burden, the lands in dispute must be taken to remain and be vested in the appellant, the successor-in-title to Chandra Narayan Roy, as his property. This contention, though in the main, in their Lordships' view sustainable enough, is in one respect mistaken, namely this, that it was competent for the Crown in the year 1859, when making the Settlement under which the respondent in effect claims, to have added to the resumed land other land then belonging to it and made a grant of both combined. Such difficulty as the case presents arises altogether from one's inability to identify by metes and bounds the land actually resumed, and it is to this point the appellant's Counsel have directed their lengthy and ingenious arguments.

Three attempts have been made to fix the boundaries of this land and to definitely ascertain its position and extent, in 1838, in 1840 and in 1848 respectively. Both the Courts below have found that the last of the three, namely, that made in 1848, was so successful that the accuracy of the result then arrived at was not before them successfully impeached. It is embodied in the map of the survey of the village of Shyampur Paharpur surveyed in April 1848, a copy of which numbered Map 2 was given in evidence. The conclusions of the Courts below on this point being concurrent findings on an issue of fact the well-established rule of this Board in such cases is, as stated by Lord Herschell in *Allen* v. *Quebec Warehouse Company* (3), this:—"Their Lordships do not consider that the question they have to

(3) 12 A. C. 101; 56 L. J. P. C. 6; 56 L. T. 30.

determine is, what conclusion they would have arrived at if the matter had for the first time come before them, but whether it has been established that the judgments of the Courts below were clearly wrong." It is vital to the appellant's case that this should be shown on his behalf, for this reason, that after the decree for resumption of the misdescribed *debutter* lands had been enforced, and the Government assessment upon them fixed, Chandra Narayan Roy declined to take the grant of them offered to him by way of Settlement, and thereupon a lease or *ijara* Settlement of them was made to one Shib Chandra Chatterji for a term of 20 years from the 1st of May 1838. On the expiration of this term, after some delay, a grant by way of final Settlement of this *khas mahal*, was, on the 27th of September 1859, made to Jogendra Narayan Roy, a younger son of Chandra Narayan Roy. By successive transfers made from time to time this *mahal* ultimately became vested in Udoy Chandra Bothra, the defaulting owner, upon whose failure to pay the Government revenue, it was, as already mentioned, sold to the respondent on the 14th of January 1891.

Now the Subordinate Judge has found (page 383) that the Permanent Settlement of this *mahal* (*Touzi* No. 218) in September 1859 "was undoubtedly made upon the *Thak* and Revenue Survey of 1847-1848." And the High Court have found as a fact (page 410) that "the Settlement of 1859 was made on the basis of the survey map, whether that map was right or wrong and whether it differed from the *tanabandi* of 1840 and the Settlement of 1838 or not. That it was wrong there is not a particle of evidence to show. It was always acted upon, and must be taken to be the best evidence of what was settled in 1859."

It was contended before their Lordships, as before the Courts below, that on a comparison of this survey map of 1848 with the proceedings in the Court of the Collector of Maldah on the 18th of June 1838, before Mr. Edward Latour, "in the matter of the settlement of *khas mahal* Taraj Shyampur Paharpur decreed under Regulation II of 1819," and the *robkari*, dated the 11th March 1840 of Mr. William Bell (Deputy Collector of the District of Maldah page 274, R.) and with the map entitled Simanabundi map prepared by him, it would be found that the area of the land alleged to have been resumed according to the revenue survey was largely in excess of the 20,254 *bighas* which in the proceedings before Mr. Latour they are found to measure, that the survey was consequently plainly inaccurate, and the findings of both the Courts below as to its being unimpeachable were, therefore, clearly wrong. This contention is dealt with in the Courts below, and especially by the High Court in their judgment at pages 410 and 411. The so-called map prepared by Mr. Bell is in truth no map at all. It is a picture containing lineal measurements, made in different directions, estimated in *rasis*, from a peg identified as one of those placed by Mr. Latour. No superficial areas were measured or the contents ascertained. In the order made by Mr. Bell on the 11th of March 1840 it is recited, amongst other things, that the boundaries of the *khas mahal* were taken by Mr. Latour by fixing pegs in certain places, and measuring from these pegs in certain directions, but that several of these pegs had been swept away, that at the time of Mr. Latour's Settlement the river Bhagirathi flowed below and to the west of a certain palm tree treated by Mr. Latour as a landmark for the purpose of his measurements, namely, the Panchatara palm tree at Dhoka, that there was *majh dearah* to the west of this river, and to the west again of that *majh dearah* the river ganges flowed, that all the lands of this *majh dearah* were diluviated, that the two rivers became united, and the former bed of the latter river became *dearah*. The physical features of the *khas mahal* thus became altogether changed. In addition, the question of this alleged excess in the survey was elaborately dealt with in the proceedings instituted in the Court of the *Thakbast* Deputy Collector of the District of Bhagalpur and Maldah in reference to disputes arising between the owners of the neighbouring *mauzah* of Sherpur Bhandar and Ram Chandra Roy and others, as owners of this *Mauzah* Shyampur Paharpur touching the boundaries between these *mauzahs*. In the order made by the Deputy Collector on the 11th May 1848, the proceedings before Messrs. Latour and Bell, respectively, are cited at

length, the alleged excess is dealt with, and it is ordered that the *hadbast* of the whole of this property in dispute should be made within the circuit of Shyampur Paharpur, that a *perwanı* should be written to Syed Ata Hossein Peshkar, directing him to make the *hadbast* thereof, and that a copy of the proceedings shall be forwarded to the Superintendent of *thakbast* for final orders with respect to the excess lands. In pursuance of this order the case came before the Superintendent of Surveys for re-trial, and by his order, dated the 6th of March 1849, reciting again at length the proceedings before Messrs. Latour and Bell, and stating the cause to which this excess was due, it was ordered that the appellant's objections should be disallowed, and that the lands which the Deputy Collector considered to be excess lands should be held to be intrinsically the land of Shyampur Paharpur Government *khas mahal* belonging to Chandra Chatterji, the respondent in that case, and that the *thak* prepared by the said officer should be maintained and confirmed. These last proceedings, like those preceding them, are in truth determinations by public officials of the matters in dispute, all the parties interested being given the opportunity of making their claims, raising their objections, and producing their evidence. The parties to them are, no doubt, not estopped by the decisions arrived at, as they would be in regular proceedings in Courts of Law, but these determinations are obviously of high authority, and when acquiesced in by all the parties interested for a length of time, and made the basis of important transactions, should not be disturbed, unless upon the clearest proof that they are erroneous. Their Lordships have not found that the comparison of Bell's map with the survey map is sufficient to lead them to the conclusion that the latter is, save possibly in one respect, erroneous, nor have they discovered anything in any of the proceedings subsequent to the year 1848 to lead them to think so. The bed of the Ganges is apparently included in the *mahal* according to the survey map, but this does not form part of the lands in dispute, and if it belonged to the Crown, as it is contended it did, it would be vested in the purchaser by the Settlement of the 27th of September 1859. The finding of both Courts that the survey formed the basis of the Settlement has not been impeached, and their Lordships, on full consideration of all the evidence, find themselves unable to come to the conclusion that the other concurrent finding of fact, namely, that the survey map is accurate, was clearly wrong. They are, therefore, of opinion that the judgment and decree appealed from should stand, and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

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

Solicitors for the Respondent: Messrs. *W. W. Box & Co.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 175 OF 1912.

April 18, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Banerji.

ZAINULABIDIN—PLAINTIFF—APPELLANT

versus

ZAKIR HUSAIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Will—Compromise—Construction.

According to a Will the plaintiff was to manage the estate of the deceased testator and was to keep the income entirely in his hands and to pay to the heirs of the deceased their proportionate shares of the income. One condition of the Will was that he was to spend a certain sum of money on '*deorhi* expenses'. The Will led to litigation which resulted in a compromise whereby the heirs got their proportionate shares in the property and agreed to pay out of its profits certain sum every year towards the expenses mentioned in the Will:

Held, that the plaintiff was entitled to the payment of money under the compromise from the heirs, that it was his duty to spend this money upon the purposes mentioned in the Will, that he was liable to account to the defendants for the expenditure of the money, but that the rendering of account was not a condition precedent to the payment of the money to the plaintiff.

Appeal under section 10 of the Letters Patent from the following judgment of

TUDBALL, J.—This and the connected appeals arise out of the following circumstances:—One Saiyed Tafazzal Husain died leaving a Will, dated the 12th of December 1872, to which he added a codicil, dated the 23rd of November 1885. According to his Will the plaintiff-respondent

was appointed executor and manager of his estate. He was to manage the estate and was to keep the income entirely in his hand and to pay to the heirs their proportionate shares of the income. One condition of the Will, with which we are concerned, is that he was to take Rs. 450, out of the income and spend it on what are called "*deorhi* expenses." In the Court below the parties agreed that these *deorhi* expenses were to include ancestral house, *fatiha* ceremonies, *neota*, etc., as set out in the Will. After the death of Tafazzul Husain the present appellants brought a suit against the present plaintiff for their share of the property. The parties entered into a compromise. According to this compromise a part of the claim in that suit was disallowed and a part was allowed. The plaintiffs therein also agreed to pay Rs. 75 per annum out of the profits of that portion of the estate, which was to go to them under the compromise, towards the *deorhi* expenses and that if they did not pay these expenses, Zainul Abidin (the plaintiff) was to recover them. A decree under the compromise was passed. Zainul Abidin has brought this suit to recover a sum of Rs. 75 per annum for three years, *minus* Rs. 15 which had been received.

The claim has been decreed and the defendants have come here on second appeal and two points are urged. The *first* is that the defendants are not personally liable and that Zainul Abidin may, if he likes, enter on the estate and collect the income and, therefore, no decree should have been passed against the appellants. The plea is one without the slightest force whatsoever. The appellants got a decree for possession of a proportionate share of the estate and they agreed to pay out of the profits thereof a sum of Rs. 75 per annum. The meaning of this clearly was that they were to collect the income of the estate, incur the necessary expenditure of management and out of the balance which remained in their hands pay Rs. 75 yearly. They were in possession of the property and the profits and it is an absurdity to say that they are not personally liable for the money. Whether the plaintiff has or has not a charge on the property is a different matter. The defendants are liable and if the plaintiff is willing to accept a simple money decree, there is nothing to prevent him from doing so.

The next point raised is that the plaintiff has not proved that he has incurred any expenditure on account of the *deorhi* in the years in question, and *secondly*, that it has not been proved that he has incurred the full expenditure of Rs. 450 per annum and that the appellants were only liable for a proportion of the expenditure of the *deorhi*, subject to a maximum of Rs. 75, in other words they were only liable for Rs. 75 if the plaintiff spent the full amount of Rs. 450 on the *deorhi*, and the lower Court has come to no finding as to what sum was spent by the plaintiff in the years in suit. The position taken by the appellants in the Courts below was that the plaintiff had incurred no expense whatsoever in the years in suit. The plaintiff showed and the Court below held that he incurred expenditure in his father's *fatiha* ceremonies, executing repairs, giving *neota* and attending to the visitors and guests in accordance with the traditions and usages of the family. It is quite clear that there is a finding that expenditure was incurred by the plaintiff. The lower Court, however, goes on in its judgment, "Having regard to the position and standing of the family the amount which was spent over the said purposes could not probably have been less than the aggregate amount claimed." Presumably the aggregate amount is the aggregate amount claimed in the three suits brought against the three sets of heirs. It is urged that this is not a clear finding and there ought to be a definite finding whether or not the plaintiff incurred the full expenditure of Rs. 450 per annum or what expenditure he really incurred. On behalf of the plaintiff it is argued that he is not liable to account to the defendants, that it is their duty to pay the money and that it is not his duty to render an account. I do not think that it is open to the plaintiff to plead that he is not liable to account. It was clearly the intention of the parties that the expenditure in the Will was to be incurred every year and the duty of performing the ceremonies, etc., was on the plaintiff and the various heirs were to pay their shares. If in any year the plaintiff did not incur the whole expenditure the heirs would be justified in holding a proportionate amount of their shares of the full sum Rs. 450

When he has incurred the expenditure and they have not paid their shares they must in equity be forced to pay the full sum of Rs. 75. I, therefore, think it desirable in order to meet the ends of justice and in order to enable me to decide the appeal to call for a finding on the following issue from the Court below: In each of the years in suit did the plaintiff incur the expenditure of full Rs. 450 on the *deorhi* as sanctioned by the Will? If not, what amount did he actually incur and what will be the proportionate share of the defendants therein? The parties will be allowed to give further evidence. On receipt of the finding ten days will be allowed for objections.

[On receipt of the finding his Lordship delivered the following:—]

JUDGMENT.—The lower Court has found on the issue remitted that the defendants in Suit No. 133 were liable for a sum of Rs. 8 per annum for each of the three years in suit, that they have paid Rs. 16 and that Rs. 16 balance remains unpaid and that, therefore, the plaintiff should have a decree for that sum. Objections have been taken to this finding on the ground that the plaintiff admitted the payment of Rs. 15 on account of the years in suit, that the whole of this sum being deducted from Rs. 24 there is only a balance of Rs. 9 left. The lower Court has clearly made a slip in the account and the objection is, therefore, valid. The result will be that the plaintiff will have a decree in this Suit No. 133 for Rs. 9 only. I, therefore, modify the decree of the Court below to this extent that the plaintiff will have a decree for the sum of Rs. 9 only. The parties will pay and receive costs in all Courts in accordance with their failure and success in the suit.

It is urged that in that portion of my order of the 11th of January 1913, which begins, "If in any year the plaintiff did not incur the whole expenditure, the heirs would be justified etc.," I have laid down as a rule that it is the duty of the plaintiff to incur annual expenditure and after rendition of accounts recover what is due from the defendants. I did not intend to lay down any such rule. My remarks must be read in view of the circumstances of the case. It would have been better expressed by saying: "If in any of the years in suit the plaintiff did not incur the whole expenditure etc." As the suit now stands the plaintiff has come into Court alleging that in the years in suit he had incurred this expenditure and, therefore, was entitled to recover his proprotional share from the other heirs who had taken possession of their shares in the estate. The decree of the Court below will be modified as noted above. No interest is claimed and no interest is allowed. In the connected Suits Nos. 136 and 122 the Court below has held that the plaintiff is entitled to recover the sum of Rs. 27-9-0 and Rs. 6 respectively. Decrees will be passed in those suits in accordance with these findings.

Mr. *S. M. Sulaiman* (with him Mr. *Muhammad Ishaq*), for the Appellant.

Mr. *Agha Haider*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff sued to recover money alleged to be due under a deed of compromise for three years upto 1317 *fasli*. It appears that one Tafazzul Husain made a Will and a codicil under which the plaintiff was to stand possessed of the entire estate of the deceased, to make certain payment each year amounting to Rs. 450 for charities, repairs to the ancestral house and other matters and to divide the surplus between the heirs of the deceased. The Will led to litigation which resulted in a compromise under which it was agreed that the plaintiff should make over to the heirs certain portions of the property representing their shares, and that each of the heirs should pay out of the profits of the property so made over to them the sum of Rs. 75 per annum towards the expenses of the repairs and other matters mentioned in the Will and codicil. The plaintiff brought the present suit against the defendants claiming this Rs. 75 for three years. The defendants contended that the plaintiff was bound to expend the money himself in the first instance and then to render an account to them of this expenditure as a condition precedent to his recovering any part of the Rs. 75. The plaintiff, on the other hand, contended that he was entitled to get Rs. 75 per annum from each of the heirs and was not bound to render any account whatever of how he had expended the money. In our opinion both of these contentions are wrong. The plaintiff was entitled to get from each of the heirs the

sum of Rs. 75 per annum but having got that, sum he was bound to expend it upon the purposes mentioned in the Will and codicil, and he was bound to give reasonable accounts to the heirs showing that he had so spent the money. The difficulty in the present case is to make a decree which is equitable and just to both parties. If we were to give the plaintiff a decree for the three years, the money could no longer be expended upon many of the purposes mentioned in the Will and codicil. The time for expending money has now gone by. We think upon the true construction of the deed of compromise the rendering of an accountis not a condition precedent to the payment of the money. But as already stated, once the money has been paid the plaintiff is bound to spend the money upon the purposes mentioned in the Will and codicil and to render a reasonable account of the expenditure. Under all the circumstances we think that the justice of the case will be met by giving the plaintiff a decree for Rs. 75 in addition to the amount allowed by the learned Judge of this Court. It will be the plaintiff's duty to spend in the following year the Rs. 75 now decreed to him upon the purposes mentioned in the Will and codicil and he will be liable to account to the defendants for the expenditure of the money. We accordingly vary the decree of this Court by awarding the plaintiff a decree for Rs. 75 in addition to the amount already decreed to him. Under all the circumstances we direct that the parties abide their own costs in all Courts.

Decree varied.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 97 OF 1912.

April 2, 1914.

Present:—Mr. Lindsay, J. C. and Mr. Stuart, A. J. C.

MUKHTAR AHMAD—PLAINTIFF—APPELLANT

versus

BARATI LAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Jurisdiction—Title, objections relating to, raised in course of partition in Revenue Court - Civil Courts to satisfy themselves if conditions and qualifications annexed to grant of jurisdiction complied with—U. P. Land Revenue Act (III of 1901), s. 111.

When a Statute confers jurisdiction upon a tribunal of limited authority and statutory origin, the conditions and qualifications annexed to the grant must be strictly complied with.

The Civil Courts are invested with jurisdiction of a two-fold character in respect of objections relating to title which have been put forward in the Revenue Court within the time specified in the proclamation. In the cases specified in clauses (*a*) and (*b*) of sub-section (1) of section 111 of the Land Revenue Act, the jurisdiction conferred is original.

In cases under clause (*a*) there is no rule of limitation other than that which would apply under the ordinary law relating to civil suits.

In cases under clause (*b*) the jurisdiction must be invoked within the period of three months from the date upon which the objector is referred to the Civil Court. In cases under clause (*c*) the Civil Court has an appellate jurisdiction only.

The jurisdiction being conferred on the Civil Courts by Statute and not by the Revenue Court order, the Civil Courts when their jurisdiction is invoked must satisfy themselves that all the conditions and qualifications annexed to the grant of jurisdiction have been strictly complied with.

Appeal against the decree of the District Judge, Lucknow, dated 21st December 1911, reversing that of the Munsif of North Lucknow, dated 1st May 1911.

Babu *Rajeshwari Prasad*, for the Appellant.

Pandit *Gokaran Nath Misra* and Babu *Bisheshwar Nath*, for the Respondents.

JUDGMENT.—Each of these appeals has been referred to a Bench for decision and although not connected with each other and differing in certain respects with regard to facts, they involve the decision of a point of law of general importance, in connection with the respective jurisdictions of the Civil and Revenue Courts in Oudh.

To what extent are the Civil Courts in Oudh entitled to take cognizance of questions of title raised in proceedings taken under the Land Revenue Act (United Provinces Act III of 1901) for the partition of revenue-paying estates?

This is the principal question for determination here. The point is one which has been discussed in a not inconsiderable number of cases decided for the most part by the High Court at Allahabad. But these rulings are not of much assistance at the present day in view of the altered provisions of the Revenue Law.

The Act which formerly regulated matters concerned with the land revenue in the

Agra Province (including the partition of revenue-paying estate) was Act XIX of 1873, section 241 of which provided that no Civil Court should exercise jurisdiction over various matters one of which was specified in clause (*f*) to be "the distribution of the land or allotment of the revenue of a *mahal* by partition."

The corresponding Act for the Province of Oudh was Act XVII of 1876, section 219, clause (*d*) of which was similar in language to section 241, clause (*f*), of Act XIX of 1873 which has just been mentioned.

Both these Acts have been replaced by the Land Revenue Act (United Provinces Act III of 1901) which embodies the Revenue Law now applicable to both Provinces. Section 233 of this latter Act contains the provisions which oust the jurisdiction of the Civil Courts and for the purpose of matters relating to partition the law as now enacted is as follows:—

Section 233—

"No person shall institute any suit or other proceeding in the Civil Court with respect to any of the following matters":—

* * * * *

"(*k*) partition or union of *mahals* except as provided in sections 111 and 112":

It is clear, therefore, that by virtue of this enactment the jurisdiction of the Civil Courts with respect to matters connected with the partition or union of *mahals* is strictly limited. The effect of the section is generally to exclude the jurisdiction of the Civil Courts in matters relating to land revenue and to confer a general jurisdiction in such matters upon the Revenue Courts constituted under the Act.

And in the construction of a section of this nature the Courts must be guided by the rule of interpretation of Statutes conferring jurisdiction which has been enunciated as follows in Craies' Statute Law at page 236: -

"As a general rule, Statutes which enable persons to take legal proceedings under certain specified circumstances must be accurately obeyed notwithstanding the fact that their provisions may be expressed in mere affirmative language."

* * * * *

"This rule may also be expressed thus that when a Statute confers jurisdiction upon a tribunal of limited authority and statutory origin the conditions and qualifications annexed to the grant must be strictly complied with."

In order, therefore, to arrive at a correct notion of the extent of the jurisdiction of the Civil Courts in matters relating to the partition or union of *mahals* we have to apply this canon of construction to the provisions of section 233, clause (*k*), of the Land Revenue Act.

We find that such matters can only be taken cognizance of by a Civil Court in the conditions mentioned in sections 111 and 112 of the Act.

Turning back then to section 111, it contains certain provisions for the disposal of a certain class of objections raised in partition proceedings, namely, objections which raise questions of proprietary title and which have been lodged in the Revenue Court on or before a certain date. This date is determined with reference to the terms of the preceding section. The Collector on receiving an application for partition has to issue a proclamation to the recorded co-sharers who have not joined in the application calling upon them to state their objections (if any) to the partition. A date has to be fixed in the proclamation beyond which objections cannot be received, namely, a day not less than thirty or more than sixty days from the date upon which the proclamation issues.

Having received objections within the time so limited, section 111 enables the Collector to deal with any of them which raise a question of proprietary title in any one of the three ways specified in clauses (*a*), (*b*) and (*c*) of section 111, sub-section (1). He may decline to grant the application for partition until the question of title so raised has been decided by a competent Court. Or he may, without refusing the application, call upon the objector to institute a suit in a Civil Court within three months from the date of his order. Proceedings are stayed meanwhile. If the objector fails to institute the suit within the time specified the question of title is decided by the Collector against him and the partition proceedings are resumed. If the suit is instituted proceedings are stayed till it is decided. After that the proceedings go on, the Collector following the

decision of the Civil Court upon the question of title.

The third course open to the Collector is to decide the question of title himself. And if he elects to take this course his proceedings are treated as proceedings of a Civil Court, and his decision is made appealable to the Civil Courts under section 112. It follows, therefore, from a consideration of the language of these two sections that the Civil Courts are invested with jurisdiction of a two-fold character in respect of objections relating to title which have been put forward in the Revenue Court within the time specified in the proclamation.

In the cases specified in clauses (*a*) and (*b*) of sub-section (1) of section 111, the jurisdiction conferred is original. In cases under clause (*a*) there is no rule of limitation other than that which would apply under the ordinary law relating to civil suits. In cases under clause (*b*) the jurisdiction must be invoked within the period of three months from the date upon which the objector is referred to the Civil Court.

In cases dealt with under clause (*c*) the Civil Court has an appellate jurisdiction only. And a reference to the provisions of sections 210 and 211 of the Act shows that no orders under the Act other than those passed in proceedings under clause (*c*) are made appealable to the Civil Courts.

It being thus made clear that the jurisdiction of the Civil Courts is strictly limited to the cases just mentioned it necessarily follows that when their jurisdiction is invoked, they must satisfy themselves that all the conditions and qualifications annexed to the grant of jurisdiction have been strictly complied with. It must be made clear in the first place that the question of title which they are invited to decide, has been raised by an objection filed in the Revenue Court within the time provided by section 110 of the Act. Again, where the intervention of the Civil Courts is sought in the exercise of their original jurisdiction, it must be shown that the conditions laid down in section 111, sub-section (1), clauses (*a*) and (*b*), have been satisfied. The Civil Court must ascertain whether the application for partition has been refused under clause (*a*) so as to leave it free to deal with the case without regard to any rule of limitation other than that which is applicable under the ordinary law: or whether the case being one under clause (*b*) the plaintiff has brought the suit within time. And lastly where intervention is sought by way of appeal, it must be shown that the order appealed against is one passed by the Revenue Court after inquiry into the merits of an objection raising a question of title which has been put before the Revenue Court within the time fixed under section 110.

To come now to the facts of the cases in appeal before us.

In Second Civil Appeal No. 97 of 1912 the appellant, Mukhtar Ahmad, was the plaintiff. He filed a suit in the Court of the Munsif of Lucknow (North) on the 27th May 1910, praying for a declaration that a certain 4-pie share which the defendants had acquired by a sale-deed, formed a moiety of a certain 8-pie share remaining in his ownership. The dispute really turned upon the construction of a particular sale-deed and the question was, what property had passed by the sale. The question raised was undoubtedly a question of title.

At the time the suit was filed there were pending in the Revenue Court partition proceedings relating to the *mahal* in which the property in suit was situated.

The application for partition was made on the 11th March 1908 by the defendants-respondents, Barati and Mata Din and on the 20th March 1908, the proclamation under section 110 was issued. The date fixed for the filing of objections was the 29th April 1908 and on that date a petition was filed by Mukhtar Ahmad. He raised no objection involving any question of proprietary title. He stated that he had no objections to partition being made, but he asked that the partition might be carried out in a particular way, *i. e.*, by arbitration and he also made certain proposals relating to the constitution of the *mahals* on partition. The proceedings went on in the Revenue Court and it was not till the 25th August 1908, that Mukhtar Ahmad broached the question which he has since brought for decision to the Civil Court. The Assistant Collector decided the question in his favour but the order was reversed by the Collector. In subsequent appeals to the Commissioner and the Board of Revenue the order of the Collector was upheld and Mukhtar Ahmad then having failed in his attempt to get the order of the Assistant Collector restored came to the Civil Court to get this declaration at a

moment when the partition proceedings had all but ended after going on for about two years.

It is quite clear from what has been said above as to the law that the Munsif who entertained this suit and decreed it had no jurisdiction to deal with it.

The objection relating to title which was raised in the Revenue Court was not an objection to which section 111 of the Land Revenue Act applies, for it had not been filed within the time specified in the proclamation. The case was, therefore, not one under either clause (*a*) or (*b*) of section 111 (1) of the Act and the Munsif's cognizance of the matter was barred.

The order of the District Judge in appeal by which he discharged the Munsif's decree is, therefore, a correct order, but not for the reasons given by the learned Judge who was erroneously of opinion that the Munsif was not competent to discuss the authority of the Collector, or of the Commissioner or the Board of Revenue to entertain appeals from the order of the Assistant Collector. It cannot be suggested as the learned Judge suggests that even if these appeals were entertained without jurisdiction, the Munsif as a Civil Court was bound by the orders passed by the superior Revenue Courts and was not to be allowed to question their authority. And the learned Counsel for the respondents has not attempted to support the lower Appellate Court's judgment on these grounds.

But where the Munsif fell into error was in not perceiving that he himself had, in the circumstances, no jurisdiction to entertain the suit for the reasons already noted. And incidentally we may remark that his opinion as to the competence of the Revenue Court to entertain successive appeals arising out of the order of the Assistant Collector is wrong. On the contrary the appeals clearly lay on the Revenue side, for as we have shown above an appeal to the Civil Courts only lies where an objection relating to title which has been lodged within time, had been dealt with by the Revenue Court under section 111 (1), clause (*c*). That was not the case here.

Mukhtar Ahmad's appeal (Second Civil Appeal No. 97 of 1912), therefore, fails and is dismissed with costs.

We have now to consider Second Civil Appeal No. 223 of 1912, which has also been referred to a Bench for decision. The facts are set out in the referring order dated the 11th December 1912. Partition proceedings between the parties to this appeal were started in the year 1909 and after the application of partition had been filed, notice issued in the ordinary course to the plaintiffs-appellants who were co-sharers in the *mahal*. The plaintiffs did not raise any question of title by objections filed within the time specified in the proclamation issued under section 110 of the Land Revenue Act.

After the partition proceedings had been going on for some time, the plaintiffs made an application to a Revenue Court for correction of the *khewat* on the allegation that at the time of the recent Settlement there had been an omission to record in their names an area of 123 *bighas* odd which they declared to be their property. This application was refused.

On the 20th March 1911 the plaintiffs again raised this question before the Assistant Collector in charge of the partition case. They stated the claim they had to the above area and announced their intention of filing a suit in the Civil Court. Upon this the Assistant Collector passed an order directing these plaintiffs to file a civil suit within three months. The suit out of which this appeal has sprung was accordingly brought on the 9th October 1911. In paragraph 5 of the plaint it was stated that the suit had been filed in pursuance of the above order of the Assistant Collector.

The Subordinate Judge entertained the suit and decreed it. In appeal the District Judge reversed the first Court's decision holding that the suit was not maintainable. The learned Judge pointed out that the Assistant Collector had no authority to pass the order directing the plaintiffs to file a civil suit within three months from the date of his order.

It is argued here that the District Judge was not entitled to go behind the order of the Revenue Court so as to question its validity. The contention is in substance that where such an order is passed, the Civil Court is at once vested with jurisdiction, whether or not the order is good in law.

This argument cannot be allowed. If, as we have already stated, the Civil Courts must

satisfy themselves that they are entitled to exercise the limited jurisdiction allowed to them in such matters by the Land Revenue Act, they must necessarily have the power to examine the validity of the order of the Revenue Court which purports to be the immediate authority for their taking cognizance of the question of title which has been raised. It would be contrary to all reason to hold that the Civil Courts are bound by an order of an Assistant Collector, right or wrong. The fallacy of the argument lies in the assumption that it is the order of the Revenue Court which confers jurisdiction upon the Civil Court. That is not so. The jurisdiction is conferred by the Statute and not by the Court's order—and it is for the Civil Courts to see that the conditions precedent which are laid down by the Act have been strictly fulfilled before they assume jurisdiction.

There can be no doubt whatever that the order of the Assistant Collector in this instance was made entirely without jurisdiction. The objection raised before him was not one under section 111 of the Land Revenue Act, for it was made long after the period limited by the proclamation had expired. We hold, therefore, that the decision of the learned District Judge is perfectly correct. The suit was unmaintainable and was properly dismissed by him.

The result is that Second Civil Appeal No. 223 of 1912 fails and is dismissed with costs. * * * * * * * * * * * * * *

Appeals dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 420 OF 1912.

April 29, 1914.

Present:—Mr. Justice Tudball and Mr. Justice Chamier.

RUPAN BIBI—PLAINTIFF—APPELLANT

versus

BHAGELU LAL—DEFENDANT—RESPONDENT.

Succession Certificate Act (VII of 1889), ss. 16, 18—Suit to have succession certificate and decree based thereon set aside, whether maintainable—Certificate how revocable.

A succession certificate is conclusive as against the debtors under section 16 of the Succession Certificate Act, and can be revoked only by the District Court under section 18 of the Act. No suit will lie to have a certificate and the decree based on it set aside on the mere ground that the certificate was obtained by the use of false evidence.

First appeal from a decree of the District Judge, Azamgarh.

Messrs. *Abdul Raoof* and *Shafi-uz-zaman*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-appellant to have it declared that a certain succession certificate granted to the defendant by the District Judge on July 2nd, 1909, had been obtained by means of false evidence and should, therefore, be set aside and also that a decree, dated March 23rd, 1911, which had been passed on the basis of the said certificate might also be set aside. It appears that one Ajudhya Pershad died and the defendant applied to the District Judge for a succession certificate in order to enable him to collect debts due to the estate, among them being one due from the present plaintiff-appellant. After inquiry the District Judge granted the certificate. A suit was brought against the present plaintiff and was decreed. It is this decree which the present plaintiff seeks to set aside. In our opinion no such suit will lie. The certificate is conclusive as against the debtors under section 16 of the Succession Certificate Act. It can be revoked by the District Court under section 18 of the same Act and, in our opinion, no suit will lie to have the certificate and the decree set aside on the mere ground that the certificate was obtained by the use of false evidence. The appeal fails and is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 1226 OF 1913.

February 6, 1914.

Present:—Mr. Justice Piggott.

HAIDAR RAZA—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Evidence Act (I of 1872), s. 91—Statement made by accused at departmental inquiry—Proof.

A statement made by an accused person at a departmental inquiry confessing his guilt is not a matter required by law to be reduced to the form of a document and hence section 91 of the Evidence Act does not apply. Such confession, however, can be proved at the time of his prosecution.

Criminal revision against an order of the Sessions Judge of Gorakhpur, dated November 7th, 1913.

Mr. *E. A. Howard*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—This is an application in revision against an order by the Sessions Judge of Gorakhpur dismissing the appeal of one Saiyad Haider Raza against his conviction of an offence punishable under section 161 of the Indian Penal Code, before a Magistrate of the first Class in that District, in which he had been sentenced to three months' rigorous imprisonment. The following facts are material:—On June the 26th, 1913, a Bench of Honorary Magistrates consisting of two Magistrates, sitting at Tamkohi in the Gorakhpur District, had before it a petty criminal case in which one Sukhari was the complainant. The Magistrates were informed that the parties were inclined to compromise, and as the offence was a compoundable one, they gave the parties an opportunity to discuss matters out of Court. Later in the day the Magistrates were informally told of a difficulty which had arisen in arranging the terms of the compromise, and Sukhari made a statement to the effect that he had paid certain money as an illegal gratification to two officials of the Court. The Magistrates administered solemn affirmation to Sukhari and then and there recorded in the English language a brief memorandum of the statement which Sukhari proceeded to make. It is not quite clear whether the present applicant, Saiyed Haidar Raza, who at the time occupied the position of clerk to the Bench of Honorary Magistrates, was present or not while Sukhari's statement on solemn affirmation was being recorded. If he was not present while this was being done, he must have been called before the Magistrates shortly afterwards, for it is in evidence that certain further conversation took place between the Magistrates, Sukhari and Saiyad Haidar Raza. A brief note was recorded in the English language by the Honorary Magistrates regarding the facts thus ascertained. That note includes a memorandum of the substance of what was then stated by Saiyad Haidar Raza. The Magistrates made some further inquiries into the matter and later on formally recorded a statement by Saiyad Haidar Raza, in the course of which he denied all the allegations against him. This was recorded on the 20th of September 1913, and is obviously in the form of an explanation offered by an official against whom proceedings are being taken departmentally. Finally, the Honorary Magistrates reported the matter to the District Magistrate with a recommendation that Saiyad Haidar Raza should be dismissed but not criminally prosecuted. The District Magistrate, however, ordered his prosecution, with the result already indicated. The question before me is as to the admissibility or otherwise of some of the evidence on the record. The Sessions Judge has ruled that the Honorary Magistrates were precluded by the provisions of section 91 of the Indian Evidence Act (I of 1872) from giving oral evidence as to what took place before them on June the 26th, 1913, in so far as that evidence involved the proving of any confession then made by Saiyad Haidar Raza. I am perhaps not quite clear regarding the view taken by the learned Sessions Judge of the record made on that day of Sukhari's statement on solemn affirmation. The result at any rate has been this that the Sessions Judge has ruled out the oral evidence of the confession alleged to have been made by the applicant on June the 26th, 1913, but has convicted him upon the oral evidence as to something which was stated by Sukhari in his presence and as to his own conduct when Sukhari made this statement.

The point taken in revision is that the evidence thus accepted does not warrant the conviction of the applicant in respect of the offence charged. I have felt it incumbent on me to deal with the case as a whole and to reconsider the finding recorded by the learned

Sessions Judge as to the admissibility of the oral evidence given by the Honorary Magistrates regarding Saiyad Haidar Raza's confession. The Sessions Judge has held that any statement which Saiyad Haidar Raza may have made to the Honorary Magistrates on June the 26th, 1913, if of the nature of a confession, would be a matter which the said Honorary Magistrates were required by law, namely, by section 164 of the Code of Criminal Procedure, to reduce to writing in a particular way. If this view is correct, it would certainly follow that the rough note or memorandum recorded by the Honorary Magistrates in which Saiyad Haidar Raza's confession is embodied, would not be a proper record of his confession and could not be accepted in evidence. It would also follow that oral evidence of the substance of this document would be excluded by section 91 of the Indian Evidence Act. Now the original statement made by Sukhari to the Honorary Magistrates, by which their attention was first drawn to the commission of an offence punishable under section 161 of the Indian Penal Code, was certainly not a "complaint" within the meaning of the definition given in section 4 of the Criminal Procedure Code. It is clear to me that Sukhari had no intention of asking the Magistrates to take action under the Criminal Procedure Code. When he made that statement, he was merely explaining to them why he was holding out for certain terms before he could consent to compound the offence in the case in which he appeared as complainant. If, therefore, the Honorary Magistrates proceeded to take cognizance of this offence, they could only do so under section 190, clause 1 (c). The learned Sessions Judge's view of the proceedings which followed seems either to be coloured by the assumption that the Honorary Magistrates, being empowered by law to take cognizance of the matter under the clause aforesaid, were legally bound to do so, and to do so immediately, or else to rest on the supposition that their examination of Sukhari on solemn affirmation shows that they had so taken cognizance. I am not prepared to admit either of these propositions. A Magistrate is also a citizen and is also the head of an office. Matters may come to his notice in either of these capacities regarding which he may consider it advisable to question other people, without its being necessarily presumed that he was acting in his magisterial capacity. From any point of view the examination of Sukhari on solemn affirmation was a mistake. Sukhari's statement is itself a confession, that he had been guilty of offences punishable under section 161/107 of the Indian Penal Code. If it was to be recorded at all by the Magistrates as such, it should have been recorded in the manner provided for confessions and not as a deposition on solemn affirmation. As a matter of fact the proceedings of the Honorary Magistrates read as a whole show clearly that they conceived themselves to be conducting a departmental inquiry into the allegations of misconduct suddenly made to them against certain of their subordinates. I have conducted inquiries of a very similar nature myself, and it certainly never occurred to me that, in questioning any one of my subordinates against whom allegations of misconduct had been made, I was bound to act in my magisterial capacity and could only record any statement which they might see fit to make subject to the formalities and safeguards prescribed by law, *i. e.*, by section 164 of the Code of Criminal Procedure. In my opinion the statements made by Saiyad Haidar Raza to the Honorary Magistrates when he was called into their presence and confronted with Sukhari on June the 26th, 1913, were not matters required by law to be reduced to the form of a document. Consequently section 91 of the Indian Evidence Act has no application. The Honorary Magistrates have been examined in the Courts below and have proved what took place before them on the date above-mentioned and what Saiyad Haidar Raza stated when the matter was unexpectedly sprung upon him. I have considered the evidence, and I see no reason to doubt that the applicant was surprised into the making of true admissions against himself and that the oral evidence on which the first Court based its conviction of the applicant was reliable as well as legally admissible. I have considered the provisions of section 24 of the Indian Evidence Act and am satisfied that they do not apply to the circumstances of this case.

The result is that I dismiss this application.

Application dismissed.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL MISCELLANEOUS CASE No. 16 OF 1913.

February 5, 1914.

Present:—Sir George W. Shaw, KT., J. C.

KATAN—APPLICANT

versus

NGA TIN AND ANOTHER—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 195 (6)—Sanction to prosecute—Application for revocation—Notice to other party, whether necessary.

An application for the revocation of a sanction granted by the lower Court should not be disposed of *ex parte* without giving notice to the person obtaining sanction or to the District Magistrate.

Mr. *J. N. Basu*, for the Applicant.

Mr. *Maung Sa*, for the Respondents.

ORDER.—On the application of the present applicant, Katan, the Additional Magistrate granted sanction to him to prosecute respondents, Nga Tin and Nga Saung, under section 193, Indian Penal Code. The Sessions Court on the application of Nga Saung revoked the sanction granted, without giving notice either to the present applicant or to the District Magistrate. This kind of *ex parte* proceeding is opposed to general principles; and there is also special authority for holding that notice is necessary in proceedings under clause 6 of section 195, Criminal Procedure Code. Compare *Ram Nath Chamar* v. *Ram Saran Lall* (1) and *Raghubir Singh* v. *Jogeshwar Tewary* (2). It is true that in *Jhalan Jha* v. *Bucha Gope* (3) it was held that notice was not necessary to the party who had obtained sanction in an application for revocation, but notice in that case had been issued to the District Magistrate. In cases of this kind as well as in other cases, I think it is desirable that both sides should be heard. Only in this way can it be expected that orders will meet with satisfaction.

I set aside the order of the Sessions Judge revoking sanction and direct that he proceed to dispose of the application after giving notice to the present applicant.

Order set aside.

(1) 1 C. W. N. 529.
(2) 8 C. W. N. 643; 1 Cr. L. J. 632.
(3) 31 C. 811; 1 Cr. L. J. 850.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 223 OF 1914.

May 1, 1914.

Present:—Mr. Justice Chamier.

SITAL PARSHAD—APPLICANT

versus

THE MUNICIPAL BOARD OF CAWNPORE—RESPONDENTS.

U. P. Municipalities Act (I of 1900), s. 147—Board's order disobeyed—Conviction—Disobedience persisted in—Second trial—Correctness of Board's order, whether can be challenged at second trial.

On his disobeying the order of the Municipal Board to remove an objectionable *chajja* the applicant was prosecuted and fined Rs. 5 under section 147 of the Municipalities Act. He challenged the correctness of that conviction by applications to the District Magistrate and to the High Court, but his applications were thrown out. On his persisting in disobeying the Board's order he was again prosecuted. At the second trial he wished to challenge the correctness of the first conviction by showing that the Board's notice was illegal and so forth:

Held, that he could not now challenge the correctness of the first conviction.

Criminal revision from an order of the District Magistrate of Cawnpore.

Mr. *A. P. Dube*, for the Applicant.

Mr. *R. Malcomson*, for the Respondents.

JUDGMENT.—The applicant was ordered by the Municipal Board of Cawnpore to pull down a *chajja* which was alleged to be in a ruinous and dangerous condition. On his disobeying the order he was prosecuted under section 147 of the Municipalities Act and was fined Rs. 5. As he persisted in disobeying the Board's order he has been prosecuted again and he has been fined Rs. 20 at the rate of Rs. 2 for each day that elapsed since the original conviction. At the second trial he wished to challenge the correctness of the first conviction by showing that the Board's notice was illegal and so forth. The Magistrate refused to allow this to be done and, in my opinion, the view taken by the Magistrate is correct. Before the institution of the second prosecution the applicant challenged the correctness of the first conviction by means of applications to the District Magistrate and to this Court, but his applications were thrown out. It seems to me impossible to hold that after a conviction under section 147 the person convicted may challenge the correctness of that conviction as often as he is prosecuted for con-

tinued disobedience of the order of the Board. The correctness of the first conviction cannot now be challenged.

This application for revision is dismissed.

Application dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 47 OF 1914.

February 20, 1914.

Present:—Mr. Justice Ryves and Mr. Justice Piggott.

SYEDA KHATUN—APPLICANT

versus

LAL SINGH AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 435—Magistrate's order—Finality of jurisdiction—Revision.

A Magistrate's order under section 145 of the Criminal Procedure Code cannot be interfered with by the High Court in revision.

Maharaj Tewari v. *Har Charan Rai*, 26 A. 144; A. W. N. (1903) 212 and *Jhingai Singh* v. *Ram Partap*, 1 Ind. Cas. 762, 31 A. 150; 9 Cr. L. J. 382; 6 A. L. J. 113, followed.

Criminal revision from an order of the Magistrate, First Class of Moradabad, dated November 19th, 1913.

FACTS.—The applicant, Syeda Khatun, brought a suit in a Civil Court for possession of certain land along with the crops that might be standing on it against Lal Singh and others. The suit was decreed on the 12th June 1913. On an application for execution of this decree an order was passed directing the *Amin* to put the decree-holder in possession of the land and also of the standing crops if judgment-debtors failed to remove them. The *Amin* executed this order. Subsequently proceedings were taken under section 145 of the Criminal Procedure Code against the parties in respect of the standing crops. The Magistrate, coming to the conclusion that possession was with the judgment-debtors, maintained their possession by his order dated 19th November 1913. Syeda Khatun applied to the High Court to revise the order of the Magistrate.

Mr. *Sarat Chandra Chaudhri*, for the Applicant, contended that the Magistrate was not competent to go behind the decree of the Civil Court and that it was his duty to maintain and give effect to it.

Mr. *D. R. Sawhny*, for the Opposite Party contended that the High Court had no jurisdiction to interfere with an order passed by a Magistrate under section 145 of the Criminal Procedure Code in revision. He relied on *Jhingai Singh* v. *Ram Pratap* (1) and *Maharaj Tewari* v. *Har Charan Rai* (2).

JUDGMENT.—In our opinion this case is covered by an authority of this Court in *Maharaj Tewari* v. *Har Charan Rai* (2). This case was followed in *Jhingai Singh* v. *Ram Partap* (1). We entirely agree with the view expressed in both these cases. We accordingly dismiss this application.

Application dismissed.

(1) 1 Ind. Cas. 762; 31 A. 150; 9 Cr. L. J. 382; 6 A. L. J. 113.

(2) 26 A. 144; A. W. N. (1903) 212; 1 Cr. L. J. 330.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL NO. 103 OF 1913.

July 28, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

MUHAMMAD KOOLAYAPPA ROWTHAN—PETITIONER—APPELLANT

versus

Sheik ABDUL KHADHIR ROWTHER AND ANOTHER—COUNTER-PETITIONERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 146, 147—Joint possession of parties—Attachment—Jurisdiction.

A Magistrate after finding that both parties are in joint possession of properties in dispute has no jurisdiction to pass an order of attachment under section 146 of the Criminal Procedure Code.

Per *Seshagiri Aiyar, J.*—Where both parties have been in joint possession and are still prepared to commit a breach of the peace by trying to oust each other, it will not be in the interests of preventive remedy that both should be maintained in possession.

Nritta Gopal Singh v. *Chandi Charan Singh*, 10 C. W. N. 1068; 4 Cr. L. J. 215; *Makhan Lal Roy* v. *Baroda Kanta Roy*, 11 C. W. N. 512; 5 Cr. L. J. 296; *Manik Chandra Chakravarthi* v. *Preo Nath Kuar*, 17 Ind. Cas. 533; 17 C. W. N. 205; 13 Cr. L. J. 759; 17 C. L. J. 397; *Rajendra Narayan Roy* v. *Mohammad Arzumand Khan*, 9 C. W. N. 887; 1 C. L. J. 331; 2 Cr. L. J. 408; *Emperor* v. *Debendra Nath Bose*, 1 C. L. J. 632; 2 Cr. L. J. 658, distinguished.

Appeal under section 15 of the Letters Patent, against the order of the Hon'ble Mr. Justice Oldfield, in Criminal

Revision Case No. 146 of 1913, preferred against that of the Sub-Divisional Magistrate of Dindigul, in Miscellaneous Case No. 66 of 1911.

Dr. *S. Swaminadhan*, for the Appellant.

The *Public Prosecutor*, for the Government.

Mr. *V. Ratnasomanadhan*, for the Respondents.

JUDGMENT.

AYLING, J.—With all deference to the view of the learned Judge who heard the revision petition, I am unable to construe the finding of the Deputy Magistrate as anything but a finding that both parties were in joint possession. This being so, it seems clear that section 146, Criminal Procedure Code, gives him no jurisdiction to pass an order of attachment. The order must, therefore, be set aside.

SESHAGIRI AIYAR, J.—The petitioner complained to the Sub-Divisional Magistrate, Dindigul, that the counter-petitioner was preparing to commit a breach of the peace by forcibly entering upon properties which were in his exclusive possession. The defence was that the properties in dispute were the joint properties of the petitioner and the counter-petitioner and "that they are in their joint enjoyment." The Magistrate inquired into the matter and came to the conclusion that the allegation of the counter-petitioner as regards item 3 was true. He held "that he could not issue an order declaring joint possession." At the same time he directed the attachment of the lands included in item 3 under section 146 of the Code. Against this order, the petitioner preferred a petition to the High Court. The learned Judge before whom the case was heard was inclined to hold that if the finding of the Sub-Divisional Magistrate was that the parties were in joint possession, section 146 was not applicable, but he was of opinion that the Magistrate did not intend to find such joint possession. I regret my inability to agree in this view. The contention of the counter-petitioner was that he was in joint possession of item 3 with the petitioner. The Magistrate refers to the fact that the lands were lying waste in *Faslis* 1320 and 1321, that is, up to the end of June 1912. Then he deals with the question as to who cultivated the land after this period and prior to the date of the application. He says that neither petitioner nor counter-petitioner was in *actual exclusive possession* of the lands. He concludes on the evidence in favour of joint enjoyment by petitioner and counter-petitioner. I feel no doubt that by *joint enjoyment* he meant *joint possession* and I cannot accede to the argument of the learned Public Prosecutor that the Magistrate meant to find only joint ownership and that his judgment indicated that he was unable to find that either of the parties was in possession.

On this conclusion of mine the question for consideration is, whether the Magistrate has jurisdiction to pass an order under section 146 of the Code of Criminal Procedure. That section enables a Magistrate to attach the property if he either finds "that none of the parties was then in such possession", or if he is unable to satisfy himself that either of them was in *such possession*. The term 'such possession' must relate back to clause (1) of section 145 which lays down the conditions under which action dealing with disputes as to immoveable property should be taken. Clause (1) speaks of actual possession. Dr. Swaminadhan contends that actual possession in that clause means exclusive possession and excludes joint possession. The authorities quoted by him support this view [*Nritta Gopal Singh* v. *Chandi Charan Singh* (1), *Makhan Lal Roy* v. *Baroda Kanta Roy* (2), *Manika Chandra Chakravarti* v. *Preo Nath Kuar* (3), see also *Rajendra Narayan Roy* v. *Mohammad Arzumand Khan* (4)]. None of these cases gives any reason for this restrictive use of the expression. Nor does the earlier decision in *Emperor* v. *Debendra Nath Bose* (5), which says that section 145 will apply to cases of joint possession, give any reason for that position. I am inclined to think that neither section 145 nor section 146 applies to cases of joint possession. The object aimed at by the Legislature is the prevention of the breach of the peace. This can be secured by asking one of the parties to keep away from the property. But

(1) 10 C. W. N. 1088; 4 Cr. L. J. 215.
(2) 11 C. W. N. 512; 5 Cr. L. J. 296.
(3) 17 Ind. Cas. 533; 17 C. W. N. 205; 13 Cr. L. J. 789; 17 C. L. J. 397.
(4) 9 C. W. N. 887; 2 Cr. L. J. 408; 1 C. L. J. 331.
(5) 1 C. L. J. 632; 2 Cr. L. J. 658.

where both parties have been in joint possession and are still prepared to commit a breach of the peace by trying to oust one another, it will not be in the interests of preventive remedy that both should be maintained in possession. It may establish their rights to remain in *status quo*. It will certainly not help the Magistracy in maintaining order and peace. That I take to be the reason of the rule why Courts have declined to declare the joint possession of the contesting parties. It is not necessary in this case to determine whether under section 147 one of the parties cannot be restrained from disturbing the other.

My conclusion is that the Sub-Divisional Magistrate had no jurisdiction to pass an order under section 146 on his finding that the contending parties are in joint possession of the disputed property. I agree that the order should be set aside.

Order set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 1227 OF 1913.

February 11, 1914.

Present:—Mr. Justice Piggott.

HAZARI LAL—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

U. P. Municipalities Act (I of 1900), s. 152—Invalid notice—Accused not prevented from raising question of invalidity of notice—Duty of Magistrate to ask prosecution to prove validity of notice.

Section 152 of the Municipalities Act does not prevent an accused person from setting up the defence that the paper served upon him was not a notice issued by the Board or by the authority of any person to whom the powers exercisable by the Board as a whole had been lawfully delegated. If such a defence is set up the Magistrate ought to inquire into it and call upon the prosecution to produce evidence sufficient to satisfy him on the point.

Criminal revision against an order of the Magistrate of Allahabad, dated December 2nd, 1913.

Mr. *Purushottam Das Tandan*, for the Applicant.

Mr. *R. Malcomson*, for the Crown.

JUDGMENT.—Hazari Lal, a resident of Allahabad, has been convicted of disobeying a written notice lawully issued by the Municipal Board of Allahabad, under the powers conferred upon it by the United Provinces Municipalities Act of 1900. He comes to this Court in revision, and the one substantial point raised by him is that the prosecution has not proved that the notice which he is alleged to have disobeyed was a notice lawfully issued by the Municipal Board of Allahabad, under the powers conferred upon it. If this were a point taken for the first time in revision, I am not certain that I should have considered it my duty to go into it. I find, however, that this defence was in substance taken before the Court below and that the trying Magistrate refused to entertain it. The Magistrate was of opinion that, if he had entered into this defence, he would be permitting the accused before him to contravene the provisions of section 152 of the Municipalities Act. That section, however, applies to a notice issued by the Board, and the point taken in the present case is that the accused had received no notice issued by the Board under the powers conferred upon it by the Act. The paper which was served upon Hazari Lal on August the 28th, 1913, contained a direction with which he admittedly failed to comply within the period prescribed by it. It did not purport on the face of it to be a notice issued by, or by order of, the Municipal Board, but on behalf of the member-in-charge of ward No. 4, and it was signed by a single member of the Board. The notice was one covered by the provisions of clause 5 of section 87 of the Municipalities Act, that is to say, it was a notice such as the Municipal Board was empowered to issue under the above-mentioned provision of the law. The only question, therefore, was whether the Board had issued this notice or not. The powers conferred upon the Municipal Board by this section are important and the Legislature found it necessary, by the Amending Act I of 1907, to make special provision for the circumstances under which alone these powers could be delegated. I think the accused in this case was entitled to set up the defence that the paper served upon him was not a notice issued by the Board or by the authority of any person to whom the powers exercisable by the Board as a whole had been lawfully delegated. The defence having been set up, the Magistrate ought to have inquired

into it and called upon the prosecution to produce evidence sufficient to satisfy him on this point. I, therefore, set aside the conviction and sentence in this case and return the record to the Court below with the following directions. The Magistrate will take up the case at the point at which it stood when the accused entered his defence and will require the prosecution to produce evidence to satisfy him, if possible, that the notice served upon Hazari Lal on August the 28th, 1913, was a notice issued by the authority of the Board or by the authority of persons to whom the powers of the Board under section 87, clause 5, of the Municipalities Act of 1900, had been lawfully delegated.

Conviction set aside.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 151 OF 1913.

May 8, 1914.

Present:—Mr. Justice Chamier.

BHAGIRATHI AND OTHERS—PETITIONERS

versus

SURAJ MAL AND ANOTHER - OPPOSITE PARTY —RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 476—Court refusing to take action on application of party—Appeal.

An order of a Munsif refusing, on the application of a party, to take action against another party under section 476, Criminal Procedure Code, is not appealable.

Revision against the order of the District Judge of Gorakhpur, dated the 8th November 1913.

JUDGMENT.—In this case the respondents asked the Munsif to send their opponents to a Criminal Court to be tried there for various offences. The Munsif came to the conclusion that there was not sufficient evidence to secure a conviction and he declined to take any action. The respondents then appealed to the District Judge who had no right to entertain the appeal inasmuch as the respondents had not asked the Munsif for sanction to prosecute their opponents. They had asked him to take action himself against them. I hold that the District Judge had no jurisdiction to entertain the appeal. He, however, recorded an order in which he called the attention of the District Magistrate to the facts and recommended him to institute criminal proceedings against the four men. The order has presumably been brought to the notice of the District Magistrate who will, no doubt, take such action as he thinks proper. All that I can do is to formally set aside the order of the Judge. But I cannot prevent the authorities from commencing criminal proceedings if they consider it necessary to do so. The order of the District Judge is set aside. No order as to costs.

Order set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO. 196 OF 1914.

April 8, 1914.

Present:—Mr. Justice Chamier.

Musammat MAHAGINIA—APPLICANT

versus

RAM CHARAN—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 438, 488—Maintenance—Revision—Power of District Magistrate to take evidence.

Where a Joint Magistrate has rejected a petition for maintenance, the District Magistrate has no power to take evidence under section 438 of the Criminal Procedure Code except for the purpose of a recommendation to the High Court.

Criminal reference made by the District Magistrate of Allahabad.

Mr. *Mohammad Yusuf*, for the Applicant.

Mr. *Pearey Lal Banerji*, for the Opposite Party.

JUDGMENT.—*Musammat* Mahaginia applied to the Joint Magistrate of Allahabad, under section 488 of the Code of Criminal Procedure, for an order directing one Ram Charan to provide for the maintenance of her child aged three years and also for a child about to be born, alleging that Ram Charan was their father. Mahaginia has since been delivered of a second child. The Joint Magistrate rejected her petition. She then applied to the District Magistrate who examined several more witnesses

and has sent the case to this Court with a recommendation that the finding of the Joint Magistrate be reversed and that Mahaginia be awarded maintenance at the rate of Rs. 3 per mensem for her two children against Ram Charan. The District Magistrate's recommendation cannot be accepted in its entirety; for it appears to me that he had no power to take evidence under section 438, Code of Criminal Procedure, and if he had power to take evidence it was only for the purpose of a recommendation to this Court and I cannot upon it proceed to award maintenance for the children. But it is quite clear that more evidence might and ought to have been produced before the Joint Magistrate, and the proceedings of the District Magistrate afford more than sufficient justification for an order for a further inquiry. I set aside the order of the Joint Magistrate and direct that the case be reheard by him.

Order set aside.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 79 OF 1913.
CIVIL REVISION PETITION No. 644 OF 1913.
April 23, 1914.

Present:—Mr. Justice Ayling.

ABDUL RAHIM SAHIB—PETITIONER—ACCUSED

versus

EMPEROR—OPPOSITE PARTY.

Arrest—Warrant addressed to bailiff not by name, whether legal.

An arrest is not illegal merely because the warrant for arrest is addressed, not by name, but only to "the bailiff of the Court."

Petition, under sections 437 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the First Class Sub-Divisional Magistrate of Koilpatti, in Civil Appeal No. 58 of 1913 preferred against that of the Court of the Stationary Second Class Magistrate of Koilpatti, in C. C. No. 115 of 1913.

Mr. *M. D. Devadoss*, for the Petitioner.

Mr. *C. F. Napier*, for the Crown.

ORDER.—The petitioner has been convicted of rescuing one Ramasami Moopan from lawful custody. Mr. Deva Doss's arguments have been devoted to show (1) that the custody in which Ramasamy Moopan was detained was not lawful; (2) that the evidence does not show that the force used by the petitioner contributed to his escape.

No authority has been quoted to me to support the view that the arrest was illegal because the warrant was not addressed to P. W. No. 2 by name but only to "The Bailiff of the Court," or that arrest only takes effect after the person ordered to be arrested has been given a chance of paying up the decree amount and has failed to do so. I have no hesitation in rejecting these contentions.

It is next argued that the procedure of the peon (P. W. No. 2) was defective in that he did not notify the contents of the warrant to the first accused before arresting him. It appears from the evidence that P. W. No. 2 informed the first accused that he had a warrant for his arrest, held it out to him and asked him to sign it, thereby affording him a chance of satisfying himself as to its contents: and that the 1st accused without taking the warrant began to object on the ground of the lateness of the hour and attempted to run away. Neither of the cases relied on for the petitioner, *In the matter of Rajani Kanto Pal* v. *Emperor* (1) and *Satish Chandra Rai* v. *Jodu Nandan Singh* (2), appear to be authority for holding that in these circumstances the arrest was illegal.

As regards the second point stress is laid on the fact that the force used by the petitioner was not to P. W. No. 3 but to another peon, P. W. No. 2, who was accompanying him at his request and assisting him. A perusal of the evidence seems to show that the violence used against P. W. No. 3 contributed to the escape of the first accused just as much as if it had been employed against P. W. No. 2.

I find no ground for interference and dismiss the petition.

Petition dismissed.

(1) 5 C. W. N. 843
(2) 26 C. 748; 3 C. W. N. 741.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 55 OF 1914.

March 25, 1914.

Present:—Mr. Lindsay, J. C.

RAM BAKHSH—APPLICANT

versus

CHHOTE AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—Delay in applying for sanction, effect of—Discretion of Court.

Where an application for sanction to prosecute is made after great delay, the Court may well exercise its discretion in refusing the application.

Yad Ram v. *Risal*, 5 Ind. Cas. 469; 7 A. L. J. 50; 11 Cr. L. J. 140, and *Balwant Singh* v. *Umed Singh*, 18 A. 203; A. W. N. (1896) 31, referred to.

Application against the order of the District Judge, Fyzabad, dated 11th February 1914, reversing that of the Subordinate Judge, Fyzabad, dated 22nd November 1913.

Mr. *Mohammad Wasim*, for the Applicant.

ORDER.—I have examined the record in this case. The District Judge has revoked the sanction to prosecute granted to the applicant on the ground that his application for sanction was made after great delay, a period of about two months having elapsed since the date of final disposal in appeal of the case in which the alleged fabricated document was used and the alleged false evidence given. I have read the application presented to the Subordinate Judge in which sanction was asked for, and there is not a word in it by way of explaining why the applicant waited so long before asking for this remedy. The learned Judge has referred to the ruling *Yad Ram* v. *Risal* (1) and also to the case reported as *Balwant Singh* v. *Umed Singh* (2) and in particular to the concluding portion of the judgment in that case at page 205, as their Lordships say:—"Where there is a great delay in making the application * * * a Court cannot help suspecting that the applicant is acting, not in the interests of justice, but for an indirect motive, possibly to worry, annoy and persecute his opponent." Orders for sanction to prosecute in these cases are made not with the object of gratifying the applicant but of securing the due administration of justice.

There can be no doubt that it was open to the Judge here to take into account the great delay in making the application and to exercise his discretion against the applicant.

I see no ground for interference and I reject this application for revision.

Application rejected.

(1) 5 Ind. Cas. 469; 7 A. L. J. 50; 11 Cr. L. J. 140.
(2) 18 A. 203; A. W. N. (1896) 31.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1540 OF 1913.

November 29, 1913.

Present:—Mr. Justice Kensington.

EMPEROR THROUGH *Musammat* RAM KAUR—COMPLAINANT

versus

WARYAM SINGH AND ANOTHER—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 488—Joint liability of father of husband for maintenance of wife—Second marriage by husband no justification for wife to claim maintenance.

Section 488 of the Criminal Procedure Code does not contemplate an order making the father of the husband jointly liable for the maintenance of the wife.

Emperor v. *Miran*, 26 P. R., 1903, Cr.; 26 P. L. R. 1904, followed.

The mere fact that the husband has contracted a second marriage and therefore his first wife declined to live with him does not justify an order under section 488, Criminal Procedure Code.

Attar Singh v. *Musammat Dharmo*, 66 P. R. 1887, Cr., referred to.

Case reported by the Sessions Judge, Jullundur Division, with his No. 635, dated the 18th August 1913.

FACTS.—Accused No. 1 has two wives, the complainant being the first, with whom both accused are displeased and have, therefore, turned her out with her child of $2\frac{1}{2}$ years of age without making any provision for their maintenance.

Hence Ram Kaur proceeded against them under section 488, Criminal Procedure Code.

Both the accused, on conviction by Chaudhri Kesar Ram, exercising the powers of a Magistrate of the first class in the Jullundur District, were ordered, by order dated 27th June 1913, under section 488, Criminal Procedure Code, to pay a maintenance of Rs. 12 per mensem to *Musammat* Ram Kaur with her child.

The proceedings are forwarded for revision on the following

GROUNDS.—The order charging the husband's father (accused No. 2) with liability is wrong and should be set aside. Section 488,

BINDHACHAL PRASAD RAI v. LAL BIHARI RAI.

Criminal Procedure Code, does not provide for any order of the kind and *Emperor* v. *Miran* (1) is authority on this point.

Bakhshi *Gokal Chand*, for the Petitioners.

ORDER.—The Magistrate is clearly wrong in making Sawan Singh, father of Waryam Singh, jointly liable for the maintenance of *Musammat* Ram Kaur. No such arrangement is contemplated by section 488, Criminal Procedure Code, and *Emperor* v. *Miran* (1) is a ruling directly in point.

The son, Waryam Singh, husband of *Musammat* Ram Kaur, admittedly owns no land in his own right, and as against him an order for maintenance at Rs. 12 a month is quite unreasonable.

It is possible that *Musammat* Ram Kaur might be entitled to some smaller rate of maintenance as against Waryam Singh alone, but on the present record I do not think that she has established a claim. The real trouble seems to be that she declines to live with Waryam Singh now that he has contracted a second marriage. This alone does not justify an order under section 488, Criminal Procedure Code [*Attar Singh* v. *Musammat Dharmo* (2)] and so far as I can Judge from the explanations given by the parties before me, the husband is willing to maintain his wife provided that she lives with him.

The revision is accordingly allowed. The Magistrate's order of 27th June 1913 is set aside and the application is dismissed.

Application dismissed.

(1) 26 P. R. 1903 Cr.; 26 P. L. R. 1904.
(2) 66 P. R. 1887 Cr.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 198 OF 1914.

April 15, 1914.

Present:—Mr. Justice Piggott.

BINDHACHAL PRASAD RAI—APPLICANT

versus

LAL BIHARI RAI AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 107, 250—"Offence"—Order for compensation, whether can be made against a petitioner under s. 107.

In view of the definition of the word "offence" in the Code of Criminal Procedure, a person in respect of whom information has been laid before a Magistrate to the effect that he is likely to commit a breach of the peace or is otherwise liable to the provisions of section 107 of the Code, is not a person accused of any offence. Therefore, an order for payment of compensation cannot be made against a man who has petitioned a Magistrate to take action under section 107 of the Code.

Criminal revision from an order of the Magistrate, first Class, of Gorakhpur.

Mr. *M. L. Agarwala*, for the Applicant.

Mr. *Benode Behari*, for the Opposite Party.

JUDGMENT.—In view of the definition of the word "offence" in the Code of Criminal Procedure, it is clear that a person in respect of whom information has been laid before a Magistrate to the effect that he is likely to commit a breach of the peace or is otherwise liable to the provisions of section 107 of the Code, is not a person accused of any offence. An order for payment of compensation cannot be made against a man who has petitioned a Magistrate to take action under section 107 of the Code. The objection is one which should have been taken before the Magistrate when the petitioner, Bindhachal Prasad, was called upon to show cause why the order under section 250 should not be made against him; but the order complained of being, in my opinion, illegal, I cannot allow it to stand now that it has come before me in revision. I set aside the order directing Bindhachal Prasad to pay compensation to each of the four persons in respect of whom proceedings under section 107 of the Code were taken. The money, if paid, will be refunded.

Order set aside.

In re OOMAYAN.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 274 OF 1914.

CASE REFERRED No. 30 OF 1914.

May 1, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

In re OOMAYAN—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 341—Deaf-mute—Possession of stolen property—Presumption—Evidence Act (I of 1872), s. 114 (a)—Penal Code (Act XLV of 1860), s. 411.

The recent possession of stolen property by a deaf-mute, with whom no one is able to communicate and whose infirmity prevents him from putting forward

any explanation he may have to offer, does not justify the presumption that he was either a thief or a dishonest receiver of stolen property.

Case referred for the orders of the High Court under section 438 of the Criminal Procedure Code, by the District Magistrate of North Arcot in his letter, dated 15th April 1914.

FACTS.—Certain properties belonging to a railway guard were stolen. A week later, the accused was found walking past the house of the said guard wearing a *pyjama* suit, which formed part of the stolen property. He was immediately apprehended and charged with the theft of the articles in question. The man was found to be a deaf-mute, but the Sub-Magistrate of Tirupattur, who tried the case, communicated with him by means of signs, and on the strength of certain signs, which he himself calls 'not very intelligible', and the presumption of law that from recent possession of stolen property the Court may presume that the person in possession was either a thief or receiver of stolen property, convicted the accused of theft. The case was then referred for the orders of the High Court under section 341 of the Criminal Procedure Code.

Mr. *J. C. Adam*, for the Public Prosecutor, in support of conviction:—The accused had been found in possession of stolen property a week after the theft. Illustration (*a*) to section 114, Evidence Act, shows that the Court may presume that in such a case the person in possession of the article stolen is either a thief or a receiver of stolen property knowing it to be stolen. The conviction for theft is, therefore, correct.

ORDER.—The accused in this case, a deaf-mute, has been convicted of theft of a box of clothes and effects belonging to a railway guard. The case has been referred for orders under section 341 of the Criminal Procedure Code.

We do not think the conviction can be sustained. The only evidence against accused is that a week after the theft, accused was caught by the guard walking past his quarters and wearing a suit of *pyjamas* which formed part of the stolen property. In the case of an ordinary individual it would be open to the Court to apply the presumption authorised in section 114 (*a*) of the Indian Evidence Act, *i. e.*, to infer from his recent possession of stolen property, unless he could explain his possession, that he was either the thief or a dishonest receiver guilty under section 411 of the Indian Penal Code.

But in the present case it is impossible to draw such an inference, because accused's infirmity prevents him from putting forward any explanation he may have to offer. No one has been found able to communicate with him and we cannot place much reliance on the Magistrate's statement of what he was able to gather from what he calls "not very intelligible signs." There appears to be no other circumstance from which a dishonest knowledge or intent on the part of of the accused can be inferred.

We set aside the conviction and direct the release of accused.

Conviction set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 185 OF 1914.

April 2, 1914.

Present:—Mr. Justice Piggott.

MUHAMMAD ISHAQ—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), *ss.* 52, 191, 193—*Perjury—False verification—Statement made therein believed to be true—Good faith, finding of.*

A man cannot be convicted of perjury for having acted rashly, or for having failed to make reasonable inquiry with regard to the facts alleged by him to be true. It must be found that he made some statement or statements which he knew to be false or which he believed to be false or which he did not believe to be true. This finding must be arrived at independently of the definition of "good faith" contained in section 52 of the Indian Penal Code.

Criminal revision from the order of the Sessions Judge of Benares, dated March 7th, 1914.

Mr. *G. P. Boys*, for the Applicant.

Mr. *R. Malconson*, (Assistant Government Advocate), for the Crown.

JUDGMENT.—This is an application in revision by one Muhammad Ishaq who has been convicted of an offence under section 193, Indian Peral Code, in that he presented before the Court of Small Causes of Benares an application for execution of a decree, duly verified according to law, which contained in the said verification allegations of fact

which were not true. So far the case for the prosecution has been fully made out. Muhammad Ishaq did present an application for execution in which he stated that a decree had been passed by the very Court to which he was applying in his favour for a certain sum of money against Bhola Sahu. It appears that on the date in question no decree had been passed in favour of Muhammad Ishaq against the defendant Bhola Sahu, although a suit was pending which ended later on in a decree in favour of Muhammad Ishaq. This decree was again not for the precise sum alleged in Muhammad Ishaq's application for execution. The Magistrate who tried the case in the first instance has discussed the defence set up by Muhammad Ishaq in a manner which clearly shows that he was labouring under a misapprehension as to the law applicable to the case. Muhammad Ishaq's plea was that he stated nothing in the verification in question which he did not believe to be true at the time that he presented his application thus verified to the Court. The Magistrate refers to the provisions of section 52 of the Indian Penal Code and remarks that on Muhammad Ishaq's own showing there was an absence of due care and attention on his part, and that he cannot be said to have believed "*in good faith*" that a decree had been passed in his favour for the sum alleged, because a very little inquiry would have shown him that no such decree had been passed. The learned Sessions Judge does not refer to section 52, Indian Penal Code, in his judgment; but he says that the question in issue is whether Muhammad Ishaq acted in good faith, under a *bona fide* mistake. This remark suggests that the provisions of section 52 were also in the mind of the learned Sessions Judge when he dismissed Muhammad Ishaq's appeal. Now the offence which is punishable under section 193, Indian Penal Code, is defined by section 191 of the same Code. That definition shows that it lay on the prosecution to prove, not merely that this verification made by Muhammad Ishaq contained statments which were false in fact, but that in making these statements Muhammad Ishaq either knew or believed the same to be false or did not believe the same to be true. There has to be a finding against the accused on this point before the conviction under section 193, Indian Penal Code, can be affirmed. This finding must be arrived at independently of the definition of "good faith" contained in section 52, Indian Penal Code. A man cannot be convicted of perjury for having acted rashly, or for having failed to make reasonable inquiry, with regard to the facts alleged by him to be true. It must be found that he made some statement or statements which he knew to be false or which he believed to be false or which he did not believe to be true. If I rightly understand the judgment of the two Courts below, there has not been any finding against Muhammad Ishaq on this essential point. The Magistrate's finding certainly amounts to no more than this that Muhammad Ishaq may have believed the statements made in his verification to be true but that, if he did, he believed this without due care and attention. In coming to this Court in revision Muhammad Ishaq has confined himself to a plea against the severity of the sentence. I take it that so far as he is personally concerned, he would be prepared to submit to the fine of Rs. 20 as a punishment for his rash and careless action but he applies to this Court to relieve him from the sentence of imprisonment. The case having come before me and the record having been examined by me according to law, I am unable to deal with the matter with reference merely to the wishes of the applicant. A man should not be convicted of perjury for having been rash or credulous, and the conviction in this case is, in my opinion, based upon an error of law. I accordingly set aside the conviction and the sentence, acquit Mohmmad Ishaq of the offence charged and direct that his security be discharged and the fine, if paid, be refunded.

Conviction set aside.

In re PUNAM CHAND MANEK LAL.

BOMBAY HIGH COURT.
FULL BENCH.

CRIMINAL REVISION APPLICATION No. 5 OF 1914.
March 31, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, Mr. Justice Batchelor and Mr. Justice Beaman.

In re PUNAM CHAND MANEK LAL—APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 195—Income-tax Collector, whether Revenue Court.

An Income-tax Collector is a 'Revenue Court' within the meaning of section 195 of the Criminal Procedure Code.

Criminal application for revision from the decision of the Joint Judge of Ahmedabad

ORDER OF REFERENCE TO A FULL BENCH

HEATON, J.—The applicant in this case is a person against whom a complaint has been made of offences under sections 177, 193, 196, 199 and 471 of the Indian Penal Code. It will be observed that these are all offences which are included in section 195 of the Criminal Procedure Code. They all arose out of what the applicant is supposed to have done in connection with proceedings before an Income-tax Collector. Now undoubtedly an Income-tax Collector is a public servant and as to the offence under section 177, his sanction would be required under clause (*a*) of section 195, and what appears to be a sanction was in fact given by the Income-tax Collector. But it is now spent, or rather was spent before this complaint was made because the complaint was made much more than six months after the sanction had been given. So far then it appears that as regrads section 177 these proceedings are not lawful in their inception and should be set aside. As regards the other sections 193, 196, 199 and 471, they are subject to precisely the same infirmity if the Income-tax Collector is a "Court" within the meaning of clauses (*b*) and (*c*) of section 195. On this matter, *i. e.*, whether an Income-tax Collector is such a "Court", there is a certain amount of authority which, in the main, favours the view that he is a "Court." But a Bench of this Court decided in 1906 that an Income-tax Collector is not a "Court" within the meaning of section 476 of the Criminal Procedure Code: *In re Kalidas Rewadas*(1). If he is not a "Court" within the meaning of that section it is at least to me difficult, inspite of the definition of "Court" in section 195, to suppose that he can be a "Court" within the meaning of the latter section, for the purpose of the two sections is very much the same and their connection is intimate.

In a very much later case [*In re Nanchand Shivchand* (2)] another Bench of this Court decided that a "District Judge" determining the validity of elections under section 22 of the District Municipalities Act (Bombay Act III of 1901) is a "Court" within the meaning of clause (*b*) of section 195 of the Criminal Procedure Code. The reasoning in Mr. Justice Batchelor's judgment in that case is, it seems to me, a reasoning which, if applied to this case, would inevitably lead to the conclusion that an Income-tax Collector is a "Court". He is empowered to summon witnesses, to take evidence and under the Oaths Act he consequently may administer an oath. I cannot myself believe that if giving false evidence on oath to an Income-tax Collector is an offence under section 193 of the Indian Penal Code and it is declared to be such an offence as covered by section 37 of the Income-Tax Act, no sanction should be required to prosecute such a person for giving false evidence, whereas sanction is required if the evidence is given, say for example, before a Magistrate or a Sub-Judge. It seems to me that the purpose of these provisions in section 195 is that when false evidence is alleged to be given on oath, the prosecution shall not proceed without a sanction, and that the Code intends to make no distinction whatever between different cases provided that the oath may properly be administered and that the evidence may be taken. Otherwise in some cases, as for instance, an Income-tax Collector's proceedings, complaints for giving false evidence might be made by any private person, they might be made out of ill-will and without the slightest foundation of truth, and yet the Magistrate would be bound to deal with them. I can see no reason whatever for supposing that the section intends such a thing to happen when it specifically provides that in other cases sanction must be furnished. Therefore, not only does the reasoning in Mr. Justice Batchelor's judgment seem to me to be

(1) 8 Bom. L. R. 477; 4 Cr. L. J. 34.

(2) 18 Ind. Cas. 408; 14 Cr. L. J. 72; 37 B. 365; 15 Bom. L. R. 45.

opposed to the decision of *In re Kalidas Rewadas*(1), but it also appeals to me as being a reasoning which is correct in itself. But we cannot altogether disregard the ruling in *In re Kalidas Rewadas* (1). Therefore it seems to me that we are bound to submit to a Full Bench this question:—

Whether an Income-tax Collector is or is not a "Court" within the meaning of that word as used in clauses (*b*) and (*c*) of section 195 of the Criminal Procedure Code?

There is only one other point that needs attention in this matter. It was argued that because the complaint, which was made against this applicant, was lodged by a certain Mr. Lakhia by order of the District Magistrate or the Collector, and because the Collector is a public servant to whom the Income-tax Collector is subordinate, therefore, this complaint may be regarded as a complaint of the kind provided for in clause (*a*) of section 195. But that clause provides that the public servant concerned may either give a sanction or make a complaint, and that seems to me to exclude the idea that a public servant may make a complaint by any form of delegation. It seems to me that he must make the complaint, if he wishes to take that course, personally. If he does not wish to take that course personally, the delegation is obtained by giving the sanction. Similarly the Collector as superior officer, though personally, no doubt, he might make the complaint, cannot delegate the making of a complaint to another. So I do not think that the proceedings in this case can be supported by that argument.

If the decision of the Full Bench is that an Income-tax Collector is a "Court" then I think the whole of those proceedings must be set aside.

SHAH, J.—I concur. This is an application to quash the proceedings arising out of a complaint lodged by Mr. T. P. Lakhia, the Resident first Class Magistrate of Nadiad, on the 10th October 1913. The complaint purports to have been made with the sanction of the Income-tax Collector dated 23rd July 1912 and relates to offences which are mentioned in section 195 of the Criminal Procedure Code. It is clear that the complaint cannot be entertained by any Court, if the order of the 23rd July 1912 is a sanction and if a sanction is necessary under the section. The order of the 23rd July 1912 was made by the Income-tax Collector after giving due notice to the petitioner, and though the terms of the order do not place the matter beyond dispute, it is fairly open to the construction that it is a sanction and not merely a departmental direction to prosecute. The complaint, so far as it relates to the offence under section 177 of the Indian Penal Code, can be taken cognizance of only with the previous sanction or on the complaint of the public servant concerned or of some servant to whom he is subordinate. Treating the Income-tax Collector's order of the 23rd July as a sanction, the proceedings so far as they relate to the offence under section 177, Indian Penal Code, must be set aside as the sanction was not in force at the date of the complaint owing to the lapse of time. Even if it be not a sanction, the same result must follow, as there can be no doubt that the present complaint is not made by the Income-tax Collector or by his superior. The present complainant, who is the Resident Magistrate at Nadiad, has nothing to do with the Income-tax Collector or his superior, and, in my opinion, he can lodge the complaint only with the *sanction* of the proper authority.

As regards the other offences, which fall under section 195, sub-section (1), clauses (*b*) and (*c*), the complaint is subject to the same objection, if the Income-tax Collector is a "Court" within the meaning of these clauses. It has been held by this Court in *In re Kalidas Rewadas* (1), that the Income-tax Collector is not a "Court" under section 476 of the Criminal Procedure Code. So far as the present point is concerned, I think the word "Court" would have the same meaning in section 195, and *In re Kalidas Rewadas* (1), is, therefore, an authority for the view that the Income-tax Collector is not a "Court" within the meaning of clauses (*b*) and (*c*) of section 195. No reasons are given in the judgment in support of this conclusion, and the *ratio decidendi* of *In re Nanchand* (2) clearly suggests that the conclusion in *In re Kalidas Rewadas* (1) is not correct. Apart from the decisions, the reason of the rule requiring a sanction or a complaint of the Court concerned in respect of certain offences is in favour of the view that the Income-tax Collector is a "Court." In a recent case the Madras High Court has held that the Income-Tax Collector is a "Court:" see *In re*

In re PUNAM CHAND MANEK LAL.

Nataraja Iyer (3). Having regard to the conflicting decisions, as well as to the practical importance of the point, I think that the question formulated by my learned colleague should be referred to a Full Bench for decision.

Mr. *Velinkar* (with him Mr. *Ratanlal Kanchhoddas*), instructed by Messrs. *Soonderdass & Co.*, for the Appellant.

Mr. *S. S. Patkar*, (Government Pleader), for the Crown.

JUDGMENT OF THE FULL BENCH.

The question referred for decision is, "whether an Income-tax Collector is or is not a 'Court' within the meaning of that word as used in clauses (*b*) and (*c*) of section 195 of the Criminal Procedure Code?"

The word "Court" is defined in the section by a limited and exclusive definition to mean a Civil, Revenue or Criminal Court. It cannot be contended that the Income-tax Collector is a Civil or Criminal Court and, therefore, the only question is whether he at any time in the discharge of his functions under Act II of 1886 is a Revenue Court.

The term "Revenue Court" is not in general use, but it has been used occasionally by local Legislatures in this country in connection with the decision of questions relating to revenue by officers specially and exclusively empowered to decide them. See, for example, the City of Bombay Revenue Act and the Revenue Codes of Oudh, the United Provinces and the Punjab (U. P. Act II of 1901, sections 59, 62; U. P. Act III of 1901, sections 189 *et seq.*; Oudh Act XXII of 1886, section 109; the Punjab Act XVI of 1887, section 101). Speaking generally, revenue questions are removed from the cognizance of Civil Courts and the officer charged with the duty of deciding disputed questions relating to revenue between the individual and the Government would be invested with the functions of a Revenue Court. The inquiries into such questions assigned to officers empowered *eo nomine* as "Revenue Courts" in the United Provinces are entertained and disposed of by corresponding officers in Bombay under Chapters XII and XIII of the Bombay Land Revenue Code of 1879, though the word "Revenue Court" is not to be found anywhere in those Chapters. We have no doubt that the Bombay inquiries would be equally proceedings in Revenue Courts in the sense in which that term is used in the definition clause of section 195 of the Criminal Procedure Code. We also think that inquiries conducted according to the forms of judicial procedure under Chapter IV of the Income Tax Act and execution proceedings under Chapter V (which provides that an order passed by a Collector on a petition under Chapter IV shall have the force of a decree of a Civil Court in a suit in which the Government is the plaintiff and the defaulter is the defendant) are proceedings in a Revenue Court.

The express exclusion from the term "Court" in section 195 of a Registrar or a Sub-Registrar, though a legislative recognition of the correctness of the conclusion in *Queen-Empress* v. *Tulja* (4), does not affect the question now before us as to the scope of the term "Revenue Court", for a Registrar or Sub-Registrar under the Registration Act could not by any stretch of imagination be held to be a Revenue Court. The Registration Act has its special group of sections corresponding with Chapter XI of the Indian Penal Code and sections 195 and 476 of the Criminal Procedure Code.

For the above reasons we answer the question referred in the affirmative.

(3) 21 Ind. Cas. 896; 14 M. L. T. 421; 25 M. L. J. 56; 14 Cr. L. J. 656; 36 M. 72.

(4) 12 B. 36.

BAL KISHUN *v.* SIPAHI LAL.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 1032 OF 1913.

May 13, 1914.

Present:—Mr. Justice KNOX.

BAL KISHUN—APPLICANT

versus

SIPAHI LAL AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1908), s. 17—Power of District Magistrate to distribute work, whether can be delegated.

Section 17 of the Criminal Procedure Code does not empower a District Magistrate to pass on his powers of calling up cases from subordinate Courts and re-distributing them. The distribution of business is confined to the District Magistrate and cannot be exercised by a Magistrate in charge of a Sub-Division or by a senior Honorary Magistrate. Therefore, the order of a District Magistrate authorizing or directing the senior Honorary Magistrate to distribute work among other Honorary Magistrates is *ultra vires*.

Criminal revision from an order of the Honorary Magistrate of Pilibhit.

JUDGMENT.—The case was one in which the offence charged was an offence under section 323 of the Indian Penal Code. It was transferred from one Court to another until it had come under the cognizance of no less than four different Courts, and even now it does not appear clear under what order the case passed from one to another of these several Courts. There appears to be a custom in Pilibhit under which all cases entrusted to a Bench of Magistrates are put before the Senior Honorary Magistrate in order that he may make a proper distribution of the work, and the authority for this practice is based upon section 17 of the Code of Criminal Procedure. Section 17 empowers District Magistrate to make rules or give special orders connected with the Code as to the distribution of work among such Magistrates and Benches. Now distribution of work is one thing, calling up a case from the Court to which it is transferred for trial is quite different and I cannot find that the Code anywhere empowers the District Magistrate to pass on his powers, of calling up cases from subordinate Courts and re-distributing them. Such a practice even if governed by a special order, would not appear to be consistent with the Code and the mischief from such a practice appears when a simple case of this kind is handed about from Court to Court.

RAM SARUP *v.* EMPEROR.

The distribution of business is, so far as I can ascertain, confined to District Magistrates and cannot be exercised by a Magistrate in charge of a Sub-Division.

The order of the Magistrate directing that the Senior Honorary Magistrate should distribute work among the other Honorary Magistrates is an order *ultra vires* and some other arrangement for distribution of work than this should be made; otherwise there is a risk of a case transferred by a Senior Honorary Magistrate being declared *null* and *void ab initio*, being a trial without jurisdiction. Let the record be returned.

Record returned.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 230 OF 1914.

May 14, 1914.

Present:—Mr. Justice PIGGOTT.

RAM SARUP AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 447—One co-sharer building upon common waste land after refusal of permission by others.

A co-sharer who builds a house on the common land despite refusal of permission by other co-sharers is not guilty of an offence under section 447 of the Penal Code.

The mere fact that a co-sharer asked another co-sharer to consent to his appropriating to his own use a portion of a plot of waste land, would not necessarily imply that the co-sharer whose consent he asked was admitted by him to be the sole owner of the plot in question.

In the matter of the petition of Gobind Prasad, 2 A. 465; *Emperor* v. *Lakshman Raghunath*, 26 B. 558; 4 Bom. L. R. 280, referred to.

Criminal revision from an order of the Joint Magistrate of Meerut.

Mr. *M. L. Agarwala*, for the Applicants.

Mr. *R. Malcomson*, for the Crown.

JUDGMENT.—This is an application in revision against an order of the District Magistrate of Meerut, dismissing the appeals of Ram Sarup, Mutsaddi Lal and Ram

Rijpal who have been convicted of an offence under section 447, Indian Penal Code, and sentenced to a fine. The case was tried by a Magistrate of the third class. His judgment contains a complete statement of the facts of the case and the evidence given by various witnesses, but makes no reference throughout to the definition of "criminal trespass" as given in the Indian Penal Code. There is, therefore, no finding recorded as to whether the conviction in this case is for having entered on property in possession of the complainant, Umrao Mirza, with intent to commit an offence, or with intent to intimidate, insult or annoy the said Umrao Mirza. The case for the prosecution is thus stated by the Magistrate at the very commencement of his judgment:—That in the village of Aslatpur plot No. 12 owned and possessed by the complainant and other co-sharers was lying waste; that the accused Ram Rijpal paid a visit to the complainant and asked his permission to build a house on the said land, which permission was flatly refused; that the complainant subsequently came to know that the three accused had built four walls on a portion of plot No. 12 aforesaid, put grass thatch on them and had commenced to tie their cattle therein and to live there themselves. I think I may infer from the judgment that these are the facts which the Magistrate held to be proved. The District Magistrate on appeal was expressly invited to consider the question whether the conviction was justified either on the evidence or in law on the facts found. He dismissed the appeal summarily without giving any reasons. So far as I can gather, the plot of waste land in question was one which might have been entered upon by any one of the accused, in the sense that they could have walked across it in pursuance of their daily avocations, without the complainant's being entitled to raise any objection. If the conviction, therefore, can be maintained at all, it must be upon a finding that, when the three accused began to build the walls, the subject-matter of the complaint, they were unlawfully remaining on this land with some such intent as would render them liable to punishment.

The only intent which could reasonably be argued against them would be an intent to annoy Umrao Mirza. I have been referred to one or two cases on the point, the first being the well-known authority in this Court *Gobind Prasad's* case (1), and another being a decision of the Bombay High Court in *Emperor* v. *Lakshman Raghunath* (2). It must be noted that the accused Ram Rijpal is himself a co-sharer in the village, and his asking another co-sharer to consent to his appropriating to his own use a portion of a plot of waste land would not necessarily imply that the co-sharer whose consent he asked was admitted by him to be the sole owner of the plot in question. On the facts of the case and in view of the authorities, I do not think that the mere fact that Umrao Mirza had intimated to Ram Rijpal that he would object to the latter's building upon any portion of that land, is sufficient to warrant a conclusion that the accused were acting unlawfully when they remained on his plot of land in order to set up enclosure walls or that their intention was to annoy Umrao Mirza. Accepting this application I set aside the conviction and the sentence in the case. The fine, if paid, will be refunded.

Conviction set aside.

(1) 2 A. 465.
(2) 26 B. 558; 4 Bom. L. R. 280.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISIONS NOS. 34B TO 46B OF 1914.

March 31, 1914.

Present:—Sir Henry Hartnoll, KT., Offg. Chief Judge, and Mr. Justice Ormond.

EMPEROR—PROSECUTOR

versus

ME THIN AND OTHERS—ACCUSED.

Arms Act (IX of 1878), s. 19 (a)—Clasp knives whether arms.

REDDI YERRANNA v. EMPEROR.

Clasp knives are not arms within the meaning of section 19 (*a*) of the Arms Act.

Ebrahim Dawoodji Babi Bawa v. *Emperor*, 3 L. B. R. 1; 2 Cr. L. J. 372, referred to.

Review of the order of the 4th Additional Magistrate of Bassein, dated the 30th of October 1913, in Criminal Trials Nos. 296, 295, 312, 314 to 322 and 301 of 1913.

Mr. *Eggar*, for the Appellant.

JUDGMENT.

HARTNOLL, OFFG. C. J.—These revisions concern a batch of cases in which certain persons have been convicted, under section 19 (*a*) of the Arms Act, of exposing for sale certain clasp knives. The learned Sessions Judge has forwarded six of the knives for our inspection and says that they are typical of the rest with respect to which the convictions have been obtained. They are stout and formidable clasp knives and five of them come to a point by virtue of the outer edge narrowing as the end of the blade is reached. When opened the blades are not held by a spring and so they differ from the weapons described in the case of *Ebrahim Dawoodji Babi Bawa* v. *Emperor* (1). It cannot be said that when manufactured they were primarily intended to be used for offence or defence. They are certainly useful for ordinary purposes such as for domestic use or for cutting sticks. In ordinary parlance they would not be spoken of as arms. They are stout and formidable clasp knives. They can be used as efficient and very serious stabbing implements, but it cannot be said that from their appearance they were manufactured primarily for the purpose of being used as such.

I would set aside the convictions and acquit the persons convicted and direct that the fines imposed be refunded and that the knives produced before the Magistrate be returned to their owners.

ORMOND, J.,—I concur.

Conviction set aside.

(1) 3 L. B. R. 1; 2 Cr. L. J. 372.

MADRAS HIGH COURT.

CRIMINAL REVISION CASES NOS. 833 TO 835 OF 1913.

CRIMINAL REVISION PETITIONS NOS. 679 TO 681 OF 1913.

July 21, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

REDDI YERRANNA AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (*Act XLV of* 1860), *ss.* 24, 379—*Acting "dishonestly"—Tenant cutting trees on* jirayati *land after execution of* kadapa—*Theft—Landlord's intent—Madras Estates Land Act* (*I of* 1908), *s.* 12.

A tenant cutting trees standing on his own *jirayati* land and for which he has executed a *kadapa*, which gives the landlord only a claim for compensation for trees so cut, cannot be said to be acting "dishonestly" within the meaning of section 24 of the Indian Penal Code and is not guilty of theft, and the provisions of section 12 of the Madras Estates Land Act do not apply.

Petitions, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgments of the first Class Magistrate of Vizagapatam, in Criminal Appeals Nos. 20, 21 and 22 of 1913, preferred against those of the Court of the Taluq Magistrate of Anakapalle, in Calendar Cases Nos. 223, 224 and 225 of 1913, respectively.

Mr. *B. Narasima Rao*, for the Petitioners:—The cutting cannot amount to theft as there was no dishonest intention. The *kadapas* provide for payment of damages and it is very likely that the accused (tenants) thought that they were entitled to cut the trees subject to their liability to pay damages to the landlord. The trees were on their own land. But for the *kadapas* the tenants would be entitled to the trees: *vide* section 12, Madras Estates Land Act. In the absence of dishonest intention, the conviction cannot stand.

The *Public Prosecutor* in support of conviction:—The existence of a civil remedy is no bar to a prosecution under the Penal Code. The accused have no right to the trees and the cutting is clearly dishonest.

ORDER.—The accused in these cases have been convicted of theft by cutting certain trees standing on their own *jirayati* land. We do not think the circumstances are such as to justify the inference that the

accused were acting dishonestly within the meaning of section 24 of the Penal Code. As already stated the trees stood in their own land; and the *kadapas* executed by them before the enactment of the Madras Estates Land Act merely provide that if they cut them without the landlord's permission, they would be liable to pay him damages. No doubt the existence of a civil remedy does not exclude a criminal one; but under such circumstances it is impossible to hold that the tenants were acting "dishonestly" in cutting the trees, or may not have concluded that they were entitled to do so subject to their liability to pay compensation to the landlord.

It is only the provisions of these *kadapas* which limit the operation of section 12 of the Madras Estates Land Act.

We set aside the convictions and sentences and direct the refund of the fines, if levied.

Conviction set aside.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPLICATION No. 29 OF 1913.

June 30, 1914.

Present:—Justice Sir Henry Hartnoll and Mr. Justice Ormond.

In the matter of A SECOND GRADE PLEADER.

Pleader—Application for enrolment—Concealment of conviction—Misconduct—Dismissal.

A Pleader who conceals his past conviction by intentionally omitting to recite it in his application for admission is liable to be dismissed.

ORDER.

HARTNOLL, J.—Though on the 15th September 1913, permission was given to the respondent to examine the further witnesses whom he desired to examine and though commissions were issued to Mandalay, Shwebo and Noakhali, he has not taken any steps to get them examined nor has he appeared at any of the three places. One Mahomed Kassim was examined at Shwebo in his absence, but according to respondent he is not the man whom he wishes to be examined. His testimony taken in respondent's absence and also in the absence of corss-examination is also valueless.

The final hearing in this Court was fixed for June 8th last. Ahmed did not appear. A few days before this date he came to me at my house, but I refused to discuss the matter with him there and told him that he should answer in Court. He then said that he was not going to appear at Court.

The file of the District Magistrate, Rangoon, shows that one Farid Ahmed purporting to be a licensed-petition writer at Moulmein did apply on the 6th June 1913 to be allowed to practise as such in Rangoon. His petitions on the file do not show that he ever gave the name of his father. In that respondent did not appear on the 6th June and, therefore, allows his case to be decided on the record as it stands. I am of opinion that no further inquiry should be made to ascertain whether this Farid Ahmed is the man who was convicted at Myitkyina in 1899. The name is not an uncommon one.

The case must, therefore, be decided on the record as it stands. The record shows that the Farid Ahmed who was convicted was the head clerk of the Mogaung Military Police Battalion from 1894 to 1898. In that year the Mogaung Battalion was amalgamated with the Myitkyina Battalion and in consequence the Farid Ahmed who was convicted was transferred as second clerk to the Myitkyina Battalion. He was then transferred as head clerk to the Mogok Battalion and from there brought back to Myitkyina under arrest, tried and convicted. The respondent is identified as this Farid Ahmed by men who served with him in those days. Subadar Sunni Ram swears to him. This man was with him for years and was Pay Havildar. He says that he used to see him daily. Mahomed Nakil and Rama Chandra Naidu, who were fellow-clerks with the Farid Ahmed who was convicted, also swear that respondent is the man who was convicted. They are still clerks at Mogok and Myitkyina respectively and gave evidence against him at his trial. Ramchandra Naidu even says that they occupied a house together. Doctor Ragunath Singha who is an unwilling witness against him, recognizes him as the Farid Ahmed who was convicted. He was in those times in charge of the Myitkyina Police Hospital and subsequently in collateral charge of the Bhamo Jail Hospital where Farid Ahmed was confined. Again one Mahomed Abdul Wajid, now a second grade Advocate in Upper Burma but in 1899 head revenue clerk at Myitkyina

recognizes the respondent as the Farid Ahmed who was convicted. It is true that Afzul Ali and Tilak Ram say that he is not the man who was convicted; but there is no reason to doubt their evidence. Afzul Ali is a fellow-countryman of respondent and Ramchandra Naidu, whom there is no reason to disbelieve, says that Afzul Ali came to him and asked him not to give evidence against the respondent. Tilak Ram came together with him to Bassein and the two do not give the same account of their movements on arrival.

But the evidence of those who state that they identify respondent as the Farid Ahmed who was convicted, apart from there being no apparent reason why they should depose falsely, receives strong corroboration from the following facts. When respondent applied to be admitted as a second grade Pleader of this Court, in giving his history he stated of himself as follows:—"Appointed licensed petition-writer by Major Browning, the then Deputy Commissioner, Shwebo, in June 1902, and worked there as such up to February 1903. Has been working as a licensed petition-writer at Rangoon from March 1903 with a view to pass the law examination." Now the register of petition-writers of the Shwebo District shows that on the 19th June 1902, one Farid Ahmed was registered as a petition-writer and that his father's name is recorded as Munshi Ezharul Huq. No name of Shaikh Faiz Ahmed appears in the years 1902, 1903 and 1904 in that register. Respondent allows that he used to write petitions in Shwebo by Major Browning's permission, but says that he received no written permission. This is an unlikely story in itself. The Farid Ahmed who was convicted gave his father's name as Munshi Ishar-ul-Huque. Similarly as regards Rangoon the petition-writers' register shows that on the 16th March 1903 one Farid Ahmed was registered as a petition writer, the father's name being given as Munshi Ezhar-ul-Huq. No name of any person of the name of Shaikh Faiz Ahmed is shown in the register as having been licensed as a petition-writer. Respondent allows that he used to write petitions in Rangoon under one Mr. Klusaman when he was learning law under him, but says that he did not apply for nor received any license. He said in his application to this Court that he was appointed licensed petition-writer in Shwebo and worked as a licensed petition-writer in Rangoon. When he wrote he had passed the second grade Pleadership Examination and so in the ordinary course would know what they meant when he used the words he did. He gives no satisfactory explanation as to how he came to write as he did if he was not licensed. These facts seem to me to afford the strongest corroboration to the testimony of those persons who say that they recognize him as the Farid Ahmed who was convicted. The registers contain no name of one Shaikh Faiz Ahmed whose father is said to be Shaikh Munshi Maziah Meah, and they do contain the name of a man named Farid Ahmed whose father is said to be Munshi Ezharul Haq. Respondent in his application to this Court says that he did practise as a licensed petition-writer at Shwebo and Rangoon at the time the entries were made and even allows now that he did at those times write petitions at Shwebo and Rangoon. The Farid Ahmed who was convicted gave his father's name as Munshi Ishar-ul-Huque. The witnesses who identify him as the Farid Ahmed who was convicted are men who in the ordinary course, except perhaps Mahomed Abdul Majid, would be in daily or constant touch with him. There is no reason apparent why they should depose falsely. In the absence of respondent showing that he did practise as a licensed petition writer at Shwebo and Rangoon as stated in his application to this Court in the name of Shaikh Faiz Ahmed, whose father was reputed to be Shaikh Munshi Maziah Meah, it is a reasonable inference to draw that he practised as a licensed petition-writer at Shwebo and Rangoon as stated by him in his application under the name of Farid Ahmed whose father is recorded as being Munshi Ezharul Huq. This was the name and recorded parentage of the man who was convicted at Myitkyina in 1899, and who is identified by the witnesses I have named as being the respondent. To proceed with the analysis of the rest of the evidence produced by the Crown Susin Kumar Ghosh, who is senior Auditor of Local Fund Accounts, says that he knew respondent as Farid Ahmed at Mandalay from June 1900 to August 1901. He states that respondent was then working as a clerk to Moulvi Abdul Gafoor Chowdhri. There

is no reason to disbelieve this witness. The respondent states that he sometimes assisted Abdul Gafur in his work though he was never employed by him. Banerji, a licensed petition writer of Rangoon, says that in 1903 he knew respondent as Farid Ahmed, that he used to sign his name as such and that he used to work as a licensed petition-writer sitting in the veranda of the Deputy Commissioner's Court House at Rangoon.

It seems unnecessary to discuss the evidence of Balasundaram, Isar Singh, Habib Ali and Yunus Khan. If their evidence does not prove much against respondent, it certainly does not tell in his favour. Abdul Ganny's evidence does not go to prove anything one way or the other. Ansar Ali's evidence is in respondent's favour as far as it goes. But it does not meet the strong case against him. The rest of the evidence called for the Crown needs no comment.

The evidence for the defence remains for consideration. It should be noticed that respondent produces no evidence to show that he practised as a petition-writer at Shwebo or Rangoon under the name of Shiakh Faiz Ahmed. If he did not do so it should not be believed that he did not do so. The only witness who says that there was a petition-writer at Shwebo under that name is Mahomed Cassim and respondent does not acknowledge him as his witness. He was not cross-examined and, as I have noted, the name of Faiz Ahmed does not appear in the Court Register. Under the circumstances his testimony carries no weight. Anwar Ali who says that he is the half-brother of the Farid Ahmed who was convicted states that respondent is not the man. Ezharul Huq, the father of the Farid Ahmed who was convicted, states that respondent is not the Farid Ahmed convicted. Ekbal Ahmed the complainant in the case in which Farid Ahmed was convicted gives evidence to the same effect. Both Anwar Ali and Ezharul Huq may be trying to save respondent from losing his means of livelihood. Ekbal Ahmed may be bought over. There is a great discrepancy in the evidence given by Anwar Ali and that given by the other two. Anwar Ali says that in 1904 he received a letter from his father telling him that Farid Ahmed was dead. Anwar Ali was examined in Bassein. The other two were examined on commission at Chittagong. Ezharul Huq when he gave his evidence said that he had been informed his son had gone to Mecca and that he saw him four or five years before he gave his evidence. He never said that he was dead and his evidence is to the effect that his son Farid Ahmed is alive. Ekbal Ahmed says that Farid Ahmed brought a suit against him which was withdrawn about a year before he gave his evidence and that he has heard that he has gone to Mecca that he has not heard any news of his death. Mg. Lu Gale's evidence as to dates is vague and he allows that he was related to respondent's wife. Abdul Rashid, a pensioned Hospital Assitant, gives evidence to respondent working as a broker at Yandoon between 1895 and 1901. Abdul Kadir speaks of respondent as Faiz Ahmed, but his evidence as to dates is vague and untrustworthy. The Noakhali witnesses, Kazi Lutful Huq and Hasan Ali, give evidence to knowing respondent at Feri some 20 years ago as Shaikh Faiz Ahmed and *prima facie* there is no reason for disbelieving them; but their evidence must be considered with that produced for the Crown. Mr. Wells' evidence carries no value. The convicted Farid Ahmed was released on the 2nd February 1900. The evidence of Khoda Baksh, Fazal Ahmed Khan and Puman Khan is vague as to dates and so is of no value. As regards the marks on respondent's body and those said to be on the Farid Ahmed who was convicted, we examined respondent when he was present before us and then came to the conclusion that the comparison did not help him. I made no note at the time, as I considered that at the adjourned hearing the note could be made. As far as I remember (but I will not be sure) there was a mark of an old scar on his face.

Considering the case as a whole I am of opinion for the reasons I have given that respondent is proved to be the Farid Ahmed who was convicted in 1899 at Myitkyina. He concealed this fact when applying for admission to this Court as a second grade Pleader. Such conduct was

inexcusable, and his past history is such that he should not be allowed to practise as a Pleader. I would, therefore, dismiss him.

ORMOND, J.—I concur.

Pleader dismissed.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 143B OF 1914.

August 3, 1914.

Present:— Justice Sir Henry Hartnoll.

MG. SAW TU—PETITIONER

versus

MA SA MA—RESPONDENT.

Custom—Karens—*Marriage — Match-making — Cock and hen eating—Buddhist Law.*

The Nat-worshipping *Karens* have peculiar marriage ceremonies of their own. A match-maker brings the parties together; the man goes to the woman's house if the parties were not married before; but the woman may go to the man's house if he is a widower. A cock and hen eating would apparently complete the ceremony but if the parties profess Buddhism, though Karens, they may marry according to Buddhist Law.

Review of the order of the First Class Sub-Divisonal Magistrate of Nyaunglebin, dated the 7th April 1914, passed in Criminal Miscellaneous No. 17 of 1914.

Mr. *Halkar*, for the Petitioner.

JUDGMENT.—Ma Sa Ma applied for an order under section 488 of the Criminal Procedure Code against one Ko Saw Tu on the ground that she was his wife but he had turned her out and deserted her. Ko Saw Tu denied that she was his wife. The parties are Karens and described themselves as professing the Buddhist religion. The Magistrate who heard the application found that there had been a marriage between the parties and directed that Saw Tu pay Rs. 5 a month to Ma Sa Ma. Saw Tu being dissatisfied with the order then applied to the Sessions Judge, Toungoo, to revise it. The Sessions Judge has submitted the proceedings to this Court with the recommendation that the Magistrate's order be set aside on the ground that it is very doubtful whether any marriage was celebrated between the parties. In the application for revision it was assumed that the parties were Nat-worshippers. The Nat-worshipping Karens have apparently peculiar marriage ceremonies of their own. The Sessions Judge in his order has assumed that any marriage between the parties must be according to these peculiar customs; but inasmuch as the parties professed themselves to be Buddhists, the question is whether the marriage ceremony to be observed in their case should not be according to the Buddhist Law.

One Nan Saw Mo, who is Saw Tu's sister-in-law, went to her brother Mg. Shwe Ke's house where Ma Sa Ma was living. She told her brother that Saw Tu wanted to marry Ma Sa Ma. Ma Sa Ma is a sister-in-law to Mg. Shwe Ke. Shwe Ke consulted Ma Sa Ma's uncle, Mg. Tha Du, and he was agreeable to the marriage. The 7th waxing of Nayon was fixed for the date, and on that day Ma Sa Ma accompanied by Mg. Tha Du and Mg. Shwe Ke and others went to the house of Mg. Ye Mo and Ma Ka U where Sa Tu was living. The marriage took place the same evening though Saw Tu and Ma Saw Ma did not sleep together that night. The customary cock and hen were not eaten till the next morning. Ma Sa Ma's relations went away leaving her in Ye Mo's house. Ma Sa Ma states that she lived with Saw Tu for a month after which he told her to go away as her star was not good. She says that four days after he turned her out she went to him and asked him to take her back, but with no result. On this occasion Mg. Shwe Zin accompanied her. Saw Tu denies the marriage and says that he never had anything to do with Ma Sa Ma. As regards the facts, I can see no reason to disbelieve Ma Sa Ma and those of her witnesses who deposed in her favour. There is no reason why Nan Saw Mo should depose falsely. She is the sister-in-law of Saw Tu and Saw Tu admits that she is on good terms with him. Nan Saw Mo says that Saw Tu did ask her to go and ask for Sa Ma in marriage, that she went and did so, that Shwe Ke agreed and a date in the rains was fixed, that Ma Sa Ma and her companions came on the day fixed to Ma Ka U's house where Saw Tu was living and that the marriage took place. It is true that Ma Ka U gives evidence to the effect that Saw Tu would not take Ma Sa Ma in marriage, but at the same time she allows that Sa Ma did come to her house with Nan Saw, Mo and Shwe Ko. She says Nan Saw Mo stated that she was going to give Sa Ma in marriage

with Saw Tu. She allows that Sa Ma remained about a month at her house. It seems most improbable that if Saw Tu would not take Sa Ma she would have remained so long in Ma Ka U's house and not have gone back to her own people. Ma Ka U is a sister of Saw Tu, I cannot accept her testimony. Saw Tu says that he does not live in Ma Ka U's house and yet Ma Ka U says that he sometimes lives there.

As regards the defence witness Po Seik, he is a tenant of Saw Tu and states that Saw Tu lends him money without interest. Shwe Kho in giving his evidence says that he had never seen Ma Sa Ma before. As he is a near neighbour of Ma Ka U, this is very improbable if, as even Ma Ka U says, Ma Sa was staying in her house for a month. As regards Mg. Shwe Zin his testimony evidently refers to the visit Ma Sa Ma says that she made to Saw Tu after he had sent her away. Shwe Zin says that his son married Saw Tu's niece, but he does not know what relation he is to Sa Ma. He also says that Tha Du told him that Saw Tu and Ma Sa Ma had been married, that he heard this in the morning. This part of his testimony goes to corroborate Mg. Tha Du. There is also evidence that Nan Saw Mo offered Rs. 150 to settle the matter. If Saw Tu had nothing to do with Ma Sa Ma it is improbable that such a sum of money would have been offered. The incident is related by *thugyi* Mg Yan Win and there seems to be no reason to disbelieve him.

As far as the facts are concerned I can see no reason to doubt that Saw Tu did ask Nan Saw Mo to go and ask for Sa Ma in marriage, that Sa Ma with her relatives Shwe Ke and Tha Du did go to the house of Ma Ka U where Saw Tu was living and did live with him as man and wife for some time. Saw Tu is a widower. On the facts as I have found them according to Buddhist Law there would be a legal marriage, but even looking at the facts according to the peculiar customs in use amongst Nat-worshipping Karens there seems to me to be sufficient on the record to find that there was a marriage. The Sessions Judge refers to a book written by one Rev. T. Thanbyah. In Chapter IV of this book the Karens' marriage customs are referred to. The first part of the Chapter appears to refer to marriages between youths and maidens. It would seem that youths and maidens mean persons who had never been married before. In the present case. Mg Saw Tu is a widower. There was a match-maker Nan Saw Mo. As regards the man not going to the house of the woman, Saw Tu himself admits that when a man who has been married before marries a woman who has not been, they eat the cock and hen at the man's house. And Mg. Shwe Zin says that it could be possible for a woman to go to the man. A cock and hen were eaten though this was on the next morning. On the case as it stands I can see no reason to interfere with the order of the Magistrate and the proceedings will be returned to the Sessions Judge.

Order upheld.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 15 OF 1914.

April 6, 1914.

Present:—Mr. Justice Shadi Lal.

RATTU RAM—CONVICT—PETITIONER

versus

EMPEROR—PROSECUTOR—RESPONDENT.

[*Revision—Concurrent findings of two Courts—Evidence not convincing—Criminal Procedure Code (Act V of 1898), s. 439.*

Where the complainant was an enemy of the accused and other circumstances also made the case against the accused doubtful he was acquitted despite the concurrent findings of the lower Courts.

Petition for revision, under section 439 of the Criminal Procedure Code, of the order of the Sessions Judge, Attock Division, at Campbellpur, dated the 2nd September 1913, affirming that of the Magistrate, First Class, Mianwali, dated the 9th August 1913, convicting the petitioner.

Mr. *Nand Lal*, for the Petitioner.

JUDGMENT.—I have given my careful consideration to this case and come to the conclusion that the conviction cannot be upheld. The prosecution which relates to the criminal misappropriation of an axe lost by the complainant two years ago is a belated one and the property involved is of a small value. The axe was not found in the possession of the accused, but with one Surab Khan who was in the employ of Wasu Ram. It is said that Wasu Ram received it from the accused and, in support of this allegation, reliance has been placed by the

Courts below on the allegad admission of the accused before the Police constable that the axe belonged to him. I doubt whether this admission is evidence against the accused. In any case, I am not inclined to believe the evidence on this point.

It must be remembered that there is enmity between the petitioner and the complainant and that the defence witnesses state that the accused has borne good character.

Having regard to all the circumstances I do not think that a case under section 403 has been made out. I, therefore, accept the application for revision, set aside the conviction and acquit the petitioner. The fine, if paid, shall be refunded to him.

Application accepted.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REPORT No. 166 OF 1913.

December 18, 1913.

Present:—Mr. Crouch, A. J. C., and Mr. Boyd, A. J. C.

EMPEROR—PROSECUTOR

versus

GHULAM ALI—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 130, 397—Imprisonment in default of giving security for good behaviour, whether imprisonment within meaning of s. 397.

When a person is committed to prison under section 123 of the Criminal Procedure Code, he is not undergoing a sentence of imprisonment within the meaning of section 397 of the Code.

Emperor v. *Vishnu Balkrishna Ram*, 17 Ind. Cas. 785; 14 Bom. L. R. 965; 13 Cr. L. J. 849; 37 B. 178, followed.

Case reported by the District Magistrate, Larkana, referring for revision an order passed by the Second Class Magistrate, Ratodero.

ORDER.—In this case one Ghulam Ali has been convicted under section 224, Indian Penal Code, by the 2nd Class Magistrate, Ratodero, and sentenced to undergo rigorous imprisonment for four months, the judgment bearing the date the 7th June 1913.

At the date of conviction Ghulam Ali was already undergoing rigorous imprisonment for 12 months, in default of giving security for good conduct in accordance with

an order passed by the Sub-Divisional Magistrate, Ratodero, on the 12th May 1913, under section 123, Criminal Procedure Code, but the Magistrate in passing sentence under section 224, Indian Penal Code, directed that it should begin to run after the expiry of the imprisonment ordered under Chapter VIII.

The District Magistrate has referred the case to this Court, recommending that in view of the ruling of the Bombay High Court in *Emperor* v. *Vishnu Balkrishna Ram* (1) the direction that the sentence of four months' rigorous imprisonment commences after the expiry of the imprisonment under Chapter VIII be altered.

Following the ruling in the case referred to, we hold that when a person is committed to prison under section 123 he is not undergoing a sentence of imprisonment within the meaning of section 397, and we alter the order of the 2nd Class Magistrate, Ratodero, by deleting the direction that the sentence begin to run after expiry of the imprisonment ordered under Chapter VIII. The four months having now expired, the full sentence has been served.

Order modified.

(1) 17 Ind. Cas. 785; 14 Bom. L. R. 965; 13 Cr. L. J. 849; 37 B. 178.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 258 OF 1914.

May 7, 1914.

Present:—Mr. Justice Banerji and Mr. Justice Chamier.

TIRKHA—APPLICANT

versus

ITWARI—OPPOSITE PARTY.

Workmen's Breach of Contract Act (XIII of 1859), s. 2—Workman ordered to work for period of contract—Order disobeyed—Imprisonment—Refund of advance and work for contract period, whether can be ordered in addition to imprisonment.

Where on a complaint under Act XIII of 1859, a Magistrate orders the workman to work for the period of contract and does not order him to re-pay the advance, on the workman's failure to comply with the order the Magistrate can do no more than sentence the workman to imprisonment. He cannot add to the sentence of imprisonment and order that the workman should work for a further period and also re-pay the advance.

VIJIARAGHAVALU PILLAI *v.* EMPEROR.

Criminal reference from an order of the Magistrate of the First Class made by the Sessions Judge of Cawnpore.

JUDGMENT.—In this case one Tirkha was ordered by the Joint Magistrate of Cawnpur to undergo rigorous imprisonment for one month under section 2 of Act XIII of 1859 and at the conclusion of the sentence to work for one and a half month for his employer, Itwari, and also to re-pay his employer Rs. 20, which had been advanced to him.

It appears that, on November 22nd, 1911, Tirkha took an advance from Itwari and agreed to work for him for twenty months. At the end of about fourteen months he ran away. Itwari complained to the Magistrate under Act XIII of 1859 and on June 19th, 1913, the Magistrate ordered Tirkha to work for six months more. Tirkha worked on and off for four and a half months and then ran away again. Itwari complained to the Magistrate again and on February 9th, 1914, the Magistrate sentenced Tirkha to one month's rigorous imprisonment and ordered him to work for one and a half month more and also to re-pay the advance. The Sessions Judge has referred the case to this Court with the recommendation that the Magistrate's order should be set aside on the ground that he had no authority to pass any order, under section 2 of the Act, after the expiry of the period for which the man agreed to work. The reported cases show that there has been some difference of opinion on the question whether an order can be passed under section 2 of the Act after the expiry of the term of the contract, but holding the view that we do in the present case we need not express any opinion on this point. It seems to us quite clear that if the Magistrate had power to pass any order under section 2 of the Act in February this year, he could only sentence the workman to imprisonment. Under the first paragraph of section 2 of the Act the Magistrate was competent at the option of the complainant, either to order the workman to re-pay the advance or such part thereof as seemed just and proper or to order him to perform the work according to the terms of his contract. Then the second paragraph provides that if the workman fails to comply with the said order the Magistrate may sentence him to imprisonment for a term not exceeding three months or if the order be for re-payment of a sum of money, may sentence him to imprisonment for three months or until such sum of money be sooner paid. In the present case the Magistrate's order was that Tirkha should work. There was no order that he should re-pay the advance. Therefore when Tirkha failed to comply with the Magistrate's order, the Magistrate could do no more than sentence him to imprisonment. It is quite clear to us that the Magistrate could not add to the sentence of imprisonment and order that Tirkha should work for a further period and also re-pay the advance. The sentence of imprisonment has been undergone. We set aside the order of the Magistrate requiring the man to work for a further period and to re-pay the advance.

Order set aside.

MADRAS HIGH COURT.

CRIMINAL REVISION CASES NOS. 69 AND 70 OF 1914.

CRIMINAL REVISION PETITIONS NOS. 60 AND 61 OF 1914.

July 28, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

M. VIJIARAGHAVALU PILLAI—COUNTER-PETITIONER—PETITIONER (IN BOTH)

IN No. 69.

P. THEAGAROYA CHETTI—COUNTER-PETITIONER—PETITIONER

IN No. 70.

P. M. APPASAWMY CHETTI—COUNTER-PETITIONER—PETITIONER

versus

EMPEROR—RESPONDENT.

Madras City Municipal Act (III of 1904), s. 413—Election rules made thereunder—Charter Act 24 & 25 Vic., C. 104, 1861, s. 15—Rules empowering Presidency Magistrate to hold inquiry into fitness of candidate for election—Presidency Magistrate, whether Court subject to jurisdiction of High Court.

A Presidency Magistrate authorized under rule 5 of the rules framed by the Local Government under section 413 of the Madras City Municipal Act to hold an inquiry and decide whether a particular candidate is fit to stand for election to a Municipal Council, is not a Court subject to the superintendence of the High Court under section 15 of the Charter Act, and the High Court will not interfere in revision with an order passed by him. His position is that of a referee between the president of the Municipal Council and the candidate.

Minakshi Naidu v. *Subramanya Sastri*, 11 M. 26 (P. C.); 14 I. A. 160; *Vasudeva Aiyar* v. *Devasthanam Committee of Negapatam*, 21 Ind. Cas. 451; 14 M. L. T. 354; (1913) M. W. N. 842; 25 M. L. J. 536; *Sawmi Chetty* v. *Corporation of Madras*, 18 Ind. Cas. 271; 14 Cr. L. J. 271; 23 M. L. J. 591, referred to.

VIJIARAGHAVALU PILLAI v. EMPEROR.

Royal Aquarium and Summer and Winter Garden Society v. *Parkinson*, (1892) 1 Q. B. 431; 66 L. T. 513; 40 W. R. 450; 61 L. J. Q. B 409; 56 J. P. 404, *Manavala Goundan* v. *Kumarappa Reddy*, 30 M. 326; 17 M. L. J. 313; 2 M. L. T. 267, *Bulaji Sakharam* v. *Merwanji Nowroji*; 21 B. 279, followed.

When *quasi* judicial functions are delegated to officers whose decisions are ordinarily subject to the revisional powers of the High Court they are not, with reference to the delegated power, necessarily subject to the said Court.

Rudolf Stallman v. *Emperor*, 10 Ind. Cas. 618; 15 C. W. N. 736; 12 Cr. L. J. 322; 38 C. 547, followed.

Petitions, under section 15 of the Charter Act and section 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Fourth Presidency Magistrate, George Town, Madras, in Applications Nos. 155 and 156 of 1914.

Mr. *T. Ethiraja Mudaliar*, for the Petitioner.

The *Crown Prosecutor*, for the Government.

ORDER.—These are petitions to revise the order of the Presidency Magistrate, George Town. Two applications were made to him by the counter-petitioners to declare that inclusion of the petitioner as a candidate for Municipal election by the President of the Corporation was illegal under rule 5 of the Rules framed by the Government in pursuance of the powers given to them by section 413 of Act III of 1904. The Magistrate allowed the applications. Against that order these petitions have been filed.

The learned Judge who admitted the petitions expressed doubts regarding the powers the High Court to revise the order of the Magistrate. We, therefore, called upon the petitioner's Vakil to argue that preliminary point. Mr. T. Ethiraja Mudaliar, who appeared for the petitioner, conceded that the petition did not lie under section 439. He, however, contended that under the Charter Act the High Court was competent to revise the order. Section 15 says that the High Court shall have superintendence *over all Courts* which may be subject to its appellate jurisdiction. Is a Magistrate giving his decision under the rules framed by the Government in this behalf "a Court subject to the appellate jurisdiction of the High Court"? No procedure is prescribed by the rules; and although the Magistrate is competent to take evidence in the case, it is not suggested that this is in pursuance of any statutory obligation to do so. The contention of the learned Vakil for the petitioner is that the Magistrate is ordinarily subject to the control of the High Court, and any power given to him by the Local Government must be considered to have been conferred on him in his capacity as being subject to the supervising power of the High Court. It seems to us that this contention is untenable. It was held in *Minakshi Naidu* v *Subramanya Sastri* (1) by the Judicial Committee that the expression "Civil Court" in section 10 of Act XX of 1863 does not import that the presiding officer is subject to the appellate authority of the High Court. They say: "In the opinion of their Lordships the tenth section places the right of appointing a member of the Committee in the Civil Court not as a matter of ordinary civil jurisdiction, but because the officer who constitutes the Civil Court is sure to be one of weight and authority and with the best means of knowing the movements of local opinion and feeling, and one can hardly imagine a case in which it would be more desirable that the discretion should be exercised by a person acquainted with the district and with all the surroundings." We are of opinion that similar considerations are responsible for the Local Government vesting in the Presidency Magistrate the discretion to prononnce an opinion on the competency or otherwise of a candidate for election. We may also, in this connection- refer to rule 11 of the Rules framed under the District Municipalities Act. The Local Government has empowered Collectors to exercise the functions which the Presidency Magistrates in the town of Madras exercise under the rule in question. It has never been suggested that a Collector's decision can be revised by the High Court. The learned Vakil for the petitioner draws cur attention to a decision reported as *Vasudeva Aiyar* v. *Devasthanam Committee of Negapatam* (2), which holds that the High Court has power to hear a revision petition under section 115 of the Code of Civil Procedure against an order passed under section 10 of Act XX of 1863. We are informed that that decision is under appeal to His Majesty in Council, and apart from this we do not think the decision has any direct bearing upon the

(1) 11 M. 26 (P. C.); 14 I. A. 160.
(2) 21 Ind. Cas. 451; 14 M. L. T. 354; (1913) M. W. N. 842; 25 M. L. J. 536.

matter we have to decide. Mr. Ethiraja Mudaliar cited *Sawmi Chetty* v. *Corporation of Madras* (3) to show that the Magistrate acting under section 171 of the City Municipal Act is subject to the jurisdiction of the High Court. The reason of that decision we take to be this. If the Magistrate had acted legally, he should have referred the matter to the High Court. By not doing so, he has illegally exercised jurisdiction to decide the matter himself and has prevented the High Court from exercising its jurisdiction in the matter. The learned Judge was, therefore, justified in that case in taking cognizance of the case in revision. The mere fact that sections 172 and 176 of the City Municipal Act put the Presidency Magistrate under the control of the High Court in certain cases is not an argument for the position that in framing rules under section 413 the Local Government invested the Magistrate with powers to be exercised subject to the superintendence of the High Court. The learned Crown Prosecutor argues that unless an officer is clothed with powers to give effect to his decision, he is not acting judicially. The reference to the functions of the Court in 3 Blackstone, pages 22 and 23, supports this contention. Lord Justice Fry in *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* (4) makes some observations which define the functions of a Court of Law. Applying the tests mentioned by the Lord Justice, the Magistrate acting under the rules could not be regarded as a Court of Law. Reference may also be made to 9 Halsbury, page 9, where it is said: "Many bodies are not Courts, although they have to decide questions, and in so doing have to act judicially in the sense that the proceedings must be conducted with fairness and impartiality." To the same effect is the conclusion to which Mr. Justice Subramania Ayyar came in *Manavala Goundan* v. *Kumarappa Reddy* (5) regarding the competency of the High Court to revise the orders of the District Registrars under section 622 of the old Code of Civil Procedure. We are, therefore, of opinion that the Presidency Magistrate in the particular instance is not a Court subject to the appellate jurisdiction of the High Court. He is in the position of a referee between the president and the candidate. The rule declares his decision to be final, as in the case of the Collector under the District Municipalities Act. The decision in *Balaji Sakharam* v. *Merwanji Nowroji* (6) may also be cited in this connection. It was held in that case that a District Judge acting under section 23 of the Bombay District Municipal Act was not subject to the revisional jurisdiction of the High Court. In *Rudolf Stallman* v. *Emperor* (7) the learned Judges decided that the High Court had no jurisdiction under the Charter Act to revise the proceedings of the Presidency Magistrate acting under sections 3 and 4 of the Extradition Act (XV of 1903). These authorities show that when *quasi*-judicial functions are delegated to an officer whose decisions are ordinarily subject to the revisional powers of the High Court, he is not with reference to the delegated power necessarily subject to our appellate or revisional authority.

We have given our careful consideration to these cases and we are constrained to hold that the High Court has no power to revise the order passed by the Magistrate in these cases.

For all these reasons we dismiss the petitions.

Petitions dismissed.

(3) 18 Ind. Cas. 271; 14 Cr. L. J. 271; 23 M. L. J. 591.

(4) (1892) 1 Q. B. 431 at pp. 447, 448; 66 L. T. 513; 40 W. R. 450; 61 L. J. Q. B. 409; 56 J. P. 404.

(5) 30 M. 326; 17 M. L. J. 313; 2 M. L. T. 267.

(6) 21 B. 279.

(7) 10 Ind Cas. 618; 15 C. W. N. 736; 12 Cr. L. J. 322, 38 C. 547.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 297 OF 1914.

May 8, 1914.

Present:—Mr. Justice Banerji.

SHIAM LAL—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 174—Non-attendance in obedience to summons—Competency of officer to issue summons.

In order to sustain a conviction under section 174, Penal Code, it must be shown that the summons issued was issued by a public servant legally competent as such public servant to issue the same and the accused intentionally omitted to attend in pursuance of the summons.

SADASIV SINGH *v.* EMPEROR.

Under rule 44 of the rules framed by the Local Government in regard to the sale of ancestral land a Collector is empowered to delegate his powers only to an Assistant Collector of the 1st class. He cannot delegate his authority to an Assistant Collector of the 2nd class and, therefore, the latter is not legally competent to issue summons the disobedience of which would be an offence under section 174, Indian Penal Code.

Criminal reference from an order of the first Additional Sessions Judge, Aligarh.

JUDGMENT.—Shiam Lal has been convicted under section 174 of the Indian Penal Code and sentenced to a fine of Rs. 30. The case has been submitted to this Court by the Additional Sessions Judge with the recommendation that the conviction and sentence be set aside. It appears that a decree was transferred to the Collector by the Civil Court for execution inasmuch as the property to be sold was ancestral property. In the course of the proceedings held in this execution case a Tahsildar, who is an Assistant Collector of the second Class, issued a summons to Shiam Lal to attend his Court in order to enable the Tahsildar to ascertain whether there was any incumbrance on the property ordered to be sold. Shiam Lal did not attend and thereupon he was prosecuted and sentenced as stated above. In order to sustain a conviction under section 174 it must be shown that the summons issued was issued by a public servant legally competent as such public servant to issue the same and the accused intentionally omitted to attend in pursuance of the summons. In this case under the rules framed by the Local Government in regard to the sale of ancestral land, the Collector is empowered to summon any person whom he thinks it necessary to summon for the purpose of ascertaining the matters to be specified in the proclamation of sale and under rule 44 he can delegate his powers only to an Assistant Collector of the first Class. He could not delegate his authority to an Assistant Collector of the second class and, therefore, the Tahsildar was not legally competent to issue the summons which Shiam Lal did not obey. Furthermore, in this case there is nothing to show that the non-compliance with the summons was intentional. Under these circumstances the conviction of Shiam Lal was illegal. I accordingly set it aside and direct that the fine imposed on him, if paid, be refunded.

Conviction set aside.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 13 OF 1913.
CRIMINAL APPEAL No. 403 OF 1913.
July 3, 1913.

Present:—Mr. Justice Woodroffe and Mr. Justice Sharfuddin.

SADASIV SINGH—ACCUSED
versus
EMPEROR—OPPOSITE PARTY.

Practice—Sessions trial—Murder case—Cross-examination of witnesses—Application for postponement, refusal of—Prejudice—Re-trial.

In capital cases every reasonable opportunity should be given to the accused to clear themselves of the charge if they can.

Counsel for an accused applied for permission to cross-examine a witness on the day following as he was not prepared to cross-examine them that day, but the Court refused permission. Upon this the Counsel, being unable to accept the responsibility of conducting the case on behalf of the accused, did not appear and a number of witnesses were consequently not cross-examined:

Held, that the application was a reasonable one and should have been granted as no adjournment was asked and the case was a fit one in which the Court should have shown an indulgence although the accused was not entitled to a postponement as of right.

Held, further, that the accused was prejudiced and the trial should commence *de novo* before another Judge.

Mr. *Roy* and *Babu Atulya Charan Bose*, for the Accused.

Mr. *Gregory*, for the Crown.

JUDGMENT.

WOODROFFE, J.—In this case the three appellants, Sadasiv Singh, Bhabuti Singh and Suambar Singh, have been tried and convicted of murder. According to the evidence, another man, Tulshi Singh, was present at, and took part in, the alleged crime. The Public Prosecutor, however, elected not to proceed against him, for no reason that I am aware of except that this man surrendered after the trial had commenced in the Magistrate's Court and it was not thought worth while to charge him and recommence the trial. However this may be, no other reason appears on the record.

In the order-sheet of the 16th April, on which date the case was taken up, learned Counsel who appeared on behalf of the appellants asked that he might cross-examine the witnesses on the day following, as he was not prepared to cross-examine that day. This application was refused, the learned Judge ordering "that the eye-witnesses and other

important witnesses should be examined on the 17th and that the examination of the other witnesses should be taken up on that day," *i.e.*, the 16th. On the following day, the 17th April, learned Counsel who had appeared for the appellants on the preceding day did not appear. We have been informed by Mr. J. N. Roy, who appears on behalf of the appellants in this Court, that as Counsel for the appellants in the lower Court was not granted the application which he had made, he was unable to accept the responsibility of conducting the case on their behalf. Certain Pleaders, however, did appear on behalf of the appellants. This application by learned Counsel appears to me to have been a reasonable application and one which, under the circumstances, should have been granted. The case is a capital one in which every reasonable opportunity should be given to the appellants to clear themselves of the charge if they can. It is not as if an adjournment of the trial itself had been asked for. No inconvenience, it seems to me, would have been suffered if the request had been granted, or even if the witnesses, or some of them, had been examined-in-chief and their cross-examination postponed. It may be, as learned Counsel for the Crown has pointed out to us, that this would not have been the right of the appellants. But I know no reason why the Sessions Court, if it thinks the case a proper one, should not show such an indulgence. However this may be, this was not asked for, but something less than this, namely, that the cross-examination might be only postponed until the following day.

The result of this refusal has been that the first six witnesses have not been cross-examined in the Sessions Court by either Counsel or Pleader; and, of these, four at least are of importance. And the other witnesses do not appear to have been very efficiently cross-examined, possibly owing to the circumstances under which the gentlemen who defended them undertook their defence.

I think that the appellants have been prejudiced, in that they have lost the opportunity of cross-examination in the Sessions Court.

We have heard the case at considerable length, and owing to the inefficient manner in which the Sub-Inspector Dwarka Nath was examined, we had to examine him ourselves under the provisions of section 428 of the Code of Criminal Procedure. His evidence was left in such an ambiguous state that, for the reasons which we gave in our order directing his examination before us, it was not possible, without further inquiry, to determine upon the evidence.

We have now heard the whole case and we are unable to accept the responsibility of adjudging it when the appellants had not, as I have stated, proper opportunity of cross-examination. For, on a review of the whole case, we find that there are matters which might, and probably would have been, cross-examined into, if due opportunity had been given.

In this case it is not sufficient to direct the cross-examination merely of the first six witnesses, as it is possible that, at their cross-examination, it may appear that there are matters as to which the other witnesses might have been, but were not, in fact, cross-examined and the appellants lost the benefit, which they would have had, of being represented by Counsel, had the Court not refused the application in respect of the cross-examination. The learned Pleader for the appellants asks us for an opportunity of fully examining the witnesses; and to this I think he is entitled.

I would, therefore, set aside the conviction and sentence and direct that the appellants be re-tried. The trial should commence *de novo* and a certified copy of the evidence taken by us of the Sub-Inspector Dwarka Nath should be returned with the record to the Sessions Court. Under the circumstances, I would direct that the case be re-tried by another Sessions Judge and would transfer the case to the Sessions Judge of the Patna District. A certified copy of the deposition of the Sub-Inspector may also be furnished to the appellants.

SHARFUDDIN, J.—I agree.

Re-trial ordered.

AHSANULLAH KHAN v. MANSUKH RAM.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 175 OF 1914.

April 15, 1914.

Present:—Mr. Justice Piggott.

AHSANULLAH KHAN—APPLICANT

versus

MANSUKH RAM—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195 (b), 437—Sanction refused by lower Courts—Revision.

Nothing in section 195 of the Code of Criminal Procedure justifies a High Court in reconsidering in revision the order of a Sessions Judge passed under clause 6 of the section.

The revisional jurisdiction of the High Court can always be exercised in order to prevent a gross and palpable failure of justice. It should not be so exercised as to make one portion of the Code conflict with another or to give a right of appeal where such right is definitely excluded by the Code.

Therefore, where sanction to prosecute was refused by the trying Magistrate as well as by the Sessions Judge on appeal and it was not shown that the orders of the Courts below had proceeded upon clearly erroneous principles of law or were likely to result in obvious failure of justice, the High Court declined to interfere in revision.

Criminal revision from an order of the Sessions Judge of Meerut.

Mr *G. P. Boys*, for the Applicant.

Mr. *R. K. Sorabji*, for the Opposite Party.

JUDGMENT.—I have before me a series of connected applications by one Ahsanullah Khan arising out of the following circumstances. Mansukh Ram brought a criminal charge against Ahsanullah Khan and others, alleging commission by them of offences punishable under sections 427 and 147 of the Indian Penal Code. After a very careful trial the accused persons were acquitted. Some two months after the order of acquittal Ahsanullah Khan presented to the Court of the trying Magistrate a series of applications asking for sanction to prosecute Mansukh Ram and his principal witnesses for the offence of giving false evidence punishable under section 193 of the Indian Penal Code. In connection with the said prosecution the Magistrate found that one of Mansukh Ram's witnesses had made a statement in support of which he produced a certain document, and that an examination of that document affords strong reasons for supposing that the statement made by him was false. He sanctioned the prosecution of that witness. He rejected the remaining applications in an order the substance of which I understand to be that there was no reason to believe that the offence alleged by Mansukh Ram had in fact been committed; that his judgment of acquittal could not be considered as amounting to more than this, that Mansukh Ram had failed to prove by convincing evidence that these offences had been committed by Ahsanullah Khan and others; that in his opinion a conviction upon the materials available, when once Mansukh Ram and his fellow witnesses were placed in the dock instead of the witness-box, was decidedly improbable and that finally the case as a whole seemed to him to be one in which a Court should either have taken action of its own motion under section 476 of the Code of Criminal Procedure or should decline to take any action at all. Ahsanullah took this order, as he was perfectly entitled to do, before the Sessions Judge under clause 6 of section 195 of the Code of Criminal Procedure. The Sessions Judge in a brief order has expressed a general concurrence with the view of the Magistrate.

I take it to be settled law that nothing in section 195 of the Code of Criminal Procedure itself justifies this Court in reconsidering the order of the Sessions Judge. The question is, whether the case is one in which this Court, after examining all the records in question, should in its discretion exercise powers conferred on it by section 439 of the Code of Criminal Procedure. The revisional jurisdiction of this Court can always be exercised in order to prevent a gross and palpable failure of justice. At the same time it should not be so exercised as to make one portion of the Code of Criminal Procedure conflict with another, as would be the case were this Court to permit the practice to grow up of invoking its interference in revision so as to give a right of appeal where such right is definitely excluded by other provisions of the Code of Criminal Procedure. I called for the record of this case and issued notice to Mansukh Ram and the other accused persons in order to satisfy myself whether the case was one in which it could be said that the orders of Courts below had proceeded upon clearly erroneous principles of law or were likely to result in obvious failure of justice. I have now fully considered the whole question, in the light more particularly of the elaborate judgment written by the trying

Magistrate when he acquitted Ahsanullah Khan and the persons accused along with him. I think it sufficient to say that, having done this, I do not regard the present case as a suitable one for the exercise of the revisional jurisdiction of this Court. The applications will stand dismissed and the records will be returned.

Applications dismissed.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 114 OF 1914.
April 17, 1914.
Present:—Mr. Justice Tudball.
BHAROSA—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Workmen's Breach of Contract Act (XIII of 1859), ss. 2, 5—Workman earning his living by laying and burning bricks, whether labourer within Act—Order for refund after lapse of time fixed for performance of contract, whether valid.

A workman earning his living by laying and burning bricks is a labourer within the meaning of Act XIII of 1859. The mere fact that the period of time within which the contract was to be performed has elapsed cannot prevent a Magistrate from passing an order for refund of the money advanced.

Khoda Bakhsh v. *Moti Lal Johori*, 11 C. W. N. 247; 5 Cr. L. J. 66, *Narsing Prasad Singh* v. *Emperor*, 35 C. 1028; 12 C. W. N. 869; 8 C. L. J. 312; 8 Cr. L. J. 134, referred to.

Criminal revision from an order of the Sessions Judge of Banda.

Mr. *Pearey Lal Banerji*, for the Applicant.

Messrs. *S. M. Sulaiman* and *Sital Prasad Ghosh*, for the Opposite Party.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—This is an application in revision in a case under Act XIII of 1859. The applicant was ordered by a Magistrate to refund the sum of Rs. 339-10-0 advanced to him and when he failed to pay, he directed him to be imprisoned for two months. This order was slightly modified by the Sessions Judge who reduced the sum from Rs. 339-10-0 to Rs. 289-10-0. The first contention on behalf of the applicant is that the case is one which does not fall within the purview of the Act. After an examination of the contract made between the parties and the evidence in the case I have no hesitation in

holding that the applicant is a labourer within the meaning of the Act. It is not a case of a contract to supply bricks, but a case of a contract to do some work by one who is a workman earning his living by laying and burning bricks.

The next contention was that as the period of time within which he was to perform the contract had elapsed no order under the Act could be passed in regard to payment, and in this respect I am referred to *Khoda Bakhsh* v. *Moti Lal Johori* (1) and *Narsing Prasad Singh* v. *Emperor* (2). The two Judges who decided the latter case differred on the point in question. Reading the language of the Act and giving to it its ordinary plain meaning, I fail to see why the fact that the period had elapsed should prevent a Magistrate from passing an order for refund of the money advanced. The case reported as *Khoda Bakhsh* v. *Moti Lal Johori* (1) gives no reason whatever for the opinion expressed therein nor does the decision in *Narsing Prasad Singh* v. *Emperor* (2) give any further reasons. There is nothing in the language of the Act which makes such an order impossible or incorrect. The application, therefore, fails and is dismissed. The applicant who is on bail will have to surrender unless he pays the amount.

Application dismissed.

(1) 11 C. W. N. 247; 5 Cr. L. J. 66.
(2) 35 C. 1028; 12 C. W. N. 869; 8 C. L. J. 312; 8 Cr. L. J. 134.

MADRAS HIGH COURT.
CRIMINAL APPEAL No. 265 OF 1914.
August 4, 1914.
Present:—Mr. Justice Ayling and
Mr. Justice Tyabji.
MURUGA GOUNDAN *alias* AYYAMPETTAIYAN—PRISIONER—APPELLANT
versus
EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 328—Offence—Mere administration of drug is not enough—Intent must be proved.

In order to convict a person of an offence under section 328, Indian Penal Code, mere administration of the drug will not do. There must also be evidence to show that such administration was with the intent specified in the section and to cause injury to the person to whom it was administered.

Appeal against the order of the Court of Session of the North Arcot Division, in Case No. 26 of the Calendar for 1914.

EMPEROR *v.* BENI.

The *Acting Public Prosecutor*, for the Government.

JUDGMENT.

AYLING, J.—The appellant has been convicted of an offence under section 328 of the Indian Penal Code in administering some drug in a ball of jaggery to a boy named Arimuthu, who is said to have died of the effects rather more than three days later. There is nothing to indicate the nature of the drug but the Sub-Assistant Surgeon (P. W. No. 7) is of opinion that the boy died of irritant poisoning, but after a careful scrutiny of his evidence and of the Chemical Examiner's report which shows that no trace of poison could be detected in the boy's internal organs, I cannot feel that the cause of death is free from doubt.

However this may be, I see no reason for doubting that as deposed by the prosecution witnesses the appellant gave the boy some jaggery in the evening before he was taken ill; and if we accept the evidence of P. W. No. 5, it would appear probable (though by no means certain) that the jaggery contained something in the nature of a love-philtre, designed to secure the affections of the boy's sister-in-law. But there is nothing in the evidence to indicate that the accused had any idea that this love-philtre was likely to be injurious and the open way in which he distributed the jaggery and disclosed his intention to prosecution witness No. 5, is opposed to such a supposition. It may be that this love-philtre contained something which disagreed with the boy and ultimately caused his death: but there is nothing from which either of the intents or the knowledge specified in section 328 of the Indian Penal Code can be inferred. He may have contemplated the commission of an offence in respect to Alamelu as the Sessions Judge surmises; but the administration of the drug to the boy which is the subject of the present charge could not facilitate this.

I would set aside the conviction and sentence and order the release of the appellant.

TYABJI, J.—I cannot accept the evidence of P. W. No. 5. On the rest of the evidence, I am not satisfied that it is proved that the jaggery was offered to the boy with the intention to cause hurt to him. It is not alleged that anything was administered to the boy with the intent to commit or facilitate the commission of an offence.

The case seems to me to be one of suspicion, but I do not think that all the elements of an offence under section 325 of the Indian Penal Code are satisfactorily proved.

I, therefore, agree in the order proposed by my learned brother.

Conviction set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 120 OF 1914.

February 21, 1914.

Present:—Mr. Justice Piggott.

EMPEROR—PROSECUTOR

versus

BENI—APPLICANT.

Penal Code (Act XLV of 1860), s. 290—Skinning an animal which died natural death—Public nuisance.

The mere act of skinning an animal which dies a natural death does not in itself constitute a public nuisance.

Criminal reference by the Sessions Judge of Shahjahanpur.

Mr. *R. Malcomson*, (Assistant Government Advocate), for the Crown.

JUDGMENT.—This is a reference by the Sessions Judge of Shahjahanpur asking this Court to interfere in the case of one Beni who, as the explanation of the Magistrate concerned now makes it clear, has been convicted of committing a public nuisance under section 290 of the Indian Penal Code and sentenced to a fine of Rs. 20. The only facts found are that the said Beni skinned an animal which had died a natural death. In the absence of any further evidence I am not prepared to accept it as a sound principle of law that this act in itself constitutes a public nuisance. I set aside the conviction and sentence in this case, acquit Beni of the offence charged and direct that the fine, if paid, be refunded.

Conviction set aside.

FRANK HAY v. RAFIUDDIN.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 212 OF 1913.

May 11, 1914.

Present:—Mr. Justice Rafique and Mr. Justice Piggott.

FRANK HAY AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAFIUDDIN—PLAINTIFF—RESPONDENT.

Mortgage—Redemption -Title to redeem—Burden of proof.

In a suit for redemption the plaintiff must prove a subsisting title.

Sheo Prasad v. *Lalit Kuar*, 18 A. 403; A. W. N. (1896) 132; *Lalla Debi Prasad* v. *Beharee Lal*, 3 N. W. P. H. C. R. 33; *Bala* v. *Shiva*, 27 B. 271; 5 Bom. L. R. 85, refered to.

Where in a suit for redemption the defendant pleaded limitation and the mortgage was found to be in existence just sixty years before the suit, it was not for the defendant to show that the mortgage was really anterior in date to that year.

First appeal from an order of the Officiating Subordinate Judge of Budaun.

Messrs. *B. E. O'Conor*, *D. R. Sawhny* and *Sital Prasad Ghosh*, for the Appellants.

Mr. *S. A. Haidar*, for the Respondent.

JUDGMENT.—This is a first appeal from an order of remand. The plaintiff claimed to redeem a mortgage alleged to have been executed in or about the year 1856 A. D. On the pleadings, the Court of first instance framed a number of issues, the first of which was, "is the suit within time?" In considering this issue the learned Munsif began by rightly remarking that, in a suit for redemption, the plaintiff must prove that he has a subsisting right to redeem. He then went on to consider the evidence and expressed himself as satisfied that there was no mortgage in the year 1856, that the mortgage under which the defendants were in possession existed certainly in the year 1853 A. D. and that there were grounds for presuming that it had been in existence a number of years prior to that. On this he held that the suit was barred by time and dismissed it accordingly. The Court of first appeal has considered the evidence which was before the first Court, and has recorded a finding that there was a mortgage of the year 1853 which the plaintiff is entitled to redeem. Having, therefore, reversed the finding of the first Court on the issue of limitation the Subordinate Judge has remanded the suit to the Court of first instance for trial on the remaining issues. The appeal before us is by the defendants against this order of remand.

It is contended, in the first place, that the lower Appellate Court, having concurred in the finding of the Court of first instance that there was no mortgage of the year 1856, should on that finding have dismissed the plaintiff's suit. For this proposition of law reliance is placed upon a decision of this Court in *Sheo Prasad* v. *Lalit Kuar* (1). It would certainly be exceedingly difficult to distinguish this case on the facts from the reported case above referred to. On behalf of the respondent we were asked to consider the question of law in the light of an old ruling in *Lalla Daibee Prasad* v. *Beharee Lal* (2), and also that the law on this point has been laid down somewhat differently by the Bombay High Court in a number of cases of which it is sufficient to refer to *Bala* v. *Shiva* (3). We think it expedient, however, to pass on to consider the second point on which the decision of the lower Appellate Court is challenged. The plea as taken in the memorandum of appeal is that there was no mortgage granted in the year 1853, and on the plea thus taken it has been contended on behalf of the respondent that it is an appeal against a finding of fact recorded by the lower Appellate Court, which is binding on us in dealing with a first appeal from order. It seems to us, however, that the finding of the the learned Subordinate Judge as to the execution of a mortgage in the year 1853 is one which rests upon no evidence. We are not even certain that the learned Subordinate Judge really intended to find this. What he relies on is a copy of an extract from a Settlement Record of the year 1853, in which one Saiyad Muhammad Husain Khan is shown to be in possession as mortgagee of the shares of Azimuddin and Fatehuddin. The defendants in this case are admittedly the successors-in-interest of Saiyad Muhammad Husain Khan, whose rights were transferred at an auction sale held in 1888. The plaintiff claims to be the successor-in-title of Azimuddin. Now what the learned Subordinate Judge really says is that this

(1) 18 A. 403; A. W N. (1896) 132.
(2) 3 N. W. P. H. C. R. 33.
(3) 27 B. 271; 5 Bom. L. R. 85.

paper proves to his mind that a mortgage, which the plaintiff has a right to redeem as against the defendants, was in existence in the year 1853 A. D. The present suit was brought in the month of April 1912, and is, therefore, just within time from any date in the year 1853. From these facts the learned Subordinate Judge concludes that it was for the defendants to show that their mortgage was really anterior in date to the year 1853 A. D. We cannot accept this proposition of law. It is contrary to the general principle that the plaintiff in a suit for redemption must prove a subsisting title. It is contrary also to the principles of law laid down in all the rulings on the subject to which our attention has been called in the course of the arguments, whether on behalf of the appellants or on behalf of the respondent. On the evidence before him the learned Subordinate Judge had no materials for concluding that any mortgage was actually granted in the year 1853 A. D., and as we have already remarked, we are not satisfied that he intended to find this. His decision is really based upon his remarks regarding the shifting of the burden of proof, which we have already dissented from. We may remark in conclusion that there is no question raised by the pleadings, or by the evidence on the record, of any extension of the period of limitation on the basis of any written admission signed by the present defendants or by their predecessors-in-title. We must, therefore, accept this appeal.

We set aside the order of the lower Appellate Court and restore the decree of the Court of first instance dismissing the plaintiff's suit. The defendants will get their costs throughout.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 503 OF 1912.

July 27, 1914.

Present:—Mr. Justice Chevis and Mr. Justice Shadi Lal.

GULAB MAL—DEFENDANT—APPELLANT

versus

SHUJAWAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 3—Limitation—Appellate Court can take cognizance of limitation when no further evidence required for decision.

An Appellate Court can take cognizance of the question of limitation for the first time, if it arises upon the pleadings or upon the allegations and if upon the facts already on the record the suit is clearly barred by time and no question of fact has to be inquired into so as to enable the Court to decide the point of limitation.

Second appeal from the decree of the Divisional Judge, Multan Division, dated the 17th February 1912, affirming that of the District Judge, Multan, dated the 8th July 1911, decreeing plaintiffs' claim.

Mr. *Pestonji Dadabhai* and Pandit *Balmokand*, for the Appellant.

Dr. *Shuja-ud-Din*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the respondents for a declaration that the defendant-appellant is owner of only those trees which existed at the time of his purchase or have grown up subsequently within the then existing clumps or within the radius of one *karam* therefrom, and that he is not entitled to the trees growing outside the aforesaid limits of which the plaintiffs are the sole owners. This claim was resisted *inter alia* on the ground of limitation and the Court of first instance raised an issue as to whether the suit was within time. Parties produced their evidence and the suit was ultimately decreed in favour of the plaintiffs by the District Judge, who remarked that nothing was urged before him as to the claim being time-barred. The defendant appealed against this decree to the Divisional Judge and in the memorandum of appeal raised several points, one of them being that the plaintiffs had failed to prove that their suit was within time (*vide* ground No. 7). At the time of the hearing of the appeal, legal grounds were not argued and, on the merits, the Divisional Judge concurred with the Court of first instance and dismissed the appeal,

B. A. GOUGH *v.* H. S. LENEHAN.

The defendant has preferred a second appeal to this Court and the first point pressed before us is that the suit is barred by time and should, therefore, be dismissed. The question for determination is whether we can entertain this plea which, though it formed the subject-matter of an issue, was not pressed in the Courts below. There is no hard and fast rule of universal application for the guidance of Courts in a matter of this kind, and the decision of each case must depend upon its particular facts and circumstances. The principle, which is now firmly established, is to the effect that an Appellate Court can take cognizance of the question of limitation for the first time if upon the facts already on the record the suit was clearly barred by time and no question of fact has to be inquired into so as to enable the Court to decide the point of limitation [Vide *inter alia* *Deo Narain* v. *C. R. H. Webb* (1) and *Balaram* v. *Mangta Dass* (2)]. The plea of limitation cannot, however, be entertained for the first time in a second appeal where such entertainment will involve the taking of additional evidence. It will be observed that in the second Calcutta case cited above the question of limitation was never raised in either of the Courts below, nor was it raised in the memorandum of appeal to the High Court, yet the point was allowed to be argued and the suit was dismissed as debarred by limitation. In the case before us there was a distinct plea of limitation, an issue was framed by the District Judge and the parties produced all the evidence they had. But as stated above, the point was not argued in the Courts below. The case is, therefore, clearly covered by the rule laid down by the Full Bench of the Calcutta High Court. This principle is further borne out by the observations of their Lordships of the Privy Council in *Venkatanarasimha Naidu* v. *Bhashyakarlu Naidu* (3) where the test laid down is, whether the question of limitation arises upon the pleadings or upon the allegations, and if it does so arise the Appellate Court has to decide it.

Having regard to the law as stated above we have to see whether upon the facts on the present record this suit is clearly barred by limitation. Now, it is not disputed that the plaintiffs are not in physical possession of the trees and that in all the annual papers and Settlement records, prepared since the mutation in favour of the defendant in 1876, he has been recorded as owner of 6/16ths share of all the trees, whether old or new. The last Settlement was in 1900 and the entries made at that time and in the subsequent *jamabandis* are in favour of the defendant. The present suit was instituted in 1908, and in the plaint the plaintiffs do not allege any action on the part of the defendant during the previous six years which constituted a cause of action against him. We repeatedly asked Counsel for the respondent to point out any such action, but he was unable to do so. In these circumstances it is clear to us that the present suit is barred by time [Vide *Akbar Khan* v. *Turaban* (4)]. We are accordingly constrained to give effect to the plea of limitation and hold that the suit must be dismissed. We accept the appeal, set aside the decree of the Courts below and dismiss the suit as barred by time. Having regard to the fact that the point of limitation was not pressed in the lower Court we leave the parties to bear their own costs in all the Courts.

Appeal accepted.

(1) 28 C. 86; 5 C. W. N. 160.
(2) 34 C. 941; 6 C. L. J. 237; 11 C. W. N. 959.
(3) 25 M. 367; 6 C. W. N. 641; 29 I. A. 76 (P. C.).
(4) 5 A. L. J. 637 at p. 639.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1794 OF 1913.

July 30, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Chevis.

B. A. GOUGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

H. S. LENEHAN—PLAINTIFF—RESPONDENT.

Contract—Turf Club Sweep tickets—Confederacy buying tickets—One member of confederacy selling half his share—Public policy—Nature of transaction—Legal.

Eleven persons joined as the 'Bhatiana Confederacy' to buy jointly six tickets in the Calcutta Turf Club Sweep on the St. Leger of 1912. Arrangements were made by B, the defendant No. 2. The Confederacy drew a horse which won the 3rd prize in the Sweep.

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The money was duly paid to *B* who promptly distributed it to the various sharers, including *G*, the defendant No. 1. It appeared that *G*, knowing that the Confederacy had drawn a horse, had sold half his chance to the plaintiff. Hence the plaintiff demanded half of *G's* share from *B*, who declined to recognise the transfer and paid *G* in full. *G* declined to pay anything to the plaintiff, who sued both *B* and *G* for recovery of half the share of *G*:

Held, (1)that the agreement between the plaintiff and *G* was in effect one to sell for a fixed amount a definite article of which the value was indeterminate at the time and in this respect it did not differ from many other contracts of sale except perhaps that the margin of possible value was unusually large;

(2)that the plaintiff was entitled to a decree against *G* but *B* was not liable at all.

First appeal from the decree of the Political Agent, Phulkian States and Bahawalpur, exercising the powers of a Divisional Judge at Chail (Patiala State), dated the 17th May 1913, decreeing the claim.

Mr. *Brandon*, for the Appellants.

Mr. *Obedulla*, for the Respondent.

JUDGMENT.

KENSINGTON, C. J.—The facts of this case have not been quite correctly stated by the lower Court. Eleven persons joined as the "Bhatiana Confederacy" to buy jointly six tickets in the Calcutta Turf Club Sweep on the St. Leger of 1912. Arrangements were made by Mr. Byers, defendant No. 2, who took a 1/6th share for himself, and the remaining ten persons including Mr. Gough, defendant No. 1, took each a 1/6th share.

The Confederacy drew a horse which won the 3rd prize of Rs. 33,340, or about that, in the Sweep. The money was duly paid to Byers who promptly distributed it to the various sharers, retaining his own share of Rs. 5,558 and giving Rs. 2,779 to each of the other ten persons, including Gough.

On the 10th September Gough, knowing that the Confederacy had drawn a horse but possibly not knowing that the horse was fairly high up in betting lists (his starting price being, so far as we have been able to ascertain, 10 to 1 against), sold half his chance to the plaintiff, Mr. Lenehan, for Rs. 50. This transaction seems to have been quite straightforward, and it was incorporated in a document, Exhibit P-1, written by Gough himself and attested by five gentlemen, in which receipt of the Rs. 50 from Lenehan was admitted.

When it was learnt that the 3rd prize had been won Lenehan formally demanded half of Gough's share from Byers, who quite correctly declined to recognise the transfer and paid Gough in full Rs. 2,779 or thereabouts, leaving him to settle with Lenehan. Gough declined to pay anything to Lenehan taking the position that he was not aware, at the time on the 10th September that the Confederacy had drawn a horse. The lower Court has found this plea to be untrue, and we think rightly so.

Failing to get redress from Gough the plaintiff instituted this suit for Rs. 1,385 in November 1912, making Byers a defendant as well as Gough. We are unable to understand why it was supposed that plaintiff had any remedy or grievance against Byers, but the lower Court without considering this point has given plaintiff a decree for Rs. 1,385 against both defendants.

The case is before us on appeal by them. We are quite clear that plaintiff never had any case at all against the defendant Byers and this is now readily admitted by plaintiff's Pleader. The appeal must obviously succeed so far as that defendant is concerned, as no sort of liability can possibly attach to him. In distributing the prize money early in October 1912, he acted quite properly in taking account only of the persons who had joined in the Confederacy.

We agree with the lower Court that as regards Gough plaintiff had a good claim on the merits, and we find it difficult to understand how this gentleman, having made a definite bargain with plaintiff, whether a good one or a bad one, could think himself entitled to avoid it afterwards on any pretext.

The question which has to be more seriously considered is, however, whether plaintiff can invoke the aid of the Civil Courts, the defendant's argument being that the consideration for the contract of 10th September 1912 was unlawful in terms of section 23 of the Contract Act, as being opposed to public policy. It is further urged that the contract or agreement is specifically declared void by law under section 30, as being an agreement by way of wager on which no suit will lie.

The case-law of England dealing with this question indicates great unwillingness to allow the Courts to take note of anything approaching to a gambling or wagering transaction otherwise than in what is popularly termed gambling on the stock exchange,

words which may be used in a comprehensive sense as covering a variety of mercantile transactions including all kinds of insurance. The distinction may be sometimes extremely difficult to follow, but there is no doubt that legal authority looks askance at anything which savours of race-course gambling in particular.

We do not propose to lay down any general propositions on this difficult subject, but with some hesitation we incline to the view taken in the lower Court that when Gough sold to plaintiff half of his chance in the ticket which had drawn a horse in the Sweep, he was not making an agreement by way of wager as commonly so-called. It is understood that the ticket would anyhow be worth something, whether the horse drawn should be placed in the race or not, and even whether it should fail to be a starter. The amount of prize money to be distributed on the ticket would be small, moderate or large according to the result of the race, but would in any case be something. The agreement was in effect one to sell for a fixed amount a definite article of which the value was indeterminate at the time, and in this respect it did not differ from many other contracts of sale except perhaps that the margin of possible value was unusually large. We desire to express this opinion with great caution, but we are not so clear that the lower Court's view is wrong in law as to justify us in disregarding all questions of equity and interfering in appeal with the decree against the defendant Gough.

The appeal is accordingly allowed to this extent only that the decree of the lower Court is modified in respect of Byers alone. The plaintiff's suit is dismissed as against Byers, there being no order for costs in his case as it is understood that the plaintiff only impleaded him as a formal defendant. The plaintiff's decree will stand against the defendant Gough, who will pay the plaintiff's costs in this Court.

CHEVIS, J.—I concur and have only a few remarks to add.

It seems to me impossible to suppose that Gough did not have good reason to suppose that one of the tickets belonging to the Confederacy had drawn a horse. The face value of each ticket is Rs. 10, but since 10 per cent. is kept by the Calcutta Turf Club to cover expenses, etc., and only 90 per cent. is distributed between the holders of horses who draw tickets, the real value is only Rs. 9. So prior to the Sweep the 6 tickets were worth only Rs. 54. How is it possible to suppose that Gough did not know full well that good news must have been received when Lenehan was offering him Rs. 50 in exchange for only 1/24th share in the six tickets?

As to the law point a prize was assured, as my learned colleague points out, and the only question which remained to be decided by the running of the race was the amount of the prize. To sell half of the prize for a definite sum was not, in my opinion, a wager, nor am I prepared to hold that it was opposed to public policy any more than any other financial transaction of a speculative nature.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 1522 OF 1913.

August 1, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Scott-Smith.

Haji ABDUR RAHMAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MR. W. O'BRIEN—DEFENDANT—RESPONDENT.

Res-judicata—Ejectment—Lease for certain period—Before expiry of period new lease executed—Condition to enhance rent on completion of certain repairs etc.—Suit for ejectment—Decision that rent could not be enhanced under second lease as no repairs had been made—Second suit for ejectment—Question whether tenant held in continuation of first lease or as trespasser—Decision in first suit not res judicata *—Interpretation of second lease—Payment of additional rent for additional rooms built under new lease—Defendant not bound to occupy unless rooms duly completed.*

The premises in suit consisted of an original building and a new building which was erected some time in 1909. The defendant had been a tenant of the original building under a lease for three years from the 1st of April 1907 to 1st March 1910 at a rental of Rs. 110 per mensem. During the continuance of this lease in April 1909 the plaintiff, the proprietor of the premises, entered into a further contract in writing with the defendant to let him the said premises from the 1st of October 1909 to the 30th September 1917 at an enhanced rent of Rs. 170 per mensem. There were various conditions in this second lease as to com-

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pletion of certain repairs and additions to the existing building.

In January 1910 the plaintiff sued to eject the defendant, but it was held that the defendant had not incurred any forfeiture of his rights to hold as a tenant, the condition for the payment of enhanced rent not having come into force, because the plaintiff had not carried out the additions agreed upon.

The plaintiff again sued for ejectment and recovery of rent and damages. In this suit the contention of the plaintiff was that the second lease never came into effect at all and that as the first lease determined on the 31st March 1910, the defendant was in possession as a trespasser and liable to ejectment. In support of this contention plaintiff relied on the judgment in the previous case. The defendant contended that the second lease was a mere modification and in continuation of the first, that by it the period fixed in the earlier lease was extended and that he was entitled to occupy the building at the original rent of Rs 110 per mensem until the 30th September 1917:

Held, that all that was held in the previous case was that the defendant was not holding under the new lease so far as the condition as to enhanced rent was concerned; that there was no necessity in that case to come to any decision about the period for which the defendant was holding and there was no discussion of any sort upon the point; and that the question whether the defendant's tenancy determined on the 31st of March 1910, therefore, was not *res judicata*.

Held, further, that there was nothing whatever in the second lease to show that the term of eight years was to be dependent on the plaintiff carrying out the additions and repairs specified and that such could never have been the intention of the parties:

Held, also, that the defendant was not bound to occupy the new rooms erected in accordance with clause 8 of the second lease and to pay a rent for them until they had been duly completed. Moreover the defendant could hardly be expected to spend money on occupying and furnishing the rooms during the pendency of the previous case.

First appeal from the decree of the District Judge, Delhi, dated the 16th June 1913, decreeing claim in part.

Sir *P. C. Chatterji* and Messrs. *Pestonji Dadabhai* and *M. N. Mukerjee*, for the Appellants.

Messrs. *Raj Narain* and *Santanam*, for the Respondent.

JUDGMENT.—In the present case the plaintiffs, who are house proprietors of Delhi, sued the defendant, a hotel proprietor of the same place, for ejectment from certain premises known as the Woodland Hotel and for Rs. 15,000 on account of rent and damages.

The premises in question consist of an original building and a new building which was erected some time in 1909. Defendant had previously been a tenant of the original building and under a lease, dated the 26th of March 1907, he held it for a period of three years from the 1st of April 1907 to 31st March 1910 at a rental of Rs. 110 per mensem, *vide* Exhibit A (page 2 of the paper-book). During the continuance of this lease and on the 2nd of April 1909 the plaintiffs entered into a further contract in writing with the defendant to let him the said premises from the 1st of October 1909 to the 30th September 1917 at an enhanced rent of Rs. 170 per mensem. There were various conditions in this second lease as to completion of certain repairs and additions to the existing building which will be referred to hereafter.

In a previous suit for ejectment brought by the plaintiffs on the 8th of January 1910 it was held that these additions had not been carried out according to agreement and that the defendant, who had all along tendered the original rent of Rs. 110 per month, had not incurred any forfeiture of his rights to hold as a tenant, the condition for payment of an enhanced rent not having come into force because the plaintiffs had not carried out the additions agreed upon. In the present suit the contention of the plaintiffs was that the second lease never came into effect at all and that as the first lease determined on the 31st March 1910, the defendant is now in possession as a trespasser and is liable to ejectment. The defendant contended that the second lease was a mere modification and in continuation of the first and that by it the period fixed in the earlier lease was extended and that he is entitled to occupy the building at the original rent of Rs. 110 per mensem until the 30th September 1917. The lower Court accepted the defendant's contention and granted the plaintiffs a decree for so much of the claim for rent as was admitted by the defendant. So far as the prayer for ejectment was concerned the suit was dismissed.

Plaintiffs have applied to this Court and Sir P. C. Chatterji has argued the case on their behalf. His contention in brief is that the defendant's tenancy determined on the 31st March 1910 and he is now a tenant holding over and liable to ejectment. His first contention is that in the previous suit the Courts held that defendant was not holding under the second lease and that such lease would not

come into force until the additions and repairs agreed to therein had been carried out by the plaintiffs. The judgments of the lower Appellate Court and of this Court in the previous case, printed at pages 30—36 of the paper-book, have been carefully perused by us. We find that what was there held was that (1) the plaintiffs had not carried out the additions and repairs agreed to, (2) this was the fault of the plaintiffs themselves and was not due in any way to any action on the part of the defendant, and (3) the condition as to an enhanced rent was not to come into force until such time as the additions and repairs were duly carried out.

Upon these findings the Courts came to the conclusion that defendant's tender of Rs. 110 per mensem, the amount fixed in the original lease, was a good tender and was sufficient to prevent forfeiture within the meaning of section 111 (*g*) of the Transfer of Property Act. No doubt the learned Judge in his judgment in that case stated that defendant continued to hold under the old lease, and he said (page 32, line 28, of the paper-book): "I hold, then, that the intention was that the repairs should, if possible, be completed by 30th September 1909, and that in that case the lease should commence from 1st October 1909 ; but that if the repairs were not completed until some later date, the lease should take effect from the day following the completion."

In this Court's judgment (page 34, line 40) we find the following: "It cannot, in our opinion, be held that the respondent entered the premises as tenant under the new lease.

"He was already in possession and the new lease, in our opinion, was merely a modification of the old lease under which Rs. 110 per mensem were payable until completion of alterations and repairs after which the enhanced rent would be payable."

We consider that all that was held in that case was that the defendant was not holding under the new lease so far as the condition as to enhanced rent was concerned. There was no necessity in that case to come to any decision about the period for which the defendant was holding and there was no discussion of any sort upon the point. We hold, therefore, that the question whether defendant's tenancy determined on the 31st of March 1910 is not *res judicata* by reason of the decision in the previous case.

We now have to consider the interpretation of the lease as it stands. The clauses in the leases Nos. 1 and 2 shew that there was a clear covenant by the plaintiffs to lease, and by the defendant to take, the premises for a period of eight years with effect from the 1st of October 1909. The 7th clause details the repairs and additions which were to be made by the plaintiffs by the 30th of September 1909 and sub-clause (*g*) of that clause contains the following words :—

"*Jis wakt yih kam* 30th September 1909 *ko khatam ho jawega, us wakt* 1st October 1909 *se kiraye mahwar* 170 *ho jawega aur is* agreement *ka amal daramad hoga.*"

Now in the previous case it was held both by the Divisional Judge and by this Court that the words *jis wakt* and *us wakt* in this sub-clause meant "if" and "then" and the dates were inserted in the clause merely to emphasise the fact that the repairs and alterations should be executed before the tourist season commenced. Now reading the lease as a whole we are quite clear that it was for a period of eight years certain from the 1st of October 1909, with the further condition that the plaintiffs were to carry out certain additions and repairs by the 30th of September 1909 if possible and that the rent was to be enhanced to Rs. 170 per mensem upon the completion of the same, but not before as held in the previous suit. There is nothing whatever in the lease to show that the term of eight years was to be dependent on the plaintiffs carrying out the additions and repairs specifid in clause 7 and we are quite clear that such can never have been the intention of the parties. The defendant wanted to lease the premises for eight years from the 1st of October 1909 and the plaintiffs agreed to let him have them. The rent was to be Rs. 170 per mensem from the 1st of October 1909, but this part of the agreement was not to come into force until the additions and repairs had been carried out; meanwhile the defendant would continue to hold under the old lease so far as the amount of the rent was concerned. Sir P. C. Chatterji

argues that the plaintiffs should not lose the whole of the difference in the rent merely because of their default in not completing the alterations and repairs. He urges that they are entitled at least to a proportionate enhancement and that because the defendant has not offered anything beyond the original rent of Rs. 110 per mensem, he has incurred a forfeiture and the lease was determined. We are unable to accede to this argument. It was within the plaintiffs' power to complete the alterations and repairs as agreed to by them and if they did not do so, they have merely themselves to thank. Under the circumstances we cannot hold that they are entitled to anything more than the original rent.

The second part of Sir P. C. Chatterji's argument deals with the new building which was erected in accordance with clause 8 of the second lease. Under the terms of the lease the defendant was to pay an extra sum of Rs. 100 per mensem for these additional rooms. He was to pay at the rate of Rs. 10 per room from the date of possession. Counsel urges that these rooms were ready in December 1909 and that defendant should have occupied them then and should not have waited until the 23rd of April 1911 on which date he actually did occupy them. He says that if it be held that defendant was in possession of these rooms before April 1911 he was liable to pay rent for them, and not having paid or offered to pay it he has forfeited his rights to continue as a tenant.

It is, however, pointed out by Mr. Raj Narain, Counsel for the respondent, that his client was entitled to wait until the rooms were finished according to specifications. He refers us to his letter dated the 1st of December 1909 on the record of the previous case and printed at page 17 of the paper-book in the present case, in which he complained on behalf of the defendant that the rooms had not yet been fully completed. It is not alleged that the plaintiffs ever replied to this letter, but it is unnecessary to labour the point any further because we find that in the suit which plaintiffs brought on the 26th of April 1911 for dispossession of the defendant from these new rooms under section 9 of the Specific Relief Act it was clearly admitted that the rooms had never been finished according to specifications. See in this connection the judgment of Bhai Umrao Singh, District Judge (page 55, line 13, of the paper-book) and the judgment of this Court (page 59, lines 13-16). We are clearly of opinion that the defendant was not bound to occupy these rooms and to pay a rent for them until they had been duly completed. Moreover, the previous suit for ejectment was instituted on the 7th of January 1910 and was not finally decided in this Court until the 17th of March 1911. Whilst that case was going on defendant could hardly be expected to spend money on occupying and furnishing the rooms when the decision of the Court might go against him. After the decision of that case in defendant's favour he decided to occupy the rooms and he accordingly did so with effect from the 23rd of April 1911. They had not even then been completed, but no doubt the defendant rightly considered in view of the approaching Darbar that it would pay him to occupy them. In his pleas in the present case he stated that he tendered Rs. 100 per month as rent for these additional rooms with effect from the 23rd of April 1910 (page 63, lines 7-8, of the paper-book). Plaintiffs in their replication (page 65) did not traverse this.

We wish to note that all this argument of learned Counsel in reference to these additional rooms is an afterthought. In the pleadings of the parties no distinction of any sort was made between the original and the new buildings. There was no plea by the plaintiffs to the effect that, even if the Court decided against them as regards the original building, in any case the defendant was not entitled to occupy the additional rooms. We have shown, however, that Counsel's argument on this part of the case has no force. We consider that the defendant was fully entitled to exercise his option of occupying the new building when he did. Our decision is, therefore, against the plaintiffs-appellants. They have, no doubt, suffered a considerable loss in the way of rent from non-completion of their agreement, but the fault is entirely their own and they must take the consequences.

The appeal fails and is dismissed with costs.

Appeal dismissed.

MRS. C. SIMON *v.* AROGIASAMI PILLAI.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1545 OF 1911.

January 16, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Sadasiva Aiyar.

MRS. C. SIMON—PLAINTIFF—APPELLANT

versus

M. G. AROGIASAMI PILLAI—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 25—Barred debt—Consideration—Plea of set-off—Written statement necessary.

A barred debt is a valid "consideration" for a promise to pay under section 25 of the Indian Contract Act even if the promisor did not know it *to be barred* on the date of the promise.

Appa Rao v. *Surya Prakasa Rao*, 23 M. 94, *Ganapathi Mudaly* v. *Muniasawmy Mudaly*, 5 Ind. Cas. 754; 7 M. L. T. 81; 33 M. 159, followed.

No plea of set-off can be raised without filing a written statement.

Second appeal against the decree of the Subordinate Judge of Coimbatore, in Appeal Suit No. 174 of 1910, on the file of the District Court of Coimbatore, preferred against that of the Court of the District Munsif of Coimbatore, in Original Suit No. 240 of 1908.

This second appeal coming on for hearing on the 2nd of December 1912, the Court delivered the following

JUDGMENT.—The defendant, a Pleader, had dealings with the plaintiff's husband for many years, and in reply to a demand for money alleged to be due replied as follows:

"I am sorry to tell you that owing to a wedding in my house I am unable to send the balance at present. I shall send it by the third week of this month."

The plaintiff now sues to recover the balance due. The defence is that a part of the claim was barred by limitation at the date of the letter and it cannot be treated as evidence of an agreement under section 25 of the Contract Act to pay a barred debt. Assuming that the debt or a portion thereof was barred, the letter contains an unconditional promise to pay whatever balance might be found to be due to the plaintiff. This is a valid agreement under section 25 of the Contract Act: See *Appa Rao* v. *Surya Prakasa Rao* (1) and *Ganapathy Mudaly* v. *Muniasawmy Mudaly* (2). There is no plea in this case that the defendant made the promise under any mistake which would enable him to avoid the contract. We think, therefore, that the plaintiff is entitled to recover the amount due to her with interest at 9 per cent. on Rs. 260 from the 15th September 1904 to date of suit.

The next question is whether the defendant is entitled to set off the amount claimed by him. In his written statement he alleged that the plaintiff had promised him a certain remuneration for acting as Receiver. This arrangement has been held to be illegal and is not relied upon before us. But after the suit the remuneration payable has been fixed at Rs. 500 by the Court. The defendant asked the first Court that this might be set off against the plaintiff's claim. He filed no fresh written statement as he should have done; but the Court received the Court-fee on this claim of Rs. 500 It should not have been received without a written statement. In the circumstances, therefore, we allow the defendant to amend his written statement by adding a prayer for setting off this sum of Rs. 500. The plaintiff's Pleader contends that there are many objections to the defendant's claim. We are not in a position now to decide whether the defendant is entitled to recover this amount. We accordingly direct the lower Appellate Court to return a finding on the question whether the amount claimed by the defendant is due to him after receiving a written statement from the plaintiff setting out her objection.

Fresh evidence may be taken. Six weeks will be allowed for the submission of the finding and seven days for filing objections.

In compliance with the above order the Subordinate Judge of Coimbatore submitted the following

FINDING.—The following issue has been remanded for a finding:—

"Whether the amount claimed by the defendant is due to him."

2. The defendant-appellant has filed a written statement in which he claims the sum of Rs. 500 as remuneration fixed by the District Court. The plaintiff-respondent has filed her objections to set-off this amount against the defendant's claim. The appellant has examined himself and there is no evidence *contra*. The appellant says that he would swear that Rs. 500 awarded by the

(1) 23 M. 94.
(2) 5 Ind. Cas 754; 7 M. L. T. 81; 33 M. 159.

District Court is the minimum remuneration for his labour and that Rs. 1,000 would be reasonable. He says his Receivership extended for a period of about five years, that he had to examine about 23 account books for about three or four months, that they involved more than ordinary trouble as the accounts had been badly kept, that he had to file about a dozen suits covering about Rs. 2,000 or Rs. 2,500, that he recovered about Rs. 800 and that at the plaintiff's instance, he had to prosecute one Budan Sahib (defendant in Original Suit No. 23 of 1901) before the Deputy Magistrate, Erode, for criminal misappropriation, that he obtained conviction in that prosecution and that he recovered Rs. 100 out of the fine imposed on Budan Sahib which he handed over to plaintiff, that he had two more suits on the file of the District Munsif, Erode, in which he had to represent the plaintiff and that, at the plaintiff's instance, he had to give advice in connection with the appeals in those suits as far as the High Court, though they ended against the interest of the plaintiff. He says that the prosecution of the criminal case (C. C. No. 43 of 1903) against Budan Sahib (defendant in Original Suit No. 23 of 1901) occupied about three months, during which he had to instruct Mr. Wilkins on behalf of the prosecution. He also says that he looked upon this prosecution as part of his duties as Receiver, as he instituted the criminal complaint against Budan Sahib in his capacity as Receiver after discovering that he was guilty of criminal misappropriation. I think it would fairly fall within the purview of his duties as Receiver to do all that is necessary for realising the amounts due to the plaintiff and if he found that any debtor to the estate was guilty of misappropriation, he would be warranted in prosecuting him criminally and also in recovering the amount from him in a Civil Court. Besides he has obtained from the prosecution of this case Rs. 100 which he paid as Receiver into the hands of the plaintiff. The appellant says finally that he did his work as Receiver as diligently as he could. He asked the plaintiff to give him credit for Rs. 500 through Exhibit IV, but he got no reply to it. As I have stated already, the appellant is a well-known District Court Pleader of long standing and is at present Municipal Chairman of Coimbatore. I find no reason to discredit his statement when he says that Rs. 500 is by no means an excessive remuneration for all the work and labour involved in his Receivership of five years on behalf of the plaintiff. The main objection urged by the plaintiff to the appellant's claim is that he was negligent in his duties as Receiver, that he allowed decrees to get time-barred to the extent of Rs. 834 and odd and that he failed to transfer the decree he obtained to the name of the plaintiff. The plaintiff also says that the order of the District Court (Exhidit VI*a*) is no order, but merely a suggestion. I have already pointed out in my judgment that the plaintiff agreed to pay Rs. 300 to the appellant as compensation for his labour before the order of the District Court (Exhibit VI*a*) was passed. The appellant admits that he was discharged from his Receivership except for the purpose of transfer of the decrees obtained by him to the plaintiff's name. There were about 21 decrees, most of them being small cause decrees, and the aggregate amount covered by them was about Rs. 500. The appellant says that he did not ask the plaintiff to provide him with funds for effecting the transfer of decrees as the plaintiff told him that it was not worth while to collect the decree amounts as they were very small. He also says that it was the plaintiff's duty to produce the stamp papers and have the decrees transferred. Though he might have given the plaintiff notice that he would not be responsible for the non-transfer of the decrees as she had not produced the necessary stamp papers, I think the appellant cannot be blamed for the non-transfer of decrees. He swears to it that both Mrs. Simon and her clerk told him that the decree amounts were trivial and that they did not think it worth while to collect them. The plaintiff's clerk who was in Court at that time would not step into the box and contradict the appellant on the point. In fact the plaintiff has not chosen to let in any evidence whatever to support her allegations about the charge of neglect of duty, etc., against the appellant. I have, therefore, to choose between the sworn testimony of the appellant on the one side and the mere statement of the plaintiff on the other unsupported by evidence, and I

have no hesitation in accepting the former in preference to the latter. I think the labour involved in the appellant's work as Receiver, as disclosed by his deposition and as stated in Exhibit VI (*b*) before the District Court, fully deserves Rs. 500, and the plaintiff has shown no grounds for holding that this sum is not due to the appellant in the circumstances of the case. I, therefore, record my finding on the issue in favour of the defendant-appellant and against the plaintiff-respondent.

This second appeal coming on this day for final hearing after the receipt of the findings of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding and modify the decree of the lower Appellate Court by awarding to the plaintiff, in addition to the amount already awarded to her, the sum of Rs. 260 with interest at 9 per cent. from 15th September 1904 to date of suit and future interest at 6 per cent. The parties will bear their own costs in second appeal.

Decree modified.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 59 OF 1913.

February 13, 1914.

Present:—Mr. Lindsay, J. C.

NANHE MAL—INSOLVENT

versus

EMPEROR THROUGH RAGHUBIR PRASAD AND OTHERS—OBJECTORS.

Provincial Insolvency Act (III of 1907), s. 43—Bad faith of debtor, Judge's power to take cognizance of—Act of bad faith, effect of—Adjudication, order of.

Under section 43 of the Provincial Insolvency Act, a Judge can take cognizance of the bad faith of a debtor at any time, whether before or after the making of the order of adjudication, although it may be that the Court has no power to refuse to make an order of adjudication merely because an act of bad faith is proved.

Hamid Ali v. *Ihtisham Ali*, 6 Ind. Cas. 748; 13 O. C. 94 and *Udai Chand Maity* v. *Ram Kumar Khara*, 7 Ind. Cas. 394; 15 C. W. N. 213, distinguished.

Appeal against the order of the District Judge, Lucknow, dated 19th November 1913.

Mr. *Bahadurji*, for the Appellant.

The *Government Pleader*, for the Crown.

JUDGMENT.—The facts of this case are as follows:—

On the 12th July 1913 a petition in insolvency was presented in the Court of the District Judge of Lucknow by Hira Lal and his son Nanhe Mal, two persons who had been carrying on business in Lucknow as cloth-dealers.

In the list attached to the petition were exhibited debts to the amount of Rs. 2,465 odd. There was also a statement of assets said to consist of debts due to the applicants, amounting to Rs. 130 odd, stock in trade to the value of Rs. 18 and moveable propetry worth Rs. 34.

Notices were issued to the creditors and after they had been served the Judge began his inquiry.

On the 27th August 1913 Hira Lal, one of the petitioners, made a statement. He said the business had got into debt on account of payments for rent and interest. He stated that he and his son began the business with a capital of Rs. 50 and that they had to close down as the shop didn't pay.

He produced three volumes of account books and the Judge then adjourned the case till the 22nd October to allow of these books being examined by the creditors.

On this latter date it was ascertained from the accounts that between June 1910, and June 1912, the petitioners had bought Rs. 19,400 worth of stock and had sold Rs. 15,077 worth.

The Judge then pointed out that these accounts did not explain what had become of the stock unsold. In the petition it had been stated that there was only about Rs.18 worth of stock left. He adjourned the case to a further date to enable the petitioners to produce some intelligible account and to explain what had become of the surplus stock.

On the 12th November Nanhe Mal stated he could not explain the accounts which had been kept by a clerk. Another week's adjournment was given to afford the petitioners a chance of explaining where the stock unaccounted for was.

On the 19th November Nanhe Mal was

examined. He admitted that the books showed purchases of Rs. 18,204 worth of stock. He stated that no accounts had been kept later than July 1912, and at that time there was Rs. 2,000 worth of stock in the shop and added that business was then carried on for about a year without any profit being earned. Nanhe Mal said that cloth was sold at cost price to attract customers.

The Judge then took action against Nanhe Mal under section 43 of the Provincial Insolvency Act. He charged him with an act of bad faith in that he neglected and refused to give a true account of the causes of the indebtedness of the business and in particular by asserting that he and his father had for three years been selling cloth at cost price to attract customers. Nanhe Mal was called upon to answer this charge. He repeated his previous allegations and the Judge then found him guilty and sentenced him to three months' simple imprisonment.

Nanhe Mal has now appealed against this order. It is contended, in the first place, that the Judge acted contrary to law in holding any inquiry into the conduct of the debtor before he made his order of adjudication. In this connecion two cases were relied upon, *Hamid Ali* v. *Ihtisham Ali* (1) and *Udai Chand Maity* v. *Ram Kumar Khara* (2). Both of these were cases in which a petition had been dismissed on the ground that the applicants had been guilty of bad faith, and it was held that questions of this kind could not be considered for the purpose of determining whether an order of adjudication should be made or not. It was further stated in both cases that such matters could properly be considered when the debtor made an application for discharge.

In this case there is no question of refusal to make an order of adjudication—the petition of Nanhe Mal and his father has not been dismissed. The rulings referred to have no direct application here. I can find nothing whatever in the language of section 43, or in any other section of the Act which prohibits the Judge from taking cognizance of an act of bad faith at any time. The debtor is liable under section 43 for any act of bad faith committed, whether before or after the making of the order of adjudication, and I can see no reason why the Court should not in these circumstances deal at once with an act of bad faith committed before adjudication, although it may be that the Court has no power to refuse to make an order of adjudication merely because an act of bad faith is proved.

It cannot, I think, be successfully maintained that because section 44 of the Act contemplates an inquiry into the behaviour of the debtor before it grants him an order of discharge, the Court is in any way restrained from making such an inquiry at any other time for the purpose of deciding whether or not an offence has been committed under section 43 of the Act.

Accordingly I am unable to hold in the appellant's favour that the District Judge acted contrary to law in inquiring into and deciding a charge of bad faith prior to the making of an order of adjudication.

The other plea put forward is that the facts alleged do not show any act of bad faith committed by Nanhe Mal in the performance of the duties imposed on him by section 43. But one of the duties enjoined by that section (see sub-section 1) is that of giving such aid in the realisation of his property as the Court may require—and obviously this includes the duty of giving information which will enable the Court to get possession of the debtor's property in order to make it available for the liquidation of his debts. This information must come in the first instance from the debetor—and it cannot be doubted that the obligation is to give true information. The accounts put forward by the appellant afforded no explanation of the disposal of the stock shown to be unsold. The Judge wanted to know where that stock was, and all that the appellant chose to say was that he did not know and to add, what is on the face of it a false statement, that he and his father had for three years been carrying on a business without any profit and had sold close on Rs. 20,000 worth of stock at the same price which they had paid for it. I cannot hold

(1) 6 Ind. Cas. 748; 13 O. C. 94
(2) 7 Ind. Cas. 394; 15 C. W. N. 213.

that the Judge was wrong in thinking that Nanhe Mal's statements amounted to a grossly perverse attempt to withhold information which it was his duty to put at the disposal of the Court. The facts speak for themselves and bearing in mind the unusual opportunities which the Act affords to dishonest debtors in the matter of obtaining the protection of an adjudication order, I do not feel disposed to encourage the notion that a petitioner can be allowed to come forward and make reckless and untrue statements touching the conduct of his business so as to prevent the Court from laying its hands upon his assets.

I see no reason to interfere with the Judge's order and I dismiss the appeal.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 342 OF 1912.

March 6, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

MANILAL POPATLAL—PLAINTIFF—APPELLANT

versus

KHODABHAI SARTANSING—DEFENDANT—RESPONDENT.

Gujarat Talukdars' Act (Bom. Act VI of 1888), s 29B —'Unable', meaning of—Claim not submitted within six months—Claimant prosecuting his claim in Court.

A asserted that he was entitled to exercise the rights of a mortgagee in respect of certain property. The claim was negatived in the Subordinate Judge's Court. *A* appealed After the appeal was filed the property passed under the management of the Talukdari Settlement Officer under the Gujarat Talukdars' Act, who issued a notification under section 29B of the Act calling upon claimants to submit their claims within six months. *A*'s appeal did not come on for hearing until some months after the notification but when heard it was decided in his favour. After the period of six months from the date of the notification had expired, the officer, as representing the estate to which the property belonged, appealed against the appellate decree. That appeal failed. *A* thereafter applied under section 29E of the Act for a certificate in order that he might proceed with the execution of the decree:

Held, that *A* was unable to put forward his real claim at the date of the notification, that at the date of the notice he was unable to comply with it within the meaning of section 29 B (3) and that the inability continued during the period of six months from the date of the notification.

The word 'unable' in section 29B (3) is not confined to physical inability on the part of the claimant.

Second appeal from the decision of the District Judge of Ahmedabad, in Appeal No. 219 of 1911, confirming the order passed by the Subordinate Judge of Dhandhuka and Gogo in *Darkhast* No. 429 of 1910.

Mr. *Inverarity*, with him Messrs. *M. K. Mehta* and *N. K. Mehta*, for the Appellant.

Mr. *G. S. Mulgaonkar*, for the Respondent.

JUDGMENT.—In the year 1904 the plaintiff Chhaganlal Kishordas sued the respondents, who were minors represented by the Talukdari Settlement Officer as their guardian, for a decree upon a mortgage. In 1905 the Subordinate Judge granted him a personal decree only for Rs. 2, 360 and costs, but the mortgage was held to be invalid under the provisions of the Gujarat Talukdars' Act. On the 27th of September 1905, the plaintiff filed an appeal. On the 21st November 1905, the Talukdari Settlement Officer took over the management of the estate under the Gujarat Talukdars' Act. On the 24th of the same month notice of the plaintiff's appeal was given to the Talukdari Settlement Officer, and on the 28th of December that officer issued a notification under section 29B of the Gujarat Talukdars' Act calling upon claimants to submit their claims within six months of the date of the notification. On the 14th of March 1906, the District Court decided the appeal in favour of the plaintiff, holding that he had a valid mortgage upon the property of the defendants, and on the 16th of that month on the application of the office of the Talukdari Settlement Officer a copy of the District Court's decree was sent to him. Then in July, after the period of six months from the date of the notification had expired, the Talukdari Settlement Officer, as representing the defendants, appealed against the District Court's decree. That appeal failed. The plaintiff thereafter applied under section 29E of the Gujarat Talukdars' Act to the Talukdari Settlement Officer for a certificate in order that he might proceed with the execution of the decree. He received a reply on the 12th of August 1908 that as he had not submitted his claim within six months of the date of the publication of notice under section 29B his claim was deemed to have been fully discharged, and, therefore, his

request for the grant of a certificate would not be complied with. After one month from the date of the receipt of that reply the plaintiff has applied to the Court for execution.

The Talukdari Settlement Officer relies upon the provisions of section 29B (3) that "every claim not submitted in compliance with a notice shall, save in certain cases, be deemed for all purposes and on all occasions, whether during the continuance of the management or afterwards, to have been duly discharged." That provision, however, is subject to an exception stated in the same section in these words:—"Unless in any suit or proceeding instituted by the claimant, or by any person claiming under him, in respect of any such claim, it is proved to the satisfaction of the Court that he was unable to comply with the notice published under sub-section (1)."

We have now before us a proceeding in execution instituted by the claimant, and the question is whether he has proved to the satisfaction of the Court that he was unable to comply with the notice of the 28th December 1905. The learned Subordinate Judge was of opinion that the inability must be some physical inability on the part of the claimant. If that is so, it is difficult to understand why physical inability should be an excuse where a suit has been instituted and not an excuse where a suit has not been instituted. We are, therefore, of opinion that the word 'unable' is not confined to physical inability on the part of the claimant.

Now, at the time of the notice on the 28th December 1905, what was the claimant's position? He had asserted that he was entitled to exercise the rights of a mortgagee in respect of certain property belonging to the defendants, who were represented by the Talukdari Settlement Officer, and whose property on the 21st of November passed under the management of that officer under the Gujarat Talukdars' Act. His claim had been negatived in the Subordinate Judge's Court, but he had appealed to the District Court and that appeal did not come on for hearing until some months after the notification under section 29B. How then could he advance his real claim at the date of the notification? The first Court had held that the claim, which he contended he was entitled to put forward, was an invalid claim. But he did not accept that decision. But if he had put forward his mortgage claim before the Talukdari Settlement Officer, that officer would have at once met him by the decree in which he had only been granted a decree for money and costs. We think, therefore, that he was unable to put forward his real claim at the date of the notification, and at the date of the notice he was unable to comply with it within the meaning of section 29B (3). The period allowed to the Talukdari Settlement Officer for appealing against the decree of the District Court enabled that Officer to keep the matter of the finality of the District Court's decree *in dubio* until after the expiration of six months from the date of the notification, and then when that period had elapsed he filed an appeal to the High Court. Under these circumstances we think that the inability of the claimant continued during that six months. We, therefore, decide the case against the Talukdari Settlement Officer without taking into consideration the injustice of the contention that he has received no notice when he was actually a litigating party in the proceeding in which the claim was finally settled. If the claim had been duly discharged under section 29B (3) it is difficult to understand why the Talukdari Settlement Officer took the trouble to appeal to the High Court. The plaintiff must have his costs throughout.

Appeal accepted.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3244 OF 1910.

May 8, 1913.

Present:—Mr. Justice Richardson and Mr. Justice Mallik.

NARENDRA NARAIN SINGH AND OTHERS PLAINTIFFS—APPELLANTS

versus

GOPI SUNDARI DASYA—DEFENDANT—RESPONDENT.

Bengal Cess Act (IX of 1880), ss. 43, 44, 46, 48, 95—'Interest', meaning of—Basis of distribution of cesses among co-sharers—Valuation of shares as between co-sharers—Jurisdiction—Burden of proof.

After opening a separate account for the purposes of the payment of land revenue the only way in

which a co-proprietor can obtain an apportionment of the cesses payable by him on any basis other than the basis of the amount of land revenue to which he is liable, is by preferring an objection in accordance with the procedure prescribed by section 44.

Section 48 of the Bengal Cess Act gives any shareholder in an estate, who may have paid the road-cess and public works cess payable in respect of such estate or any part thereof in excess of the amount proportionate to his own interest in such estate, a right to recover from his co-sharers any amount paid by him on account of their respective shares and interests.

The words "proportionate to his own interest" in section 48 refer to the share of the estate held by the share-holder and not to valuation of that share or the income which he derives from it.

The word "interest" in section 48 means an interest of a kind capable of being entered in the Land Register. The section implies that the co-sharers as between themselves are bound to pay in proportion to their respective shares without regard to the valuations of those shares submitted to or adopted by the Collector for the purpose of determining the total amount of cesses payable.

The basis of distribution of cesses is the land revenue payable, or, in other words, the share or interest recorded in the Land Register and not, in the first instance, the valuation (for road cess purposes) of the new estates.

Until a separate apportionment is obtained by a share-holder under the provisions of the Act, the extent of his liability for cesses as between himself and his co-sharers is the extent of his share or extent of his liability for land revenue.

If a share-holder comes into a Civil Court to recover from his co-sharer a sum paid in excess of the cesses payable by him and if the question arises whether the valuation submitted by him to the Collector is or is not correct, the burden is on him to prove that it is correct, because under section 95 the return filed by him is only admissible in evidence against, and not in his favour.

Appeal against the decree of the Sub-Judge, second Court, Pabna and Bogra, dated 29th August 1910, affirming that of the Munsif, second Court, Pabna, dated 21st December 1909.

Babu *D. N. Chakravarti* and *Shama Charan Roy*, for the Appellants.

Babu *Ram Chandra Majumdar*, for the Respondent.

JUDGMENT.—The plaintiffs and the defendant in the suit were joint proprietors in equal shares of an estate called Islampur. The estate was valued by the Collector for the purposes of road and public work cesses at Rs. 65,075 odd. The amount of cesses assessed upon that valuation was Rs. 3,543 odd. The parties each paid annually half of the total cesses assessed, that is, they paid in proportion to their shares in the joint estate or, which is the same thing, in proportion to the amount of land revenue for which each was responsible. Subsequently the defendant opened a separate account for the purpose of the payment of land revenue and in connection with that separate account, the Collector proceeded under section 44 of the Bengal Cess Act (IX of 1880) to apportion half the cesses to the plaintiffs' share and half the cesses to the defendant's share. The defendant took no objection such as is contemplated by clauses (2) and (4) of section 44. On this suit the plaintiffs claim to recover from the defendant a certain sum which they say they paid in excess of the cesses properly payable by them. The claim is in respect of cesses paid both before and after the separate account was opened. In regard, however, to the period after the separate account was opened the claim is no longer pressed. In regard to the period before the separate account, the plaintiffs rest their case on the valuation rolls submitted by the parties. They allege that they valued their shares at Rs. 3,245 odd while the defendant valued her share at Rs. 3,329, and they assert that they are entitled to recover from the defendant in this suit the cesses paid by them prior to the opening of the separate account in excess of the amounts which would have been payable by them had the total amount of cesses been apportioned between themselves and the defendant in the proportion of the two sums we have just mentioned. They assert further that they are entitled to enforce such a claim under section 48 of the Bengal Cess Act.

In regard to the period subsequent to the opening of the separate account the plaintiffs originally claimed in their plaint that they were entitled to a declaration that the apportionment made by the Collecter under section 44 should be altered in the manner we have already indicated. That part of the case, however, has, as we have already said, been abandoned in this Court and need not, therefore, be considered. It may be well, however, to say in this connection that it is now admitted that after the opening of a separate account for the purposes of the payment of land revenue the only way in which a co-proprietor can obtain an apportionment of the cesses payable by him on

any basis other than the basis of the amount of land revenue to which he is liable, is by preferring an objection in accordance with the procedure prescribed by section 44. The plaintiffs did not take that course and it is now conceded that they cannot come to the Civil Court to rectify the apportionment made by the Collector and that the Civil Court has no jurisdiction to alter that apportionment.

To return to the period prior to the opening of the separate account, during that period the joint estate was liable under the provisions of the Public Demands Recovery Act for the whole amount of the cesses assessed. There was no separate apportionment of the amount of cesses payable by each co-sharer. It is argued, therefore, for the plaintiffs, the appellants before us, that the Civil Court can step in and adjust the contributions due from the co-sharers as between each other upon an equitable basis. The basis suggested here is the valuation of their shares as made by their respective proprietors. We are of opinion, however, that section 48 of the Act does not contemplate such a claim. That section gives any share-holder in an estate, who may have paid the roadcess and public works cess payable in respect of such estate or any part thereof in excess of the amount proportionate to his own interest in such estate, a right to recover from his co-sharers any amount paid by him on account of their respective shares and interests. As we read the section the words "proportionate to his own interest" refer to the share of the estate held by the share-holder and not to valuation of that share or the income which he derives from it. The word "interest" and the words "shares and interests" used in this section may be compared with the words "specified share or interest" used in clause (1) of section 46. In that clause what is meant is obviously a share or interest of the nature of the shares and interests recorded in Part I of the Collector's Land Register. The word "interest" in section 48 seems to us to mean an interest of that kind, that is an interest of a kind capable of being entered in the Land Register. In our view section 48 according to its true meaning implies this that the co-sharers as between themselves are bound to pay in proportion to their respective shares without regard to the valuations of those shares submitted to or adopted by the Collector for the purpose of determining the total amount of cesses payable. In support of that view we may refer to section 43. That section lays down that in case of partition of an estate under the Estates Partition Act the total valuation of the original estate is to be distributed in the first instance by the Collector over the newly found estates proportionately to the land revenue. The basis of distribution is, therefore, the land revenue payable, or in other words the share or interest recorded in the Land Register, and not, in the first instance, the valuation (for road-cess purposes) of the new estates. The scheme of the Act seems to us to be that until a separate apportionment is obtained by a share-holder under the provisions of the Act, the extent of his liability for cesses as between himself and his co-sharers is the extent of his share on the extent of his liability for land revenue. In the present case the plaintiffs as already mentioned, might have obtained a separate apportionment under section 44. Section 44 deals with revenue paying estates. In the case of such estates the opening of a separate account for land revenue purposes seems to be a condition precedent to the opening of a separate account for cess purposes or to the re-distribution between the different share-holders of the total amount of cesses payable. Section 46, which we understand has been extended by the Local Government to all Districts in Bengal, deals with the case of revenue-free estates. The result is that, in our opinion, this suit is not maintainable under section 48.

Having arrived at that conclusion, it is hardly necessary for us to go into another question which was argued, namely, whether the plaintiffs have proved the valuation of their share. In regard to that question the record is not in a very satisfactory state. Both the Courts below have found that the plaintiffs have failed to prove as between themselves and the defendant that the proper valuation of their share for roadcess purposes is Rs. 3,245. They put their claim on an equitable basis and obviously if the suit were maintainable at all, it would be open to the defendant to raise the question of valuation. It would not be equitable that the plaintiffs should succeed on the basis of a

valuation made by themselves, if that valuation be an undervaluation. We do not desire to say that the Courts are wrong in saying the valuation had not been proved, although there may be ground for supposing that the parties were agreed as to the amount at which they had valued their respective shares and as to the correctness of the valuation. All we desire to say is that if a share-holder comes into a Civil Court for such a purpose as the present and if the question arises whether the valuation submitted by him to the Collector is or is not correct, the burden is on him to prove that it is correct, because under section 95 the general rule is that the return filed by him is only admissible in evidence against and is not evidence admissible in his favour.

The result is that this appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 90 OF 1912.

August 6, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

MOTAVENGATTIL KRISHNA PANIKKAR—DEFENDANT—APPELLANT

versus

KEZATATH KRISHNA MENON—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 83—Deposit of money—Mortgagee drawing money—Mortgagor, whether can object.

When a mortgagor deposits the mortgage-money into Court under section 83 of the Transfer of Property Act, it is no longer his, and he cannot object to the mortgagee drawing the same from the Court.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut, in Appeal Suit No. 650 of 1911, preferred against that of the Court of the District Munsif of Tirur, in Miscellaneous Petition No. 2009 of 1911, in Original Suit No. 304 of 1909.

Mr. *K. P. Govinda Menon*, for the Appellant.

JUDGMENT.—The application of the mortgagee (appellant-defendant) is, in substance, not for compelling the mortgagor (respondent-plaintiff) to take delivery of the mortgaged property from the appellant but for the issue of a cheque in favour of the appellant for the amount deposited in Court by the respondent.

The money was paid into Court by the respondent expressly in order that the appellant, who was entitled under the decree to have the property sold in default of such payment, might not bring it to sale and might draw the amount from Court. The money became the money of the appellant as soon as it was so deposited and the plaintiff cannot be heard to object to the appellant receiving a cheque to draw that money from the Court.

The lower Court's order is set aside and the Munsif's order restored with costs on the respondent (plaintiff) in all Courts.

Appeal allowed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 184 OF 1911.

March 26, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

RAOJI KESHAV DESHMUKH—DEFENDANT—APPELLANT

versus

KRISHNARAO ANANDRAO—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 5—Judge provisionally admitting appeal as within time—Competency of Court at hearing to decide question of limitation—Practice.

Where a Judge has provisionally admitted an appeal to the file in the absence of the respondent, there is no objection to the Judge entertaining and deciding at the hearing the question whether there was sufficient cause under section 5 of the Indian Limitation Act for extending time for filing the appeal.

First appeal from the decision of the Additional First Class Subordinate Judge at Nasik, in Appeal No. 556 of 1910, dismissing as time-barred the appeal from the decision of the Second Class Subordinate Judge at Sinnar, in Civil Suit No. 464 of 1909.

Mr. *R. R. Desai*, for the Appellant.

Mr. *G. S. Rao*, for Respondent.

JUDGMENT:—We cannot say that as a matter of law there was sufficient cause for

extending the time under section 5, and we do not think there was any objection to the learned Judge entertaining the question after he had provisionally admitted the appeal to the file in the absence of the respondent. We are of opinion that this is a second appeal and not a first appeal, because it is an appeal from a decree of an Appellate Court. We dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 87 OF 1910.

June 28, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice and Justice Sir Asutosh Mookerjee, KT.

KHETRAMANI DASEE—PLAINTIFF—APPELLANT

versus

DHIRENDRA NATH ROY—DEFENDANT—RESPONDENT.

Will—Residuary legatee, right of, to claim account from executor—Account filed in Probate Court—Executor, whether discharged from all liability—Limitation Act (IX of 1908), Sch. I, Art. 123—Heir of executor, liability of.

As a residuary legatee is entitled to recover his legacy or share granted under a Will, he has a right to get such an account from the executor as is necessary for the purpose of ascertaining what the residuary share is.

In a suit brought against an executor for the purpose of enforcing a right to the residue under a Will, the executor cannot plead that he is discharged from all liability to account because he has filed certain accounts in the testamentary jurisdiction.

Bissell v. *Axtell*, (1688) 2 Vern. 47; 23 E. R. 641; 1 Eq. Ca. Ab. 12, pl. 9; 136, pl. 4 and *Khitish Chandra Acharya Chowdhury* v. *Osmond Beeby*, 14 Ind. Cas. 4; 16 C. W. N. 516; 39 C. 587, referred to.

A suit by a residuary legatee to recover her legacy or share falls under Article 123 of the Limitation Act of 1908 and is not barred if brought within 12 years from the time when the share became payable.

The heir or representative of a deceased executor is not personally liable for any breach of obligation by executor, but is liable to the extent of the assets received from the executor's estate.

Letters Patent Appeal by the plaintiff from the judgment of Mr. Justice Richardson.

Babu *Provash Chandra Mitter* with him Babu *Surendra Madhab Mallik*, for the Appellant.

Babu *Bipin Chandra Mallik*, for the Respondent.

JUDGMENT.

JENKINS, C. J.—Much time, and I fear expense, has been wasted on this litigation, for I cannot help thinking that the true nature of the suit has been misunderstood. Though I would not hold the plaint up as a model of good drafting, still I think it is clear what its purpose is. The plaintiff is the widow of a deceased testator. Her case is that she obtained under her husband's Will a share in his residue for the interest indicated in the Will. The executor of that Will, according to her, was one Ashutosh Roy who died on the 2nd of January 1904, leaving the present first defendant his sole heir. The testator died on the 21st January 1895 and Probate of the Will was taken out by Ashutosh Roy on the 14th of November 1895. The plaintiff says that there were considerable assets, that the estate remained in the hands of the executor Ashutosh up to his death, and was not handed over to her or her co-residuary legatee even on his death. It is in these circumstances that she has instituted this suit. The lower Courts have unanimously rejected her claim. There seems to be an idea running through the judgments that a residuary legatee cannot obtain an account for the purpose of recovering her legacy unless there is some allegation of misappropriation or devastation or something of that sort. But it is clear that a residuary legatee is entitled to recover her legacy or her share in it, and in the generality of cases, that would involve an account for the purpose of ascertaining what that share was, and that is all that the plaintiff really seeks in this case. The learned Vakil, who appeared for the plaintiff, conceded that on her plaint, as it is framed, the plaintiff cannot ask for an account on the footing of wilful default, but maintained that she is entitled to get such an account as is necessary for the purpose of ascertaining what the residuary share is to which she became entitled under her husband's Will. This, for some reason that I do not appreciate, all the Courts have rejected. There has been some suggestion that the executor is discharged from all liability to account because he has filed certain accounts in the testamentary jurisdiction, but that is not a sufficient answer to a suit brought against an executor for the purpose of enforcing a right to the residue under a Will. In support of this I need only refer to *Bissell* v. *Axtell* (1) to which attention was drawn in

(1) (1688) 2 Vern. 47; 23 E. R. 641; 1 Eq. Ca. Ab. 12, pl. 9; 136, pl. 4.

Khitish Chandra Acharya Chowdhury v. *Osmond Beeby* (2).

It has been suggested before us that perhaps there might be the bar of limitation. But this suit is one which comes within Article 123 and so is within time, for it was instituted within twelve years from the time when the share became payable.

We accordingly reverse the judgment of Richardson, J., and the decrees of the lower Courts and send back the case that it may be determined whether the plaintiff is entitled to the legacy, that is to say, the share of the residue which she alleges was bequeathed to her by the testator. If accounts are necessary for the purpose of ascertaining that residue, those accounts must be directed. It is true that the executor is dead, but his estate, which would be liable at least to the extent to which it was enriched, is represented by the presence before the Court of his sole heir and representative. That does not mean that the heir or representative is personally liable for his father's breach of obligation, if breach there was, but that he is liable to the extent of the assets received from the father's estate. It is an unfortunate feature in this case that the plaintiff is a *pardanashin* lady and the defendant is a minor who has as his guardian his mother, also presumably a *pardanashin* lady, and in taking the account the Court will, of course, have regard to the fact that it is the father of the minor and not the minor himself who had direct knowledge of events, and will give such effect to that circumstance as may be required by the justice of the case. But at the same time the plaintiff is entitled, as far as possible, to have the residue ascertained and have her right to it established in this suit. The matter in dispute is not large. I have indicated what the position of the several parties is, and I venture to express the strong hope that when this case goes back to the Court of first instance, some arrangement may be made between the parties which will do away with the necessity of further litigation.

There has been such misconception of the position that we think the proper order for costs will be that each party will bear his own costs up to this stage of the litigation.

MOOKERJEE, J.—I agree.

Appeal allowed.

(2) 14 Ind. Cas. 4; 16 C. W. N. 516; 39 C. 587.

BOMBAY HIGH COURT.

CIVIL APPLICATION (EXTRAORDINARY JURISDICTION) No. 271 OF 1913.

March 26, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

VELCHAND CHHAGANLAL SHAH—

PLAINTIFF

versus

LIEUT. R. C. C. LISTON—

DEFENDANT.

Civil Procedure Code (Act V of 1908), ss. 115, 151—Abuse of judicial process—Civil circulars of Bombay High Court—Money-lender obtaining pro-note—Agreement to refer to arbitration—Authority for Pleader to admit award—Decree in accordance with award set aside.

On the 9th of July 1913 a money-lender obtained from an Officer a promissory note, and under date the 11th July two other documents, one in the form of a reference to arbitration, whereby the Officer and the money-lender agreed to refer the matter of money dealings between them to a Pleader and nominated him arbitrator to settle the accounts and pass a judgment against the Officer in favour of the money-lender on the strength of the promissory note, and the other document was a *vakilpatra* by the Officer appointing and authorizing a Pleader to appear in Court and admit the award that might be passed against him by the arbitrator. On the 16th July, the money-lender made an application to the Court for filing the award said to have been passed by the arbitrator, and on the 22nd of July the Court passed a decree in accordance with the award:

Held, setting aside the decree, that upon the proceedings it was quite clear that there was no point of difference between the parties and that the Judge had disregarded a circular of the High Court and allowed a most transparent abuse of judicial process.

Civil application on a letter from the District Judge of Ahmedabad.

JUDGMENT.—In this case the Subordinate Judge, Mr. Mohile, has disregarded a circular of this Court and allowed a most transparent abuse of judicial process. A money-lender obtains from an Officer at Aurangabad a promissory note for Rs. 4,931, payable in Ahmedabad or in Baroda, with interest, dated the 9th of July 1913, and under date the 11th of July two other documents are obtained from the Officer, one in the form of a reference to arbitration whereby the Officer and the money-lender agree to refer the matter of money dealings between them to Bhailal Nandlal, a Pleader of Ahmedadad, and nominate him arbitrator to settle the accounts and pass a judgment against the Officer in favour of the money-lender on the strength of the promissory

note of the 9th of July. The other document is a *vakilpatra* by the Officer appointing Velchand Umedchand of Ahmedabad as his Pleader to authorize him to appear in the Court of the First Class Subordinate Judge of Ahmedabad and admit the award that may be passed against him by Bhailal Nandlal in the matter of money transactions between himself and Velchand Chhaganlal. Both the last mentioned documents are on printed forms supplied presumably by the money-lender. Then a plaint is filed on the 16th of July by the money-lender's *Mukhtyar* stating that in order to settle the dispute relating to the promissory note of the 9th of July the parties appointed the Pleader as *Panch* on the 11th, who decided the matter and made his award on the 16th directing that the defendant should pay the plaintiff at Ahmedadad Rs. 4, 931 in cash by instalments and Rs. 30 for Pleader's fee; and the plaint prayed for a decree in terms of the award. Then there is an affidavit of the agent of the money-lender, dated the 21st of July, stating that as the defendant has at present no means to pay off the debt, we appointed a *Panch* and the *Panch* fixed instalments as mentioned above.

Mr. Mohile, the Subordinate Judge, on the 22nd of July entertained the application to pass a decree in accordance with the so-called award. He says:—"There appears to be a real point of difference between the plaintiff and the defendant, that is the amount due by the latter to the former and the amount of instalments which the defendant should pay to the plaintiff." It was quite clear upon the proceedings that there was no point of difference between the parties and no dispute as to the amount of instalments which should be paid. We regret that the first Class Subordinate Judge should have allowed his Court to be used for a proceeding of this kind, and it reflects but little credit on his judicial capacity that he should have permitted it. We set aside the decree under sections 115 and 151 of the Code of Civil Procedure.

Decree set aside.

MADRAS HIGH COURT.

SECOND APPEALS NOS. 2013 TO 2015 OF 1912.

January 9, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Sadasiva Aiyar.

POTINENI GANGIAH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAJA VENKATA RAMAYYA APPA ROW BAHADUR ZEMINDAR GARU AND OTHERS—DEFENDANTS—RESPONDENTS.

Res judicata—*Landlord and tenant—Tenant setting up adverse possession in Civil Court—Decision of Revenue Court no bar.*

Where an alleged tenant sets up in a Civil Court an independent title against his landlord the decision of a Revenue Court is not a bar to the same.

Ragava v. *Rajagopal*, 9 M. 39, distinguished.

Gangaraju v. *Kondireddiswami*, 17 M. 106; *Manicka Gramani* v. *Ramachandra Ayyar*, 21 M. 482; 8 M. L. J. 210, followed.

Second appeals against the decrees of the District Court of Kistna in Appeal Suits Nos. 186 to 188 of 1908 respectively, preferred against those of the Court of the District Munsif of Bezwada, in Original Suits Nos. 449 to 451 of 1906 respectively.

Mr. *P. Narayanamurthi*, for the Appellant.

Dr. *S. Swaminadhan*, for the Respondents.

These second appeals coming on for hearing on 5th August 1913, the Court delivered the following

JUDGMENT.—We must accept the finding of the District Judge that the excess area of 2·12 acres is an encroachment on the *zemindar's* land; but there remains the plea raised by the plaintiff that his lessors, defendants Nos. 3 and 4, had acquired a title by adverse possession. The plea, embodied in issue No. 4, has not been decided in either Court. The District Judge has held, relying on *Ragava* v. *Rajagopal* (1), that the decisions of the Revenue Courts in 1905 (copies filed as Exhibits I and II) operate as *res judicata*, so as to bar this plea. The decision in *Gangaraju* v. *Kondireddiswami* (2) is a distinct authority for holding that in a case like the present where the alleged tenant set up in the Civil Court an independent title against his landlord, the decision of the Revenue Court would not be a bar to the same. Both these cases were considered by a Full Bench in *Manicka Gramani* v. *Rama-*

(1) 9 M. 39.
(2) 17 M. 106

chandra Ayyar (3) and a perusal of the judgments of the learned Judges in that case shows clearly that they did not intend or wish to dissent from *Gangaraju* v. *Kondireddiswami*(2). Shephard, Officiating C. J., and Moore, J., while approving the decision in *Ragava* v. *Rajagopal*(1), are careful to distinguish between cases where the alleged tenant did, and where he did not, set up an independent title as owner.

In our opinion the decisions of the Revenue Courts in these cases do not operate as *res judicata*.

We must, therefore, call for a finding from the District Judge on the 4th issue on the evidence already on record. One month's time is allowed from the date of the receipt of this order for the submission of the finding and ten days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the District Judge of Kistna submitted the following

FINDING.—These appeals have been remanded back by their Lordships of the High Court to give a finding on the 4th issue in the lower Court:

"Had the suit lands, measuring 57 cents in Original Suit No. 449 of 1906, 1 acre 3 cents in Original Suit No. 450 of 1906, and acre 0·52 in No. 451 of 1906, been part and parcel of the land let to the plaintiff by the defendants Nos. 3 and 4 for more than 12 years before the suit."

2. The plaintiffs are the lessees from 3rd and 4th defendants under Exhibit A of 1903.

I had intended to answer this, when I stated in my judgment that the real area of the *inam* was clearly given in the old survey of 1861, Exhibit E1, and that in the new survey of 1891, Exhibit F1, the land in the possession of the *inamdars* (3rd and 4th defendants) had grown by 2-12 acres. I wished to imply that 3rd and 4th defendants were in possession of the excess prior to 1891. By 1891, therefore, defendants No. 3 and 4 were in possession of 2-12 acres in excess of their *inam* and it was an encroachment on surrounding lands. There is no evidence that they were out of possession of it between then and the date when they leased it to plaintiff in 1903 and it is in evidence that it was not till 1906 that plaintiff was ejected.

(3) 21 M. 482; 8 M. L. J. 210.

3. Therefore, we must presume that the possession continued uninterruptedly from prior to 1891 to the date of ejectment in 1906, *i. e.*, for more than twelve years.

My finding, therefore, is that the suit lands had been part and parcel of the land let to the plaintiff by the defendants Nos. 3 and 4 for more than 12 years before the suit.

These second appeals coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—No objection is taken to the finding, which we accept.

The decrees of the District Judge are set aside and those of the District Munsif restored. The appellants will get their costs from the respondents Nos. 1 and 2 in this and the lower Appellate Court.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3540 OF 1911.

May 14, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

PROMODE RANJAN GHOSH *alias* MANOO GHOSH—PLAINTIFF—APPELLANT

versus

ABIJAN BIBI AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), *ss.* 3, *cl.* (8), 11—Nimhowla *tenures of Backerganj—Transferable and heritable—Permanent tenure—Transfer notified—Landlord, whether entitled to rent from original tenant.*

Nimhowla tenures of Backerganj are permanent tenures within the meaning of section 3, clause 8, of the Bengal Tenancy Act, and as such capable of transfer and bequest like other immoveable property under section 11 of the Act.

Huromohun Mookerjee v. *Rani Lalun Monee Dasee*, 1 W. R. 5; *Juggut Chunder Roy* v. *Ramnarain Bhuttacharjee*, 1 W. R. 126, referred to.

Ajoodhya Pershad v. *Mussamut Imam Bandi*, 7 W. R. 528; B. L. R. Supp. Vol. 725; 2 Ind. Jur. (N.S.) 192, distinguished.

Where the transfer of such a tenure has been notified to the landlord he is no longer entitled to claim the rent in respect of it as against the original tenants.

Appeal against the decree of the Subordinate Judge, Khulna, dated the 15th of September 1911, reversing that of the Munsif, Third Court, Bagerhat, dated the 5th of May 1910.

Babus *Jogendra Chandra Ghosh*, *Anilendra Nath Roy Chaudhuri* and *Smritish Chandra Ghosh*, for the Appellant.

PROMODE RANJAN GHOSH *v.* ABIJAN BIBI.

JUDGMENT.—This is an appeal by the plaintiff in a suit for arrears of rent. The rent is claimed in respect of a *nimhowla* tenure, which lay originally within the District of Backerganj but is now within the District of Khulna and which, it is alleged, is held by the defendants under the plaintiff. The defendants resist the claim substantially on the ground that they have transferred the tenure by conveyances and are no longer liable for the rent. The Court of first instance held that the defendants had failed to establish that the tenure was transferable and were consequently responsible for the rent. On appeal the Subordinate Judge has taken a contrary view and has come to the conclusion that *nimhowla* tenures in Backerganj are transferable. In our opinion the view taken by the Subordinate Judge is correct.

The Subordinate Judge has, in support of this view, referred to the cases of *Huromohun Mookerjee* v. *Ranee Lalun Monee Dasee* (1) and *Juggut Chunder Roy* v. *Ramnarain Bhuttacharjee* (2). In the first of these cases, Kemp and Glover, JJ., stated that "various descriptions of tenures other than *mokararí* can be sold and are sold every day," and, as illustrations, mentioned the *howlas* and *nimhowlas* of Backerganj and the *jotes* of Rangpore. In the second case, Campbell and Glover, JJ., held that *nimhowla* tenures of Backerganj, even though not held at a fixed rent, were transferable tenures. The same statement is to be found in the case of *Mussamut Taramonee Dassee* v. *Birressur Mozoomdar* (3), where Kemp and Glover, JJ., stated that "*jotes* of Rangpore and *howlas* and *nimhowlas* of Backerganj are transferable and heritable."

On behalf of the appellant it has been contended, however, that a contrary view was taken by the Full Bench in the case of *Ajoodhya Pershad* v. *Mussamut Imam Bandi Begum* (4). That case, in our opinion, has no bearing upon the question raised before us. It was there decided that, if a tenure was not transferable, the mere fact that the tenant had gained a right of occupancy therein under section 6 of Act X of 1859 by continuous occupation and cultivation for 12 years, did not make the tenure transferable. No such question calls for our decision here. We are of opinion that the Subordinate Judge very properly took judicial notice of what was mentioned as a well-known fact half a century ago in the cases of *Haromohan Mukerjee* v. *Ranee Lallan Mani Dasi* (1) and *Jagat Chandra Roy* v. *Ram Narain Bhattacharjee* (2). His conclusion is always supported by section 11 of the Bengal Tenancy Act read with the definition of the expression "permanent tenure" contained in clause (8) of section 3. "Permanent tenure" means a tenure which is heritable and which is not held for a limited time. The tenure in the case before us may be taken to be heritable, because the plaintiff seeks to hold the heirs of the original tenant responsible for the rent. It is also *prima facie* not held for a limited time, for there is no suggestion on the present record on behalf of either the plaintiffs or the defendants that the tenure was created for a fixed period. Consequently the tenure is a permanent tenure within the meaning of clause (8) of section 3, and such a tenure is by section 11 made capable of transfer and bequest in the same manner and to the same extent as other immoveable property.

It has been argued, however, on behalf of the appellant that the question is concluded by a consent decree made on the 30th June 1904 between the parties to this litigation. That decree, in our opinion, is of no assistance to the appellant. The decree was made in a suit for rent and does not set out all the terms of the compromise between the parties. It says merely that at that time the present defendants consented to accept liability for payment of rent for the particular years for which rent was then claimed. The question raised before us is undoubtedly not concluded by that decree.

Reference has also been made to an earlier rent-decree of the 15th July 1882 which contains a recital that in the plaint the landlord described the tenure as non-transferable. There was, however, no adjudication upon this point, for the obvious reason that the decision of the question was not necessary for the purposes of the suit for rent.

We hold accordingly that the Subordinate Judge rightly came to the conclusion that the tenure was transferable, and that as the

(1) 1 W. R. 5 at p. 6.
(2) 1 W. R. 126.
(3) 1 W. R. 86.
(4) 7 W. R. 528; B. L. R. Sup. Vol. 725; 2 Ind. Jur. (N. S.) 192.

transfer had been notified to the plaintiff he was not entitled to claim rent as against the original tenants. The decree of the Subordinate Judge is consequently affirmed and this appeal dismissed.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 983 OF 1912.

March 4, 1914.

Present:—Mr. Justice Wallis and Mr. Justice Ayling.

KRISHNA MALLAR—PLAINTIFF—PETITIONER

versus

SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF MALABAR—RESPONDENT.

Court Fees Act (VII of 1870), s. 7, cl. iv—Suits Valuation Act (VII of 1887), s. 8—Suit for declaratory and consequential relief—Different valuations given—Plaint returned for amendment—Higher valuation elected by plaintiff—Right to claim that Court-fee should be for lower amount.

A suit *to declare* a bond void contained also a prayer for *consequential relief* that it should be cancelled. The reliefs were differently valued. The plaint was returned for amendment and the plaintiff being asked to put a single valuation for both the reliefs, chose the higher valuation and paid Court-fee thereon:

Held, that, reading section 7, clause 4, of the Court Fees Act and section 8 of the Suits Valuation Act together, it was not open to the plaintiff to ask in revision that he should have paid Court-fee on the lower valuation.

Chinnammal v. *Madara Rowther*, 27 M. 480; 14 M. L. J. 343, followed.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of North Malabar, in Miscellaneous Petition No. 284 of 1912, in Original Suit No. 1 of 1908.

Mr. *C. Madhavan Nair*, for the Petitioner.

Dr. *S. Swaminathan*, Government Pleader, for the Respondent.

JUDGMENT.—Under section 8 of the Suits Valuation Act in this class of suits the valuation as determinable for the computation of the Court-fee and the valuation for the purposes of jurisdiction shall be the same. The plaint valued the suit at Rs. 15,100, but the prayer stated that the declaration was valued at Rs. 15,000 for purposes of jurisdiction and that the consequential relief—the cancellation and return of the bond-was valued at Rs. 100. Under section 7 (iv) of the Court Fees Act the consequential relief should alone have been valued and the value under section 8 of the Suits Valuation Act would determine the jurisdiction. As it appeared on the face of the plaint that the valuation of the consequential relief was only Rs. 100, whereas there was another valuation of Rs. 15,100 given, the plaint should have been returned for amendment so that the plaintiff might elect one single valuation for both purposes as required by law. It appears that the plaintiff presented his plaint with a stamp for Rs. 17-8-0 and that the Court returned it to the plaintiff. A few days later the plaintiff paid up the deficiency in the Court-fee on Rs. 15,100.

We think in these circumstances he must be taken to have elected to value his suit for all purposes at Rs. 15,100, a valuation which he was entitled to make, *Chinnammal* v. *Madarsa Rowther* (1), and we decline to interfere in revision with the order of the District Judge.

The petition is dismissed.

Petition dismissed.

(1) 27 M. 480; 14 M. L. J. 343.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 509 OF 1913.

March 24, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

TAYABALI GHULAM HUSEIN AND OTHERS—DEFENDANTS—APPELLANTS

versus

ATMARAM SAKHARAM VANI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 58, 63—Attachment of debt—Objection proceeding—Garnishee—Cross-debt—Set-off—Payment of Court-fee.

Order XXI, rule 58, applies in terms to any property attached in execution and thus relates to debts so attached. Under Order XXI, rule 63, of the Code of Civil Procedure, 1908, it is not open to a garnishee to plead a defence which has already in

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an execution inquiry been unsuccessful, except in a suit instituted within one year from the date of the adverse order.

If a cross-debt is due to the garnishee at the date of attachment, he has a right of set-off in his favour, and the equity arising from the cross-debt can be set up without payment of a Court-fee.

Second appeal from the decision of the Assistant Judge of Khandesh, in Appeal No. 327 of 1910, confirming the decree passed by the Subordinate Judge at Chalisgaon, in Civil Suit No. 115 of 1908.

Mr. *Shortt*, with him Mr. *M. V. Bhat*, for the Appellants.

Mr. *Weldon*, with him Mr. *R. R. Desai*, for the Respondent.

JUDGMENT.—In execution of a decree in Suit No. 689 of 1904 against Baba Ismail, a debt of Rs. 1,023, alleged to be due to the judgment-debtor by the firm of Tyaballi Gulam Hussein, the present defendants, was attached by the judgment-creditor, the present plaintiff, under section 268 of the Code of 1882. The garnishees received notice to bring into Court the amount of the alleged debt, but as they disputed their liability they objected to the attachment and the judgment-creditor having put in an answer, they gave evidence before the executing Court to prove that they in fact owed nothing to the judgment-debtor as, although Rs. 594 were due by them to the judgment-debtor's Chalisgaon shop, Rs. 676 was due to them by the judgment-debtor's Pachora shop. This evidence was given on the 4th of September 1905 and thereafter on the same day the plaintiff applied for sale of the debt of Rs. 594. The executing Court then ordered that this debt should be sold On the sale it was purchased by the plaintiff who now brings this suit to recover the Rs. 594 from the garnishees.

The garnishees set up the same facts in defence as they set up when they unsuccessfully objected to the attachment. The learned Judge in the lower Appellate Court was of opinion that the Chalisgaon and the Pachora accounts being separate, the defendants could not claim that the Pachora debt should be taken into account, for the judgment-creditor had not made himself responsible for the judgment-debtor's debts having only purchased one of his assets. If this were the only question in the case we should reverse the decree of the Assistant Judge for, as decided in *Tapp* v. *Jones* (1), if a cross-debt were due to the garnishee at the date of the attachment it is obviously just that there should be a right of set-off in his favour: this principle is recognised by the Indian Legislature in the Transfer of Property Act, section 132 [see ill. (*i*)]. We also do not agree with the Subordinate Judge in the trial Court that the equity arising from the cross-debt could not be set up by the defendants except on payment of a Court-fee as on a counter-claim.

The more serious question for the defendants is, we think, whether the defence of set-off is open to them after their failure to raise the attachment, as no suit has been filed by them within a year from the 4th of September 1905 to establish the right alleged by them and not allowed by the executing Court.

The point was not taken by the plaintiff in the lower Court and was just suggested from the Bench in this appeal. We have now heard arguments upon the point.

The defendants' Counsel relies upon the decision of *Mussamut Rambutty Koer* v. *Kamessur Pershad* (2) which upon the facts found was a similar case to the present. We are, however, unable to accept it as an authority, for two reasons. *First*, because section 246 of the Code of 1859 provided that the party against whom an order might be given on investigation might bring a suit to establish his right within one year from the date of the order: a provision which the Court held would not necessarily prevent the garnishee from setting up the same defence upon an action brought against him by the purchaser of the debt. This ruling is no longer applicable, for section 283 of the Code of 1882 (Order XXI, rule 63, of the present Code) provides that the order on the investigation shall, subject to the result of such suit, if any, be conclusive It is, therefore, no longer open to a garnishee to plead a defence which has already in an execution inquiry been unsuccessful except in a suit instituted within one year from the date of the adverse order. *Secondly*, we are unable to follow the argument of the

(1) (1875) 10 Q. B. 591 at p. 593; 44 L. J. Q. B. 127; 38 L. T. 201; 23 W. R. 694.
(2) 22 W. R. 36.

Calcutta Judges based upon other sections of the Act of 1859, for it seems to ignore the finding arrived at, that the property attached was not money but a debt, and the provisions of section 265, which provided for the delivery of debts *sold* in execution.

The other case relied on by the appellants was *Harilal Amthabhai* v. *Abhesang Meru* (3) in which on an unargued reference for opinion from a Subordinate Court the Judges expressed the opinion that section 278 of the Code did not apply to objections to the attachment of debts, but that the Court should satisfy itself that a debt was existent before selling it. This decision does not appear to us wholly consistent with that in *Mansukh Umed* v. *Bhagwandas Jamnadas* mentioned in the Subordinate Judge's reference in *Harilal Amthabhai* v. *Abhesang Meru* (3). We cannot accept an expression of opinion on an unargued reference as a binding authority. A different view of section 278 has been taken by a Full Bench of the Madras High Court after argument in *Chidambara Patter* v. *Ramasamy Patter* (4) overruling *Basavayya* v. *Syed Abbas Saheb* (5), a decision based upon *Mussamut Rambutty Kooer* v. *Kamessur Pershad* (2). We agree with the Full Bench of the Madras High Court. It is of importance that garnishees' claims and objections should be decided at least as promptly as other objections to attachment.

Order XXI, rule 58, applies in terms to any property attached in execution and thus relates to debts so attached. The sum of Rs. 594 appearing due, in one set of the garnishees' books, to the judgment-debtor was not liable to attachment if it was in fact cancelled by another debt due by the judgment-debtor to the garnishees in another set of books. If it was not so cancelled it was attachable property constructively in the possession of the judgment-debtor. In another view also the question raised by the garnishees called for investigation under section 278 and the following sections, for the debt attached could be regarded as property in the possession of the garnishees in trust for the judgment-debtor: see *Vinall* v. *De Pass* (6).

We dismiss the appeal without costs.

Appeal dismissed.

(3) 4 B. 323.
(4) 27 M. 67; 13 M. L. J. 467 (F. B).
(5) 24 M. 20.
(6) (1892) A. C. 90 at p. 95; 61 L. J. Q. B. 507; 66 L. T. 422.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2293 OF 1911.

April 1, 1914.

Present:—Mr. Justice Woodroffe and Mr. Justice Carnduff.

SHAIKH RAFIC—DEFENDANT—APPELLANT

versus

BHAGABAN CHANDAR DHAR—PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), s. 17—Compromise—Registration—Matter extraneous to litigation—Hindu widow, right of, to compromise—Legal necessity—Surrender of right to one reversioner—Right of other reversioners.

A compromise of a suit in so far as it relates to a settlement touching property extraneous to litigation, requires registration to be valid and admissible in evidence.

A Hindu widow is not entitled to enter into a compromise so as to affect her life-interest, unless the compromise is for the purpose of legal necessity.

A surrender of her rights by a Hindu widow in favour of one only of many reversioners living at the time, cannot operate to create an absolute title in favour of that reversioner and he or his transferees cannot resist the right of the reversioners at the date of the widow's death.

Appeal against the decree of the Sub-Judge, Sylhet, dated 12th June 1911, affirming that of the Munsif, Habiganj, dated 8th February 1911.

FACTS.—The property in dispute belonged to one Ganga Prosad Dhar. He died long ago before 1260 B. S. leaving his widow, Joy Tara Dasee, and two sisters, Taran Dasee and Bhairabi Dasee, and their sons, Golak Chandra and Jugal Chandra Gupta of Taran Dasee and Madho Sudan Dutt of Bhairabi Dasee; the sons of Taran Dasee were minors at the time. On 12th January 1860 Madhu Sudan and Taran Dasee on behalf of her minor, sons alleging themselves to be in possession of the property, executed an unregistered *kobala* in favour of two brothers, Hamidulla and Furkhan, in respect of a 2-annas share and on 18th December 1863 a similar *kobala* in favour of the same

persons in respect of 4-annas share of the property, and the remaining 10-annas was granted to them in *ijara*. It is a finding of fact that Hamidullah and Furkhan never had possession of the property under these transactions till after July 1873.

Notwithstanding the above transactions Joy Tara executed an *ijara* of her property in favour of two persons who, failing to recover possession, brought Suit No. 419 of 1873 for recovery of possession and in that suit Hamidullah, Furkhan, Joy Tara and Mado Sudan were parties and these among themselves entered into a compromise, Exhibit F, dated 7th July 1873 by which, for a consideration of Rs. 275, Joy Tara agreed that the 6-annas portion of the property sold to Hamidullah and Furkhan should be confirmed to them and the remaining 10-annas return to her and then, afterwards, Joy Tara surrendered her interest in respect of this 10-annas share to Madhu Sudan alone, although the sons of Taran Dasee were then living, by an unregistered deed of release for a trifling sum. Madhu Sudan then transferred his interests to other persons, from whom and the sons of Hamidullah and Furkhan the present defendant-appellant derived his rights by successive conveyances.

Joy Tara died in *Baisakh* 1316 B. S. The sisters' sons of Ganga Prasad having all died previously, the reversionary succession opened to one Kula Chandra Dutt, the daughter's son of the paternal grandfather's brother's son of Ganga Prasad, and he conveyed his rights to the plaintiff, Bhagaban Chandar Dhar, who is an agnate cousin of the late Ganga Prasad, in *Chait* 1316 B. S., and the plaintiff brought his suit to recover possession as against the defendants.

The defendant No. 1, who now holds the possession of the entire property, alone contested the suit. He raised many grounds of which two only require consideration, namely, (1) limitation under the old Act XIV of 1859, section 1, clause 12. But, eventually, nothing turned upon this question as on the above finding of fact as to possession the Court held that the question did not to arise at all and Article 141 of the Limitation Act, IX of 1871, governed the case, (2) Ratification by Joy Tara in consequence of the *solenamah*, Exhibit F, in Suit No. 419 of 1873 which, it was contended, was binding on the plaintiff. On this point the nature of the arguments addressed to Court and the answers given will appear from the judgment.

Babus *Tarakishore Ray Chaudhuri* and *Sasadhar Roy*, for the Appellant.

Babus *Mahendra Nath Roy*, *Brajalal Chakravarti* for Babu *Birendra K. De*, for the Respondent.

JUDGMENT.

WOODROFFE, J.—The plaintiff in the suit claims as reversioner after the death of Joy Tara, widow of one Ganga Prosad Dhar, and the defendants claim under certain conveyances said to have been executed during her life-time. The plaintiff's claim has been decreed by both the lower Courts and it is the defendant who now appeals.

We have heard this appeal at great length for the greater part of the day with the result that, in my opinion, that decision which has been arrived at by both the lower Courts is the correct one.

The decision of the Subordinate Judge has been attacked upon two grounds, *first*, that of limitation, it being contended that the defendants as the purchasers-in-interest had been in adverse possession for more than 50 years and that thereby they acquired a title which was not defeasible by the plaintiff. The lower Appellate Court has held that the title of Joy Tara and of the reversioner was not extinguished by limitation and this finding has been impugned as erroneous in law. The way in which this point is sought to be made out is this. The learned Judge has stated that Act IX of 1871 came into operation on the 1st July 1871 and if that be so, then it is conceded that there is nothing in the point which the appellant raises before us. But it is contended that the learned Judge is wrong in holding that the Act came into operation on the 1st July 1871 and that, upon a proper construction of the Act, it should be held that it came into operation on the 1st day of April 1873.

Now, in the first place, it is to be observed that even if this argument were correct, it will only affect the first of the conveyances to which I have referred; for, according to the facts recited, after the suit of 1854 the reversioners alleging that they were in possession are said to have sold 2-annas to

Hamidullah or Furkhan on the 12th January 1860 and 4-annas are said to be sold by the same persons to the same parties on the 18th December 1863, and it was after this date that the remaining 10-annas were granted out to these persons in *ijara*. Even if the Act be held to have come into force on the 1st April 1873, 12 years had not elapsed at that time from the date of the second and third of the conveyances to which I have referred.

It is not necessary, however, to decide in this case whether the construction upon this Act by the learnad Pleader for the appellant is correct or whether, as the learned Pleader for the respondent contends, that the Act by its plain terms provides that it shall come into force on the 1st day of July 1871 but shall not apply to suits instituted before the 1st April 1873, it being pointed out in connection with this argument that there was in fact no such suit. The learned Pleader for the appellant relies on the case of *Drobomoyi Gupta* v. *C. T. Davis* (1). On the other hand, reference is made to the decision in *Joyram Loot* v. *Pani Ram Dhoba* (2) which held that the proviso which I have mentioned refers only to suits actually instituted on the 1st April 1873. It is not necessary to consider this point because it can only arise if, as a matter of fact, possession was had under these documents and as regards that, we have the finding of fact of the lower Appellate Court that there is not sufficient evidence to enable it to hold that after execution the purchaser had possession of the purchased property. This disposes, therefore, of the question of limitation.

The second point is one which is raised with reference to a compromise passed in Suit No. 419 of 1873. The facts relating to this compromise are shortly these. Notwithstanding the sale and *ijara* to Hamidulla and Furkhan Ali which I have mentioned, Joy Tara executed an *ijara* to another party who, it is said, having failed to obtain possession brought a suit for recovery of possession in 1873 making parties to it not only Hamidulla and Furkhan but others including Joy Tara and Madhu Sudan. This suit is alleged to have been settled by the compromise under which the 6-annas said to have been purchased by Hamidulla and Furkhan were confirmed to them and they, on the other hand, gave up their claim in respect of the *ijara* extending over the 10-annas interest to Joy Tara, who subsequently conveyed her interest in the 10-annas to Madhu Sudan whose name appears on the pedigree table.

On this it has been argued that the effect of that compromise was to vest the 10-annas interest in Madhu Sudan through whom the defendants claim. There are, however, at least three objections to the argument which is based upon this alleged compromise. In the first place, there is this difficulty that it cannot be put in evidence at all in so far as it is a compromise of a matter which is not the subject of that suit. That suit was concerned with the question of the *ijara*, the point in issue being whether or not the party who took from Joy Tara was or was not entitled to possession. It may be that the petition of compromise, in so far as it relates to property in suit, does not require registration; but in so far as the settlement touches property extraneous to litigation, registration is necessary and the learned Judge has so held. But even if we could look at the document and there were no such technical objections available to the respondent, there are two others which are equally fatal. In the first place, it was not open to the widow to enter into a compromise so as to affect anything but her life-interest unless it could be shown that the compromise was for the purpose of legal necessity. As regards this, there is no finding that it was so and indeed the judgment of the first Court which is affirmed by the Court of Appeal below appears to hold that there is no evidence of legal necessity. Then, there is this further objection which the Subordinate Judge has pointed out that there is nothing to show that Joy Tara in fact authorised the *solenamah*, and the Munsif points out that from the oath of the plaintiff and the decree, Exhibits E and F, it appears that there were two mother's sister's sons of Madhu Sudan Dutt alive at the date of the alleged surrender which was, as I have said, made only in favour of one of the then reversioners, Madhu Sudan Dutt. Therefore, on that ground also the surrender could not operate as creating an absolute right in favour of Madhu Sudan and his transferees as against

(1) 14 C. 323 at p. 344.
(2) 8 C. L. R. 54.

the plaintiff who was the reversioner at the date of the death of Joy Tara.

In these circumstances, both the grounds on which the judgment of the lower Court has been attacked having failed, the appeal must be dismissed with costs.

CARNDUFF, J.—I agree.

Appeal dismissed.

BOMBAY HIGH COURT.

CIVIL APPLICATION (EXTRAORDINARY JURISDICTION) No. 234 OF 1913.

June 12, 1914.

Present:—Mr. Justice Beaman and Mr. Justice Hayward.

DOLATRAM DWARKADAS—APPLICANT

versus

THE BOMBAY, BARODA & CENTRAL INDIA RAILWAY CO.—RESPONDENT.

Railway receipt—Mercantile document of title—Rights of endorsee.

A railway receipt is a mercantile document of title, and its endorsee has sufficient interest in the goods covered by it to maintain an action for their loss.

Civil application from the decision of the Judge of Court of Samll Causes at Ahmedabad, in Civil Suit No. 3040 of 1912.

Mr. *G. N. Thakor*, for the Applicant.

Mr. *Binning*, with him Messrs. *Crawford, Brown & Co.*, for the Respondent.

JUDGMENT.—After having given this nice question our most careful consideration we think that, in view of the recent decision of this appeal Court in *Amarchand & Co.* v. *Ramdas* (1), it must be taken as settled law that a railway receipt is a mercantile document of title. That being so, we think it necessarily follows that the endorsee of such a railway receipt has sufficient interest in the goods covered by it to maintain an action of this kind. We are, therefore, of opinion that the decision of the Subordinate Judge with Small Cause Court powers was not according to law. Reversing his decision upon the point just mentioned we agree with his findings of fact, and now order that the decree be made in the plaintiff's favour in the terms of those findings. The defendant-Company must pay all the costs.

Rule made absolute.

(1) 21 Ind. Cas. 343; 15 Bom. L. R. 890; 38 B. 255.

CALCUTTA HIGH COURT.

FIRST APPEAL FROM ORDER No. 49 OF 1912.

May 15, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

INTU MIAH MISTRY—PETITIONER—APPELLANT

versus

DARBUKSH BHUIYAN—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. V, rr. 15, 16, 27, 28—Service of notice, when sufficient—Appellant in marine service—No special service.

An appeal was decided *ex parte* against the appellant who was employed in His Majesty's Marine Service. He applied to set aside the *ex parte* decree on the ground of insufficiency of notice. It was found that a notice was served under the provisions of rules 15 and 16 of Order V of the Civil Procedure Code and the appellant had an opportunity of appearing as he was in communication with his family members both before and after the service:

Held, that the service was sufficient and the *ex parte* decree could not be set aside.

Held, also, that the officer or mechanic in the employ of the Indian Marine Service is subject to exactly the same rules with regard to service of summons as any other person as provided in rules 27 and 28 of Order V of the Civil Procedure Code.

Appeal against the order of the Sub-Judge, Second Court, Chittagong, dated 16th December 1911.

Babus *Bepin Behary Ghosh* (Junior) and *Prabodh Kumar Das*, for the Appellant.

Babu *Surendranath Guha*, for the Respondent.

JUDGMENT.—This is an appeal from the order of the Subordinate Judge of Chittagong rejecting the appellant's application to set aside an *ex parte* decree of the 28th July 1909.

It appears that this litigation began in 1907 and that decree was passed on the 14th March 1908 by the Munsif in favour of five persons, among whom the appellant was the defendant No. 2. But upon appeal the learned Subordinate Judge in the Court below reversed the Munsif's decision and found against the defendants. The defendant No. 1, who is proved to be joint with the defendant No. 2, preferred an appeal to the High Court and that appeal was summarily dismissed. The defendant No. 2, the present appellant, applied to the learned Subordinate Judge during the pendency of the appeal in the High Court to have his appeal re-heard by the Subordinate Judge. The Subordinate Judge held that he had no

jurisdiction to entertain the application. On appeal to this Court a Divisional Bench of this Court held that he had jurisdiction to decide the matter and he was the best person to decide it. He has accordingly on the 16th of December 1911 decided against the defendant No. 2's application. The grounds which he has given appear on the face of them to be good, for it would appear from what he states not only that the provisions of the law contained in Order V, rules 15 and 17, were complied with, but that the learned Judge satisfied himself that the defendant No. 2 had an opportunity of appearing, inasmuch as he was in communication with his wife, brother and nephew during his absence at Rangoon both before and after the service.

One new factor has arisen in the case, namely, that in his application in this case he states that he is employed as a *mistry* or engine hand on H. M. S. Rob Roy, and it may, therefore, be that he belongs to the Indian Marine Service. It is a curious fact that by rule 27, Order V, officers belonging to His Majesty's Military or Naval Forces or His Majesty's Indian Marine Service are excluded from the discretion which is given to the Court of serving notice on public officers or servants of a Railway Company or local authority through the head of their office if that course is most convenient. There is a further rule 28 that where the defendant is a soldier, the Court shall send summons for service to his Commanding Officer. In this state of the law the only conclusion we can come to is that the officer or mechanic in the employ of the Indian Marine is subject to exactly the same rules as every other person under the Code, and we cannot, therefore, go beyond the provisions of rules 15 and 17 in this case.

It is urged that there was no proper inquiry and if the peon had made the least inquiry from the other members, he must have learnt that defendant No. 2 had gone back to Rangoon to join his employment. This might have some substance if defendant No. 2 had succeeded in establishing what he sought to establish, *viz.*, that he had separated from his brother, defendant No. 1, and from the other defendants after the Munsif's decision and that he had adverse interest to his brother, defendant No. 1. But in this he appears to have put forward a false story, and the Subordinate Judge in the lower Court has clearly found that his story is false. That being so there is no other alternative but to accept the theory that defendant No. 1 did accept service on behalf of his brother, although he refused to sign the notice. That notice was duly posted up, as is found, upon the office room door of the place where the family ordinarily resided, and at the time living in that house were the wife, the brother and the nephew of the defendant No. 2 and all these persons had correspondence with the defendant No. 2 during the time that the negotiations for the prosecution of the appeal were going on. It is, therefore, impossible for us to hold that the defendant No. 2 had not in fact notice of this appeal, and his continuous attempts to have this case re-opened, which has been going on for many years and when he is exactly in the same boat with his brother, defendant No. 1, do not appear to be *bona fide*.

For these reasons the appeal is dismissed with costs. We assess the hearing fee at one gold *mohur*.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 205 OF 1913.

May 2, 1914.

Present:—Mr. Justice Piggott and Mr. Justice Rafique.

MATA PRASAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM CHARAN SAHU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Res judicata—*Defendant pleading that he is* benamidar—*Decree against him as real owner, whether binds real owner.*

If a litigation is carried on with the full knowledge and authority of the real owner and the latter does not wish to come forward, he is bound by the decree against his *benamidar*.

Where the defendant protested that she was a mere *benamidar* and she did not want to carry on the litigation which was brought against her though not in her capacity of a *benamidar*, but wanted her sons, who were the real owners, to be brought on the record as defendants in the case, and the plaintiffs in the case not only failed to take advantage of this information but contradicted it:

MATA PRASAD v. RAM CHARAN SAHU.

Held, that the decree passed in their favour could not bind the real owners, the sons of the defendant, and could not constitute *res judicata* so as to bar the subsequent suit brought by the real owner.

Gopi Nath Chobey v. *Bhugwat Pershad*, 10 C. 697 at p. 705, referred to.

Appeal against the order of the Additional Judge of Gorakhpur, reversing that of the Officiating Subordinate Judge of Gorakhpur.

Mr. *S. C. Banerji*, with him Mr. *Jang Bahadur Lal*, for the Appellants.

Mr. *Gokul Prasad*, with him Mr. *B. E. O'Conor*, for the Respondents.

JUDGMENT.—This is an appeal from an order of the learned Additional District Judge of Gorakhpur, remanding the case under Order XLI, rule 23, Civil Procedure Code. The circumstances which led to the making of that order are as follows:—Baijnath and Jagannath were two brothers who were members of a joint Hindu family. In 1878 a simple money decree was passed in favour of Baijnath against one Ramjas. There was a partition among the two brothers, Baijnath and Jagannath, in 1881 when it was declared that Jagannath had also a share in the decree of 1878. Subsequent to the partition among the two brothers they applied jointly for the execution of the decree of 1878 against Ramjas. In execution of that decree the entire village of Karma with some other property was attached on the 20th of September 1884. During the continuance of that attachment and before the property was brought to sale, Ramjas executed a deed of mortgage in respect of 8-annas of village Karma in favour of the defendants, 1st party. On the 10th of January 1891, while this attachment was still pending, Ramjas executed a deed of sale in respect of 9-annas 6-pies of village Karma out of 16-annas in favour of *Musammat* Sheolagna, the mother of the sons of Jagannath. The consideration of the sale-deed consisted of the decretal amount due from Ramjas and Rs. 127 cash. Baijnath and Jagannath had died prior to the execution of the sale-deed. Rs. 127 were paid in cash to Ramjas and the remainder of the consideration was left in the hands of the vendee for payment of the decree of 1878 and another decree which Baijnath alone held against Ramjas. In the early part of 1893 the defendants 1st party, brought a suit on foot of their mortgage for recovery of the money due on it by sale of the mortgaged property. The suit was brought against the son of Ramjas, as Ramjas had already died, and also against *Musammat* Sheolagna. She resisted the suit principally on the ground that she was a *benamidar* and that the real purchasers under the sale-deed of the 10th of January 1891 were her sons who should be brought on the record as defendants in the case. This allegation of hers was denied by the defendants, 1st party, who were plaintiffs in that case. On their denial an issue was framed as to whether *Musammat* Sheolagna was a *benamidar* or not. The learned Subordinate Judge who tried the case held that she was not a *benamidar* and on the merits of the case, decreed the claim for recovery of the mortgage-money by sale of the mortgaged property. The defendants, 1st party, put their decree into execution and 6-annas of village Karma which included admittedly 4-annas out of the 9-annas 6-pies share conveyed by the deed of the 10th of January 1891 were put up to auction and purchased by the plaintiffsd-ecree-holders themselves. They obtained possession through Court on the 14th of April 1900. On the 16th of December 1911 the sons of Jagannath, plaintiffs-respondents in the present case, sued in the Court of the Subordinate Judge of Gorakhpur for the recovery of possession of 4-annas out of 6-annas sold in execution of the decree of the 2nd of June 1893 on the allegation that they were the real purchasers under the deed of the 10th of January 1891 and were not bound by the decree and sale in favour of the defendants, 1st party, whose mortgage they challenged on several grounds. The defendants in the case objected to the suit on the ground among others of *res judicata*. The learned Subordinate Judge held that the claim was barred by the rule of *res judicata* and dismissed it. On appeal the learned Additional Judge took a different view and held that the rule of *res judicata* did not apply and remanded the case for trial on the merits. The point, therefore, in appeal before us is, whether the claim of the plaintiffs-respondents is barred by *res judicata*.

It is urged on behalf of the appellants that on the admitted statements of the plaintiffs-respondents in their plaint their mother, *Musammat* Sheolagna, was a *benamidar* for them and if she was a *benamidar* for the plaintiffs-respondents

a decree passed against her in that capacity is binding upon the plaintiffs also, if the parties in the present litigation are the same who were parties in the former litigation and the questions in issue were the same. In support of this view the learned Advocate for the appellants relies on *Khub Chand* v. *Narain Singh* (1), *Nand Kishore Lal* v. *Ahmad Ata* (2), *Yad Ram* v. *Umrao Singh* (3) and *Kaniz Fatima* v. *Wali Ullah* (4). We do not think that the rule of *res judicata* is applicable to the circumstances of the present case. It appears to us that the rule has been made applicable in cases of decrees in favour of or against a *benamidar* where the real owner has allowed the dispute to be fought out between his *benamidar* and a third party and has abstained from coming forward. The principle upon which the rule has been applied to cases fought in the name of a *benamidar* is well expressed in *Gopi Nath Chobey* v. *Bhugwat Pershad* (5), where the learned Judges held that "the proper rule is that in the absence of any evidence to the contrary it is to be presumed that the *benamidar* has instituted the suit with full authority of the beneficial owner, and if he does so, any decision come to in his presence would be as much binding upon the real owner as if the suit had been brought by the real owner himself". In other words, if the litigation is carried on with the full knowledge and authority of the real owner and the latter does not wish to come forward, he is bound by the decree. In the present case *Musammat* Sheolagna protested that she was a *benamidar* and she did not want to carry on the litigation which the defendants, 1st party, brought against her though not in her capacity as a *benamidar*, but wanted her sons to be brought on the record as defendants in the case. She gave information of the real state of the transaction of the 10th of January 1891 to the defendants, 1st party, who not only failed to take advantage of this information but contradicted it. It cannot, therefore, be said that the rule contended for by the learned Advocate for the appellants is applicable to the circumstances of the present case. Moreover, the decree against *Musammat* Sheolagna was not passed as a *benamidar* for her sons, but on an express finding that she was the real owner and not a *benamidar* of her sons The rule, therefore, that a decree against the *benamidar* binds the real owner does not hold good in the present case. There is another consideration why the plea of *res judicata* should not be given effect to in this case. There were certain defences open to the present plaintiffs which were not open to their mother in the suit of 1893. In fact one of those defences was put forward by *Musammat* Sheolagna which formed the subject-matter of the fourth issue. The learned Subordinate Judge overruled by saying that she had no interest in the decree of 1878.

We, therefore, hold that the rule of *res judicata* does not bar the present suit and the order of the Court below is a correct order. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(1) 3 A. 812; A. W. N. (1881) 79.
(2) 18 A. 69; A. W. N. (1895) 160.
(3) 21 A. 380; A. W. N. (1899) 130.
(4) 30 A. 30; 4 A. L. J. 689; A. W. N. (1907) 272.
(5) 10 C. 697 at p. 705.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 594 OF 1911.

July 30, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

VELLACHAMI CHETTY—DEFENDANT—APPELLANT

versus

MUTHU CHETTY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Easements Act (V of 1882), s. 38—Continuous easement—Cesser of enjoyment—Proof—Mere failure to repair servient tenement, whether sufficient.

In order to disentitle a dominant owner to an easement on the ground of non-user, the permanent alteration made in the dominant heritage must be of such a nature as to show that the dominant owner intended to cease to enjoy the easement in future.

A mere failure to keep the servient tenement in good repair is insufficient to establish an intention to abandon the easement.

Second appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura, in Appeal Suit No. 98 of 1910, preferred against that of the Additional District Munsif of Paramakudi, in Original Suit No. 263 of 1908.

Mr. *K. Narayana Row*, for the Appellant.

Mr. *K. Srinivasa Aiyangar*, with him Mr. *S. Ramasawmy Aiyar*, for the Respondents.

JUDGMENT.—Both the lower Courts have found

(*a*) that the continuous easement in question in this suit did not cease "to be enjoyed as such for an unbroken period of twenty years" by the plaintiff;

(*b*) that "its enjoyment was" *not* "obstructed by the servient owners" though the latter cultivated certain portions of the bed of the channel, it being possible notwithstanding such intermittent cultivation for water to flow through the channel at times of flood;

(*c*) that the dominant owners did not do any act which made it impossible for them to enjoy the easement; and

(*d*) that they did not abandon the easement though they might not have used it.

We have heard nothing in the arguments which should induce us to hold that the lower Appellate Court committed any error of law (such as the misconstruction of any document or the basing of a finding on a total absence of evidence) in arriving at conclusions (*a*), (*b*) and (*c*). As regards the finding (*d*) it is argued that non-user by the dominant owners need not be accompanied by any positive act of theirs to indicate their abandonment of the easement, that section 38 of the Easements Act, Explanation I, clause (*b*), shows that it will suffice if a permanent alteration "is made in the dominant heritage of such a nature as to show that the dominant owner intended to cease to enjoy the easement in future", and that in this case such a permanent alteration has been made by reason of the neglect of the dominant owners to repair the channel bed and the culvert near the tank, though not by any positive act of theirs.

Even assuming that the permanent alteration of the nature referred to in section 38 may be made by mere negligence and not by a positive act on the part of the dominant owners, it must be such as "to show that the dominant owners intended to cease to enjoy" the easement in future. It would be very difficult to establish such intention by mere proof of negligence and the lower Appellate Court whose judgment shows that it was fully aware of such negligence on the plaintiff's part, has clearly found that no intention to abandon the easement has been established thereby. Further it found (as we stated already) that the alteration made by the negligence was not of such a character as to form a total obstruction to the enjoyment of the easement and if so, no such intention to abandon the easement could be inferred from such alteration.

This second appeal fails and is dismissed with costs. The memorandum of objections complains that some relief which is not even remotely referred to in the plaint and the right to which is not based on any allegation of injury to be found in the plaint, has not been granted by the lower Courts. The plaintiffs (respondents) are not entitled to obtain any such relief, as no facts disclosing a cause of action for such relief were alleged in the plaint and we therefore, dismiss the memorandum of objections with costs.

Appeal and objections dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 41 OF 1913.

April 15, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C.

Pandit KISHAN LAL ATAL—DECREE-HOLDER—APPELLANT

versus

Nawab UMMAT-UL-FATIMA BEGAM AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Attachment—Sequestration of property by attachment, effect of—Creditor, right of—Personal liability of heirs-at-law—Heirs, right of, to profits—Civil Procedure Code (Act V of 1908), s. 52.

Till the sequestration of the estate by attachment or otherwise, a creditor is not entitled to seize the rents and profits of the property of the deceased accruing after the property has devolved on his heirs-at-law or to make them personally liable to the extent of those profits prior to the sequestration. Such profits cannot be treated as the estate of the deceased and the heirs of the deceased are entitled to appropriate them.

Jafri Begam v. *Amir Muhammad Khan*, 7 A. 822; A. W. N. (1885) 248, *Rani Kanno Dai* v. *B. J. Lacy*, 19 A. 235; A. W. N. (1897) 39 and *Bowles* v. *Hyatt*, *Hyatt, In re*, 38 Ch. D. 609, 57 L. J. Ch. 777; 59 L. T. 227, referred to.

KISHAN LAL ATAL *v.* UMAT-UL-FATIMA.

Appeal against the order of the Additional Subordinate Judge, Lucknow, dated 26th March 1913.

Babu *J. K. Banerji*, for the Appellant.

Mr. *Zahur Ahmad*, for the Respondents.

JUDGMENT.—This appeal arises out of an application made by the decree-holder-appellant for the execution of a decree obtained by him against the judgment-debtors-respondents in their capacity as the legal representatives of Nawab Iffat Ara Begam, under section 90 of the Transfer of Property Act, in respect of the balance due on a mortgage. The decree was passed on the 10th November 1900 and directed that the money would be realized from the estate of Nawab Iffat Ara Begam which might have come to the hands of the present judgment-debtors. The decree-holder stated in his application that as far as he was aware, Nawab Iffat Ara Begam left no immoveable property other than that already sold from which he could realize the balance of the decretal money, that the judgment-debtors realized about Rs. 20,000 or Rs. 25,000 as profits from the property left by the deceased lady and appropriated the same and that the judgment-debtors could, therefore, be made personally liable under section 52 of the Code of Civil Procedure. A phaeton and horse belonging to one of the judgment-debtors was attached in execution, to which objection was taken by the judgment-debtors. The Court below allowed the objection and held that the profits realized by the judgment-debtors from the property inherited by them from Nawab Iffat Ara Begam did not form a part of the estate left by the deceased.

Section 52 of the Code of Civil Procedure authorizes a decree-holder to execute his decree against the judgment-debtor against whom a decree has been passed in the capacity of a legal representative of a deceased person if no property of the deceased remains in his possession and he fails to satisfy the Court that he has duly applied such property of the deceased as came into his possession. It declares that execution will be granted in such a case only to the extent of the property in respect of which he may so fail to satisfy. It is argued on behalf of the judgment-debtors that there is still some property of Nawab Iffat Ara Begam remaining unsold and that on a previous occasion when the decree-holder had similarly attempted to proceed personally against the judgment-debtors on the ground that they had realized some dower-debt due to the deceased, execution was refused because a part of the *corpus* of the estate had remained unsold. The learned Subordinate Judge states in his judgment that it is not disputed that a part of Nawab Iffat Ara Begam's estate is still existing. The contention of the decree-holder-appellant is that the rents and profits derived from the property of the deceased form an accretion to that property and cannot be appropriated by the heirs of the deceased until the debts due by the deceased are liquidated. But as held in *Jafri Begam* v. *Amir Muhammad Khan* (1) the devolution is not suspended till the payment of debts. In *Rani Kanno Dai* v. *B. J. Lacy* (2) it was held in the case of a Hindu widow who had inherited some property from her husband that she was entitled in virtue of her widow's estate upon the death of her husband to the rents which might accrue from the said property and the rents so received by her could not be treated in law as the estate of her husband. Till the sequestration of the estate by attachment or otherwise a creditor is not entitled, in the absence of any specific direction by his deceased debtor, to seize the rents and profits of the property of the deceased accruing after the property has devolved on his heirs-at-law or to make them personally liable to the extent of those profits prior to the sequestration. In *Bowles* v. *Hyatt*, *Hyatt*, *In re* (3) it was held that the rents and profits form an accretion to the estate in the hands of an executor, but an heir-at-law is not subject to the liabilities attaching to an executor or administrator, for he is entitled to claim the property left by the deceased as his own subject to any liabilities on the *corpus* of the estate which the deceased may have created prior to his death.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(1) 7 A. 822; A. W. N. (1885) 248.
(2) 19 A. 235; A. W. N. (1897) 38.
(3) 38 Ch. D. 609; 57 L. J. Ch. 777; 59 L. T. 297.

KANAI LAL MANDAL v. JADAB LAL GANGOPADHAYA.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3179 OF 1910.

January 19, 1914.

Present.—Mr. Justice Teunon.

KANAI LAL MANDAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JADAB LAL GANGOPADHAYA—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s 26—Filling up water channel, when obstruction.

The mere filling up of a water channel would not necessarily constitute an obstruction of the plaintiff's enjoyment of his right within the meaning of explanation to section 26 of the Limitation Act of 1908, if no water for purposes of irrigation was required at that time and there was no refusal by the defendants to re-open the channel.

Appeal against the decree of the District Judge, Birbhum, dated 14th June 1910, reversing that of the Munsif, Bolpur, dated 6th December 1909.

FACTS.—The plaintiff sued for declaration his right to carry water from a certain tank through a channel cut through the defendants' land to irrigate his own land. The defendants filled up this channel, according to them, on 30th *Baisakh* 1314 corresponding to 14th May 1907. The suit was brought on 14th June 1909. On these facts it was contended on behalf of the defendants that the right was obstructed on 14th May 1907 and, therefore, the suit was out of time. The lower Appellate Court found that the channel was filled up in *Baisakh* 1314. and added that in fact, there was no stoppage of water until within two years of suit but it did not find when this stoppage occurred. The appeal was remanded to it for a clear finding on the latter point.

Babu *Sajani Kanta Singh*, for the Appellants.

Babu *Siva Prasanna Bhattacharya*, for the Respondent.

JUDGMENT.—This appeal is by the principal defendants in a suit brought by the plaintiff to have it declared that he is entitled to irrigate certain lands from a certain tank by taking water through a channel cut through the defendants' land. The Court of first instance has found that the claim is barred by limitation, but, on appeal by the plaintiff, the learned District Judge has found that he has acquired the right which he claims and that there is no bar by limitation. In this appeal by the defendants it is contended, *first*, that the owner of the tank in question, which does not belong to the appellants, was a necessary party to the suit: and, *secondly*, that on the District Judge's own finding he should have held that the suit was barred by limitation.

On the first point it may be observed that the owner of the tank not having been made a party to the plaintiff's claim, he will not be bound by any decision that may be arrived at in this suit; but it does not appear that he is an absolutely necessary party.

On the question of limitation, the District Judge has come to the conclusion on the evidence that the defendants removed or filled up the channel spoken of by the plaintiff in *Baisakh* 1314. The appellants ask me to say that, by the filling up or removal of the channel, they obstructed the plaintiff's enjoyment of his right of irrigation on 30th *Baisakh* 1314 corresponding with 14th May 1907 and to hold that this suit, instituted as it was on 14th June 1909, is barred. But I am unable to accept this view. The filling up of the channel would not necessarily constitute an obstruction of the plaintiff's enjoyment of his right, if no water for purposes of irrigation was required at that time and there was no refusal by the defendants to re-open the channel. This also appears to have been the view taken by the District Judge; for, having found that the defendants removed and filled up the channel in *Baisakh* 1314, he goes on to say that there was, in fact, no stoppage of water until within two years before the suit. As to when this stoppage occurred, there is no clear finding.

I am, therefore, of opinion that the appeal should be remanded to the learned District Judge for a clear finding on the following issue, namely, when was the plaintiff's enjoyment to the right which he had acquired interrupted within the meaning of the explanation of section 26 of the Indian Limitation Act (IX of 1908)? The finding will be returned to this Court within two months from this date.

Suit remanded.

WAHID KHAN *v.* ZAINAB.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 220 OF 1913.

May 7, 1914.

Present:—Mr. Justice Rafique and Mr. Justice Piggott.

WAHID KHAN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

ZAINAB—PLAINTIFF—RESPONDENT.

Muhammadan Law—Hanafia Law—Divorce—Sufficiency of words used—Onus of proof.

No special form or formula is prescribed for a divorce under the Hanafia Law. All that the law requires is to see that the words of divorce pronounced by a husband should show a clear intention on his part to dissolve the contract of marriage.

Where witnesses, whom the Court believes, depose that in their presence the wife was divorced by her husband, the burden of proving that the words used by the husband were insufficient and incomplete to support a valid divorce is on the person who questions the validity of the divorce.

Second appeal from a decree of the Subordinate Judge of Agra.

Mr. *S. A. Haidar*, for the Appellants.

The Hon'ble Mr. *Gokul Prasad*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by a Muhammadan widow to recover her dower-debt and legal share in the estate of her deceased husband as also her wearing apparel or its value, which she alleged was retained by the defendants. The suit was brought against her two step-sons called Wahid Khan and Majid Khan. She stated in her plaint that she was the second wife of Mehrab Khan to whom she was married some six or seven years ago on a dower of Rs. 500, and that she lived with him until his death which occurred on the 2nd of November 1910. After his death her two step-sons turned her out of the house retaining all her personal goods and declining to give her any share in the estate of her deceased husband or to pay her dower-debt. The suit was resisted on various grounds. It was urged in defence that the plaintiff was not the lawfully married wife of Mehrab Khan, but was his mistress and that she herself had taken away articles worth Rs. 1,000 from the house when Mehrab Khan died. The property in which she claimed a share was said to be the property of one of the sons of Mehrab Khan. The Court of first instance decreed the claim in full. On appeal the learned Judge modified the decree as regards the claim to the legal share in the landed property. He held that the said property belonged to the defendant Wahid Khan. The defendants have come up in second appeal to this Court and the only point urged before us is that the plaintiff was not legally married to Mehrab Khan. They said that the plaintiff was first married to a man of the name of Mahbub Ali who never legally divorced her and, therefore, she could not be lawfully married to Mehrab Khan.

This question was agitated in both the lower Courts and was found against the defendants-appellants on the evidence in the case. But it is contended that the question was not purely one of fact but a mixed question of fact and law and can be raised in second appeal. The argument is that the plaintiff was admittedly married to Mahbub Ali, but says that she was divorced by him almost immediately after the marriage and that some time after the divorce she married Mehrab Khan. The evidence of the alleged divorce consists of the statements of two witnesses who say that in their presence Mahbub Ali divorced her. That evidence is not sufficient because the witnesses do not say what words were used by Mahbub Ali when he pronounced the divorce, for unless such words are known it cannot be said whether the divorce was valid or not. It was for the plaintiff-respondent to prove the validity of the divorce in order to succeed in her claim and, therefore, it was incumbent on her to produce evidence with regard to the formula pronounced by her first husband, Mahbub Ali. We are unable to agree with this contention. The parties to the present appeal are Sunnis and are governed by the Hanafia Law. No special form or formula is prescribed for a divorce under the Hanafia Law. All that the law requires is to see that the words of divorce pronounced by a husband should show a clear intention on his part to dissolve the contract of marriage. In the present case the two witnesses whom the Courts below have believed depose that in their presence Mahbub Ali divorced *Musammat* Zainab, the plaintiff-respondent. It was for the defendants to cross-examine the witnesses as to the words used by the husband when pronouncing the divorce in order to show

that the words used were insufficient and incomplete to support a valid divorce. We think that the lower Courts were right in holding that the divorce of the plaintiff by Mahbub Ali was proved. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 599 OF 1913.

July 30, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Napier.

CHORAGUDI CHINNA KOTAYYA—DEFENDANT—PETITIONER

versus

Sri Rajah VARADARAJA APPA ROW BAHADUR ZAMINDAR GARU—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 107, O. XXIII, r. 1—Appellate Court, whether can permit withdrawal of suit in appeal with liberty to bring fresh suit.

An Appellate Court cannot permit a plaintiff, whose suit has been dismissed by the lower Court and who appeals against that dismissal, to withdraw from his appeal with liberty to bring a fresh suit, inasmuch as the language of Order XXIII, rule 1, Civil Procedure Code, implies that a suit has not yet been disposed of.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the decree and order of the District Court of Kistna at Masulipatam, in Appeal Suit No. 92 of 1912 and I. A. No. 927 of 1912, preferred against those of the Court of the Additional District Munsif of Masulipatam, in Original Suit No. 136 of 1910 (Gudivada).

Mr. *V. Ramadoss*, for the Petitioner:—The Appellate Court has no jurisdiction to allow a suit to be withdrawn after it terminated in a decree in defendant's favour. Clauses (1) and (3) of Order XXIII, rule 1, Civil Procedure Code, clearly apply in terms to a pending suit only. Clause (2) must be similarly construed. The words 'abandon such part of a claim' and 'the suit must fail by reason of some formal defect', can possibly have no application to a suit which had terminated in a decree. The words 'withdraw his suit' occurring in clause (1) and 'withdraw from such suit' occurring in clause (2) have the same meaning and refer only to a suit pending in the trial Court. The power to award costs conferred by clause (3) can only be exercised by the Court of first instance. *Tirupati* v. *Muthu* (1) and *Eknath* v. *Ranoji* (2).

Mr. *P. Nagabhushanam*, for the Respondent:—The power in question has been very frequently exercised by the first as well as the second Appellate Courts and there is nothing in the language of Order XXIII rule 1, Civil Procedure Code, to prohibit such use. The language of the section is "after the institution of the suit." The words 'before decree' are not there and there is no warrant for importing them into the section. Circumstances can be easily imagined under which grave miscarriage of justice would occur if such a power were not recognised. A question of fact might be decided in one way by the Court of first instance (*e. g.*, question as to whether the defendant denied the plaintiff's title before suit). If the first Court held that there was a denial of title before suit and that, therefore, no notice was necessary, but the Appellate Court held that there was no denial of title before suit, the Appellate Court might have, in consequence of its finding, to decide whether the plaintiff should be given permission to withdraw the suit and institute a fresh one. If the Appellate Court thought fit to grant the permission, it might have to put the plaintiff on terms as regards costs, and under clause 2 (*b*) of Order XXIII, rule 1, the Court has ample powers in this behalf. Section 107, clause 2, makes this section applicable to Appellate Courts and in order to make it so applicable it is not necessary to substitute the word 'appeal' for 'suit' wherever the word 'suit' occurs in Order XXIII, rule 1. The language of clause (2) of section 107 implies that this need not be done. Under that clause the Appellate Court shall exercise the same functions as are conferred and imposed by the Code on Courts of original jurisdiction *in respect of suits instituted therein*. If such a power can be exercised by a Court of original jurisdiction in respect of a suit, in respect of the same suit the Appellate Court can likewise exer-

(1) 11 M. 322.
(2) 10 Ind. Cas. 813: 35 B. 261: 13 Bom. L. R. 237.

cise the power when the appeal is pending before it. The observations in *Eknath* v. *Ranoji* (2) are *obiter*, the decision having proceeded primarily on another ground.

JUDGMENT.—The question raised in this revision petition is whether plaintiff (appellant) can be permitted by the Appellate Court to withdraw from his appeal with liberty to bring a fresh suit, his suit having been dismissed in the lower Court and his appeal having been against that dismissal. The District Judge of Kistna states in his judgment that on the hearing of the appeal the appellant wished to file a number of fresh documents, that he declined to give him permission and that, then, the appellant made the application referred to, which application was granted by the Court on payment of costs. It is contended before us that the lower Appellate Court had no power to allow him to do so.

The question turns on the construction of Order XXIII, rule 1 and the respondent, who was appellant in the lower Court, relies on section 107, Civil Procedure Code, as vesting this power in the Appellate Court. Admittedly, this power has frequently been exercised and we are referred to two cases, one in *Tirupati* v. *Muttu* (1) and the other *Chidambara Mudali* v. *Kozhandavelu Mudali*(3), where the High Court permitted it to be done in second appeal. The point, however, was not argued in those cases and we have, therefore, to see whether on the true construction of the Civil Procedure Code the power exists. The language of the Order is as follows:—

Order XXIII, rule 1, clause (1):—"At any time after the institution of a suit the plaintiff may.... withdraw his suit or abandon part of his claim."

Clause (2).—" Where the Court is satisfied (*a*) that a suit must fail by reason of some formal defect, or (*b*) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit,...it may.. grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit."

Clause (3):—" Where the plaintiff does so without the permission above referred to, he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit."

Considering clauses (1) and (3) first, it must be apparent that they cannot refer to a suit that has already terminated in a decree, because clause (3) covers the whole of the ground covered by clause (1). That is to say, clause (3) applies to every case where a plaintiff withdraws his suit or abandons part of his claim.

It is to be noted in passing that the language of clause (3) varies slightly from that of clause (1), the words in clause (3) being "withdraws from a suit," while in clause (1) it is "withdraws his suit," and that the word "from" also occurs in clause (2). Some argument might be based on this change of language in clause (2), were it not apparent that clause 3, which is couched in the same language, has reference entirely to clause (1). The variation must, we think, be purely accidental. The language of section 373 of the old Code was "withdraw from" all through. As, therefore, clause (3) applies entirely to clause (1), it necessarily follows that in all suits withdrawn without permission the Court has power to award costs after the withdrawal. This power clearly cannot exist in a case where the suit has terminated in a decree against the plaintiff, because costs have already been provided for in the decree and cannot be awarded after the withdrawal. Further, it has never been suggested that a party whose suit has been dismissed with costs has power apart from clause (2) to have the decree set aside. The suit has terminated and the claim has merged in a decree. If a party does not wish to execute his decree he need not do so, and if he desires to abandon part of the amount which has been decreed to him, it is open to him to certify satisfaction of that part. It must follow, therefore, that clauses (1) and (3) do not include suits which have terminated in decree.

We now come to clause (2). It is obvious that clause (2) does not give the permission to withdraw and abandon, that permission being unnecessary under clause (1). What it does is to authorize the Court, in certain circumstances where a party wishes to withdraw, to give him liberty to institute a fresh suit. It seems to follow from this that the liberty to institute a fresh suit can only be given in cirumstances in which the applicant is entitled under clause (1) to withdraw Further, paragraph (*a*) of clause (2) of the rule is in terms only applicable to a pending

(3) 17 Ind. Cas. 395; (1912) M. W. N. 1003.

suit and if paragraph (*b*) is to be read as limited to a case where a suit must fail, then that language would negative the construction asked for. But it is certainly open to argument that the words "there are sufficient grounds" are alternative to the words "a suit must fail," and not to the words "by reason of some formal defect," and it is on reliance on this reading that some argument can be based. Whatever meaning, however, is to be given to that language, it cannot, we think, alter the basis of the clause and extend the right of withdrawal or rather be read to give the Court power to "permit" withdrawal. The language of this sub-clause being the same as that in clause (1) the same meaning should primarily be applied to it. As to one part of the sentence, the position is quite clear. The words "abandon such part of a claim" are not applicable to a suit which has terminated and, therefore, the clause cannot possibly apply where the plaintiff, against whom a decree has been given, wishes to bring a fresh suit abandoning part of the claim and we should, therefore, be driven to this position if we were to accept the respondent's contention, that no leave can be given in a terminated suit where part of the original claim is sought to be abandoned but that leave can be given after decree, where the fresh suit is to be otherwise than for a part of a claim. There is, however, a fatal answer to this in the last words of the clause, because the fresh suit to be permitted is specifically stated to be a fresh suit in respect of "such part of the claim" as well as "the subject-matter of such suit." The reading, therefore, would require the excision of the words "such part of the claim" from the sentence permitting the institution of a fresh suit. That not being permissible, it necessarily follows that the fresh suit must be permitted in circumstances applying both to the "subject-matter of a suit" and "the part of a claim:" and as it cannot apply in respect to a "part of a claim" after a decree has already been pronounced, it seems to follow necessarily that it cannot apply in respect of the "subject-matter of a suit" after a decree has already been passed. Applying the same chain of reasoning to paragraph (*b*) of clause (2), we get this position, *first*, that the words "part of a claim" cannot apply after a decree; *next*, that the "fresh suit" must have the same meaning for both parts of the sentence; and *finally*, that the "fresh suit" cannot be one to be brought after decree, with the result that, whether the words "other sufficient grounds" are alternative to "a suit must fail" or "some formal defect", they are alike subject to the limitation that no decree has been passed in the suit sought to be withdrawn. It may well be that during a pending suit leave may be given to withdraw on grounds other than that "the suit must fail." It may be that proper relief cannot, in some cases, be given by way of amendment, such as would give the plaintiff all that the circumstances entitle him to claim and that, therefore, he may be given permission to bring a fresh suit on withdrawal of the pending suit. But it is not necessary to decide that question here. All we have to consider is, whether the language of this clause (2) is to be confined to a pending suit, as clauses (1) and (3) must necessarily be, or can be read as extending to a suit in which a decree has already been passed, and for the reasons given we are of opinion that it cannot be so extended.

The further argument remains, however, that the Appellate Court can do what the first Court cannot do. One argument is that in considering the powers of the Appellate Court the word "appeal" is to be substituted for the word "suit" and so the Appellate Court, has got the power. The answer to this contention is this: if the word "appeal" is to be substituted for the word "suit," it must be substituted all through the order. The order as made applicable to the Appellate Court would then run as follows: "At any time after the filing of an appeal the plaintiff may withdraw his appeal or abandon part of his claim, etc.

Clause (2):—* * * *

There are obvious objections to this reading of the order. In the first place the words "abandon part of a claim" are no more applicable to an appeal than they are to a suit that has terminated in a decree; and, *secondly*, there are ample powers to be found in the Code for dealing with the merits of an appeal without the necessity for giving leave to file a fresh appeal. This, however, is not the construction sought for by the respondent, for it will not assist him. What he wishes to do is in effect to alter the word 'suit' into 'appeal' in the first line, rule 1, clause (1), and read it 'at any time after the filing of an appeal' and then leave the rest

of the rule as it stands. This, of course, cannot be a proper application of the order to an Appellate Court. The other method by which he would arrive at the powers he seeks to establish is by taking the whole rule *en bloc* and saying that the Appellate Court could do it by reason of the words "at any time after the institution of a suit," his argument being that, although the first Court having passed a decree cannot alter it, the Appellate Court can do so, as the whole case is re-opened by the appeal.

It was this contention that made it necessary to examine the language of the rule minutely, and if the order is to be read as suggested above, that is to say, as limited to suits which have not terminated in a decree, it is obviously impossible to read the order otherwise when the suit is before the Appellate Court. The language of the order cannot be construed, as to its subject-matter, differently according to the Court which is construing it. The Code can apply the procedure of an Original Court to the Appellate Court with the necessary variation in the terms. This is done specifically in Order XXII, rule 11; and section 107 generally provides for the exercise, by the Appellate Court, of the same powers and the same duties as are conferred and imposed on Courts of original jurisdiction. Section 107 will, however, not avail the respondent in the manner he seeks to apply it, for as shown above the Court of original jurisdiction has no power to permit the institution of a fresh suit after decree. The respondent is, therefore, in this difficulty, that if he wishes to apply Order XXIII, rule 1, to the Court of Appeal by virtue of section 107, it can only be done by substituting the word 'appeal' for 'suit' all through the rule—which will not give him the remedy that he requires. No other construction is possible because, with regard to the suit itself, the original Court has no such power.

The view that we have taken is in accordance with the decision in *Eknath* v. *Ranoji* (2), where the Court lays down that the language of Order XXIII implies that a suit has not yet been disposed of. For the reasons given above, we are of the same opinion. The petition will be allowed with costs. The order of the lower Appellate Court will be set aside and the lower Appellate Court will take the appeal on its file and dispose of it according to law.

Petition allowed.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL JURISDICTION.

July 9, 1913.

Present:—Mr. Justice Chaudhuri.

CROMPTON & Co. LD.

AND

MOHAN LAL

Re ARBITRATION BETWEEN.

Arbitration Act (IX of 1899), ss. 13, 14—Award set aside for legal misconduct, whether can be remitted to same arbitrator—Party not given opportunity to put his case—All points in dispute not decided—Irregular procedure—Legal misconduct—Moral misconduct—Award, definite character of.

An arbitrator who does not give a party an opportunity to put his case before him and who does not decide all matters in dispute between the parties, acts improperly and his conduct amounts to a legal misconduct.

Where an arbitrator's award is set aside for legal misconduct or irregular discharge of his duties, and not for moral misconduct, corruption or partiality, the Court can remit the award to the same arbitrator for further consideration.

An award must be definite with regard to all points in dispute between the parties.

Mr. *Buckland*, for the Petitioners.

Mr. *Zorab* (with him Mr. *A. N. Chaudhuri*), for the Opposite Party.

JUDGMENT.—This is an application on behalf of Rai Bahadur Mohan Lal to set aside an award made by one Mr. Pooler, dated the 16th September 1912. The grounds upon which the application is made are set out in the affidavits of Rai Bahadur Mohan Lal and Mr. Lal Chand.

The petitioners complain that they received no notice from Mr. Pooler of his intention to enter upon the reference, and that he paid the defendant firm one visit for about ten minutes only and save and except for that visit the petitioners did not know, prior to the said Mr. Pooler making his award, of any steps being taken by him in connection with the said reference, nor was any notice of the time or place of meeting sent or given to the petitioners, nor had they or either of them any interview with or communication from the said Mr. Pooler with regard to the reference; that they wer

desirous of being heard and of adducing evidence before the arbitrator, but no opportunity was given to them. This is admitted by Mr. Pooler, who says in a letter set out in the said affidavit, addressed to Mr. Lal Chand, that he had made the award in the case without taking any defence from the defendant Company. He says he went through the file of correspondence between them and Crompton & Co. and also their file on the matter; but he did not place the proposed award before them for criticism or defence.

It is quite clear from the affidavits that Mr. Pooler ought to have given the petitioners an opportunity of putting their case before him and the petitioners, not knowing that the reference had been taken up or that it was being dealt with, have been prejudiced.

One of the points in dispute between the parties is about some motors which the defendants said were useless. They said that although on one occasion Mr. Pooler went with them to the place where the motors were lying, he did not examine them. Mr. Lal Chand says that he understood from Mr. Pooler that due notice of the reference was going to be given in the ordinary course. Nothing was done by Mr. Pooler, and the defendants had no opportunity of placing what they had to say in respect of their defence.

The award itself is defective in some respects. Take the last paragraph: "I further recommend that if Crompton & Co. can make use of any of the motors lying useless with Messrs. Gulab Singh & Sons, that they take these over at one-half of the costs originally charged, etc. . . . . This is at Crompton and Co.'s option. The machineries charged for in 2409 and 2935 should be certainly taken back at one-half the costs if in good condition. . . ."

Now, these were some of the matters in dispute between the parties, and it cannot be said that the arbitrator has decided these points or given any definite directions with regard to them, as he ought to have done. I am clearly of opinion that the conduct of Mr. Pooler in proceeding with the reference in the manner he did was not proper, and that it amounts to legal misconduct. The award, therefore, must be set aside.

The petitioners have strenuously contended that the matter should not be remitted to Mr. Pooler. Mr. Buckland appearing for them contended that in cases of misconduct if so held by the Court, the Court had no power to remit the award to the arbitrator. He relies upon sections 13 and 14 of the Indian Arbitration Act (IX of 1899), which run as follows:—"The Court may, from time to time, remit the award to the re-consideration of the arbitrator or umpire." Section 14 says: "Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set aside the award." His argument is that there is no provision, in the section for remitting the award, in the case of misconduct, but that power is given merely to set aside the award, and that section 13 dealt with cases other than that of misconduct. Section 13 of the Aribitration Act corresponds with section 10 of the English Arbitration Act of 1889, 52 and 53 Vict. c. 49, and section 14 corresponds with section 11, sub-clause 2. Section 10 of the English Act of 1889 is the same as section 8 of the Common Law Procedure Act of 1854: under section 8 an award could be remitted upon certain specified grounds. The same rule as laid down in section 8 has been held to apply to section 10 of the English Act of 1889. This was so stated by Lord Esher, M. R., in *In re Keighley and Durant* (1). In *Re an Arbitration between Montgomery, Jones & Co.* (2), Smith, L. J., and Chitty, L. J., held the same. They said that they agreed that with regard to section 10 of the English Arbitration Act of 1889 there were four grounds upon which the matter could be remitted to an arbitrator for re-consideration. Those grounds are (1) where the award is bad on the face of it, (2) where there has been misconduct on the part of the arbitrator, (3) where there has been an admitted mistake and the arbitrator himself asks that the matter may be remitted, (4) where additional evidence has been discovered after the making of the award. Chitty, L. J., however, thought that it was not necessary to limit the operation of section 10 to those four grounds. In this case there is no question of moral misconduct and there is no suggestion that the arbitrator is corrupt

(1) (1893) 1 Q. B. 405; 62 L. J. Q. B. 105; 4 R. 136; 68 L. T. 61; 41 W. R. 437; 7 Asp. M. C. 268.
(2) (1898) 68 L. T. 406.

or partial in any way. All that is said is that he acted irregularly in the discharge of his duties.

There was a statement in the affidavit of Mr. Lal Chand that he had been informed that Mr. Pooler when in Calcutta had frequent conversations on the telephone with persons in the office of Martin & Co., the agents of Crompton & Co. This is denied by Mr. Theoboald in his affidavit of the 25th June 1913, paragraph 11. He says that so far as he is aware no conversation took place over the telephone between January and September 1912 between Martin & Co. or the said Crompton & Co. with Mr. Pooler with reference to the said arbitration, save and except that on certain occasions he caused inquiries to be made over the telephone of Mr. Pooler as to when he would make his award in this matter.

Under the circumstances the question is whether it would be right to remit the award to Mr. Pooler. I think I have power to remit it, and it would be entirely right in the circumstances of this case to remit the award to him for further consideration.

I have already drawn attention to the indefinite character of the directions in the last paragraph of the said award. The award must be definite with regard to all points in dispute between the parties.

In *Anning* v. *Hartley* (3), Pollock, C. B., held in the circumstances of that case that he ought to remit the award to the arbitrators. One of the objections taken in that case was that the third arbitrator had heard evidence in the absence of the parties and their attorneys. The learned Judge did not find that there was the slightest imputation on the conduct of the arbitrators as to their intention, and said: "it would be indeed lamentable if the Court was not able to send back the award to them to be set right, as otherwise all the expenses already incurred would be thrown away." Watson, B., was of the same opinion and said: "The Court sends back an award to the same arbitrators in such cases where there is no reason to believe they are not to be trusted."

There is also a serious question in this case as to whether the claim of Crompton & Co. would not be barred by the Statute of Limitations if the award was simply set aside and the Company was left to their remedy by suit.

I hold that the present award cannot be upheld. I asked if the petitioners could agree to refer the matter to any other person; but they were unwilling to make any suggestion and only insisted that the award should be set aside. I, therefore, order that the present award be set aside and the matter be remitted to the arbitrator, Mr. Pooler, for further consideration. He is to give the parties an opportunity of placing their respective cases before him and he is to consider the cases made by them.

The petitioners would be entitled to the costs of this application from Crompton & Co.

Award set aside and matter remitted.

Attorneys for the Petitioners: Messrs. *Sanderson & Co.*

Attorneys for the Opposite Party: Messrs. *Morgan & Co.*

(3) (1858) 27 L. J. Ex. 145.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 111 OF 1913.

July 20, 1914.

Present:—Mr. Wallis, Offg. Chief Justice, and Mr. Justice Kumarasawmy Sastri.

V. K. RAJAMMAL—CLAIMANT—APPELLANT

versus

THE HEADQUARTERS DEPUTY COLLECTOR, VELLORE—PETITIONER—RESPONDENT.

Land Acquisition Act (I of 1894), ss. 23, 38—House, market-value of—Twenty years annual rental—Annual rental, how found in growing towns—Fruit-bearing trees, valuation of.

In computing the value of a house in a town of growing importance twenty times the annual rental value, and not what it would cost to build, a house of that description, should be allowed, and the annual rental should not be merely the rent which the house is commanding at the time, but what it is likely to fetch in future, *minus* the cost of ordinary repairs which a tenant would be likely to ask for and get from a landlord.

Fruit-bearing trees likely to bear fruit for a number of years, *e. g.*, mango trees, should also be valued at twenty years annual rental.

RAJAMMAL *v.* HEADQUARTERS DEPUTY COLLECTOR, VELLORE.

Appeal against the judgment of the District Court of North Arcot, in Civil Miscellaneous Petition No. 439 of 1912 (Original Petition No. 38 of 1912).

Mr. *L. A. Govindaraghava Aiyar* (with him Mr. *A. Viswanatha Aiyar*), for the Appellant.

The *Government Pleader*, for the Government.

JUDGMENT.—This case comes before us rather in an unsatisfactory manner. The District Judge has commented on the fact that the Deputy Collector did not give a proper opportunity to the claimant to adduce evidence of the value of the land which was to be acquired, and at the hearing the claimant has not supported her case on some points by very satisfactory evidence. Then there are some points as regards which the District Judge has followed the report of the Tahsildar—which is not before us—and which, therefore, we are unable to attach any weight to. Nor was the Tahsildar examined as to the reasons for his report. The net result is that it is very difficult for us to come to a conclusion satisfactory to our own mind and all that we can do is to do the best we can upon the materials before us.

At first, as regards the value of the house, the District Judge points out that Mr. Cornwell adopted a totally erroneous method of valuation, what it would cost to build such a house now. The District Judge has rightly disregarded that. But we think he has not paid sufficient attention to the evidence as to the prospect of rents rising in Vellore, which is undoubtedly a place of growing importance, which has recently been elevated to a Collectorate and which, it is not unlikely, will have other offices established soon. There certainly is evidence that the rents not only of officials but of Missionaries like Mr. Coles have been rising of recent years and the rent of this house was raised from Rs. 65 some years ago to Rs. 80 in consequence of some repairs which were done. We think that we shall not be going far beyond the mark if we allow Rs. 90 as the rent upon which the compensation should be calculated. There are no taxes on this house as it is outside the Municipal limits, and consequently the only reduction that we have to make is for repairs. The District Judge has taken into account the expenses of the repairs which the Public Works Department have proposed to effect subsequent to acquisition. We do not think that this is the right test. The Public Works Department are, no doubt, proceeding, we dare say quite rightly, on a very handsome scale and in a very thorough fashion. But what we have to consider is, what are the sort of repairs that a tenant would be likely to ask for and get from a landlord in the position of a claimant; and we do not think that they are likely to be on anything like so large a scale. The ordinary allowance for repairs is one month's rent and we propose to apply that; so that deducting from Rs. 1,080, which is twelve months' rent at Rs. 90, we have Rs. 990 as the net annual rental value. We have decided to take twenty years' purchase, which is the rate allowed by the District Judge, which gives Rs. 19,800 which, on the whole, seems to us not to be an unfair amount.

Then as regards the trees the evidence is exceedingly unsatisfactory. Obviously the plaintiff's evidence must be greatly discounted. There is no evidence at all on the other side except the Tahsildar's report which we have not seen. He estimated the rental from the trees at Rs. 100. Having regard to the number of trees and the evidence in the case we think that, making all proper allowance, Rs. 150 is a reasonable annual rental. Then the Judge has allowed eight years' purchase for the trees. No reasons are given for it, nor is the Government Pleader in a position to suggest how this figure was arrived at. Mango trees are as a rule long-lived and produce for a long period of years and in the absence of any satisfactory evidence we see no reason to give a different rate for trees. We, therefore, allow twenty years' purchase for mango trees at Rs. 150: that makes Rs. 3,000.

We are not prepared on the evidence to disturb the District Judge's finding of Rs. 200 an acre for the compound.

We do not think that the District Judge was right in making the appellant pay the Collector's costs, though we think he was quite justified in depriving her of her own costs under the discretion given to him under section 27 of the Act. Therefore, we direct the decree as to costs to be modified by making each party bear his own costs in the lower Court. As regards the costs in this

Court the parties will give and take proportionate costs.

Under section 34 of the Act the appellant is entitled to interest on the additional amount which we have awarded at 6 per cent. from the date of taking possession of the premises by the Collector.

Decree modified.

ALLAHABAD HIGH COURT.

STAMP REFERENCE No. 343 OF 1913.

March 27, 1914.

Present:—Mr. Justice Tudball.

HAIDARI BEGAM—DEFENDANT—APPELLANT

versus

GULZAR BANO—PLAINTIFF—RESPONDENT.

Court Fees Act (VII of 1870), Sch. I, Art. 1—Suit for possession of property—Plea raised that plaintiff cannot succeed without paying defendant's dower-debt—Suit decreed without condition of payment of dower-debt—Appeal—Subject-matter in dispute—Court-fee—Decree.

In a suit by the defendant's deceased husband's sister for possession of certain property, the defendant denied the plaintiff's title and also contended that the plaintiff could not succeed without paying the defendant's dower-debt of Rs 80,000. The lower Court decreed the plaintiff's claim, holding that she was entitled to succeed even if the defendant's dower was not paid. The defendant appealed paying the same Court-fee as the plaintiff had paid on the plaint.

Held, that as the amount or value of the subject-matter of the appeal was not more than the value of the property which the plaintiff was seeking to recover and possession of which the defendant was seeking to retain, the defendant was not liable to pay Court-fee on the sum of Rs. 80,000 which she claimed as her dower-debt:

Held, also, that without payment of any Court-fee on the amount of dower-debt claimed by the defendant, the Court could grant to the plaintiff a decree conditional on payment of whatever may be found due to the defendant as her dower-debt.

Stamp reference made by the Taxing Officer.

FACTS appear from the following

ORDER OF REFERENCE.

In this case the defendant-appellant seeks that the decree of the Court below be set aside and the suit be dismissed. The defendant-appellant is the widow of one Saiyed Kurban Husain who is the own brother of the plaintiff. The plaintiff claims that her right in certain property may be established and a declaration made to the effect that the defendant-appellant has no title thereto, and that she (the plaintiff) may be put in proprietary possession of certain property. She also stated that if she was held liable to the payment of the dower-debt due to the defendant she was ready to pay the same.

In the lower Court the defendant-appellant denied the plaintiff's title to and possession over the property, and contended that her dower-debt amounted to Rs. 80,000 and that in lieu thereof she was entitled to remain in possession of the entire property. She also alleged that as the plaintiff had not shown her readiness to pay the full amount of her dower-debt, the suit was liable to be dismissed.

The lower Court decreed the suit in the plaintiff's favour and did not record any finding on the 2nd issue, *viz.*, "What is the amount of the defendant's dower-debt?" It, however, expressed an opinion in its judgment that the plaintiff was entitled to recover possession of the property in dispute even if the defendant's dower-debt be unpaid.

The defendant-appellant has now preferred this appeal to this Court and has paid a Court-fee of Rs. 700 as was paid by the plaintiff-respondent on the plaint. She seeks that the decree of the Court below be set aside and the plaintiff-respondent's suit be dismissed.

Pleas Nos. 1, 3 and 9 of the memorandum of appeal are important. The 1st plea states that she is entitled to retain possession till her dower-debt is paid in full, and in plea No. 9 she claims to hold the entire property against the plaintiff in lieu of dower. It is, therefore, open to question whether she is not liable to pay Court-fee on the sum of Rs. 80,000, which she claims as the amount of her dower-debt. If this view is correct, a further Court-fee of Rs. 615 is due from the defendant-appellant.

The learned Counsel for the defendant-appellant maintains that the appellant is merely asking for the suit to be dismissed and claims no set-off. I have had an opportunity of hearing the learned Counsel, and I asked him whether there was any bar to the Bench hearing the case passing a decree modifying the decree of the lower Court to this extent that the plaintiff be given possession and her title be upheld on condition that she pays

Rs. 80,000, the amount of the dower-debt, as claimed by the defendant-appellant, to the defendant-appellant. The learned Counsel admitted that such a decree was possible, but he maintains that even if such a decree be passed, the defendant-appellant cannot execute the same; but the defendant-appellant is already in possession of the property, and if she obtains such a decree she obtains the relief she desires as mentioned in the pleas raised in the memorandum of appeal.

Schedule I, Article 1, of the Court Fees Act gives the *ad valorem* fee to be paid on the subject-matter in dispute in the case not only on claim but on counter-claim. I consider, therefore, that the Court-fee should be paid on the value of this counter-claim, and hold that the additional Court-fee of Rs. 615 must be paid. As, however, the question is by no means free from difficulty and is of general importance, I refer the same to the Hon'ble Taxing Judge.

Dr. *Satish Chandra Banerji*, for the Appellant.

JUDGMENT.—This is a reference by the Taxing Officer. The defendant-appellant is the widow of a deceased Muhammadan Saiyed Qurban Husain. The plaintiff-respondent is the own sister of the deceased. She brought a suit to obtain possession of certain property and a declaration that the defendant had no title thereto. She added that if she were held liable for payment of any dower-debt due to the defendant, she was ready to pay the same. In the Court below the defendant-appellant denied the plaintiff's title to the property and further contended that her own dower-debt amounted to Rs. 80,000 and that she was entitled to remain in possession of the entire property, at least until herd ower-debt had been satisfied. The Court of first instance decreed the plaintiff's suit. It did not go into the question of the amount of the defendant's dower, being of opinion that the plaintiff was entitled to recover possession even if the dower-debt remained unpaid. The defendant-appellant has now preferred this appeal paying a Court fee equal in amount to that paid by the plaintiff in the lower Court. She raises the same pleas and the question before me is whether she is liable to pay Court-fee on the sum of Rs. 80,000, which she claims as the amount of her dower-debt. The question is, what is the value or amount of the subject-matter in dispute in this appeal? It is suggested that it is not only the property in dispute but also the dower-debt claimed by the appellant. It is perfectly true that it is open to this Court to grant a decree to the plaintiff conditional on payment of whatever may be found due to the defendant as her dower-debt. But even in that case it will not be a decree which the defendant-appellant would be able to put into execution, so as to enable her to recover her debt. It would be merely an attachment of a condition to the decree for possession. Of course, it may also be that the Court might dismiss the claim of the plaintiff *in toto* or it might uphold the decree of the Court below. In any view it seems to me impossible to hold that the amount or value of the subject-matter of this appeal is anything more than the value of the property which the plaintiff is seeking to recover and possession of which the defendant is seeking to retain. The same considerations do not operate in this instance as would operate if the plaintiff had appealed against a decree for possession conditional on payment of a large sum. I am, therefore, of opinion that the Court-fee already paid is sufficient.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 73 OF 1913.

July 24, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Napier.

ZENAMANDRA PAPIAH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

LANKA SUBBASASTRULU—DEFENDANT—RESPONDENT.

Hindu Law—Father's debts—Suit against father and son—Decree against father alone—Attachment of family property—Son's share, liability of—Civil Procedure Code (Act V of 1908), s. 11, Exp. V.

In a suit for mesne profits against a Hindu father and his son, the decree was given only against the father. In execution of that decree a house belonging to both father and son was attached. The son objected that his undivided share in the house was not liable to attachment inasmuch as the decree was only against the father:

Held, that, as under the Hindu Law the a libility of a son to pay his father's debts to the extent of his share in the family property is based on religious

and moral considerations and not on some direct liability to his father's creditor, the decree in the suit for mesne profits left the son exactly in the position in which he would have been if he had never been impleaded at all, and that, therefore, his contention against attachment was untenable.

Shiam Lal v. *Ganeshi Lal*, 28 A. 288, followed.

Suraj Bunsi Koer v. *Sheo Persad Singh*, 5 C. 148 (P. C.); 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 4 C. L. R. 226; 2 Shome's L. R. 242, referred to.

Appeal against the order of the Court of the Temporary Subordinate Judge of Nellore, in Appeal Suit No. 129 of 1912, preferred against that of the District Munsif of Kanigiri, in Civil Miscellenous Petition No. 820 of 1912 (Original Suit No. 96 of 1909), dated 19th August 1912.

Mr. *S. Subramania Aiyar*, for the Appellants.

Mr. *P. Chenchiah*, for the Respondent.

JUDGMENT.—This is an appeal from the appellate order of the Temporary Subordinate Judge of Nellore passed on appeal from an order of the District Munsif of Kanigiri on a petition filed by the third defendant in execution proceedings in Original Suit No. 96 of 1909 on the file of his Court. The third defendant is the son of the first defendant in the suit. The suit was against the father, the present petitioner and others for a declaration of the plaintiff's right to certain items of immovable property, for recovery of possession of the same from them and for mesne profits. By the decree passed on the 22nd December 1910 all the defendants were ordered to put the plaintiffs in possession of certain items of the suit property and the first defendant was also directed to pay Rs. 370 for mesne profits and costs on the mesne profits. In execution of the decree against the first defendant for mesne profits and costs the entire house belonging to the first and third defendants was attached, and the third defendant claimed in the petition under appeal that his undivided half share was not liable to attachment on the ground that the decree for mesne profits and costs was limited against the first defendant, his father. The District Munsif held that his share was liable to be taken in execution for his father's debts, they not being tainted by any illegality or immorality. The Temporary Subordinate Judge on appeal was of opinion that, although the primary liability of the third defendant to pay such debts undoubtedly existed, yet, as he had been a party to the suit and no decree had been passed against him, the decree was final as regards his liability and was a bar to the plaintiff's claim.

It is contended before us that this view is correct and reliance is placed on section 11, Explanation V, of the Civil Procedure Code, in that relief was claimed against the petitioner and not being granted should be deemed to be refused. We are of opinion that this plea is bad. The liability which was sought to be enforced in the suit was a suggested primary liability of the third defendant to the plaintiffs and his liability was negatived. The liability under which the plaintiffs are entitled to take the share of the third defendant in execution is the liability of a son to pay his father's debts to the extent of his share in the family property based on religious and moral considerations which are fundamental in Hindu Law and well recognized by the Courts. It is from his duty to his father that the right of the creditor springs and not from any decree against the son personally. This is made clear by the Privy Council in the leading case of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1); following an earlier decision of the Board in *Muddun Thakoor* v. *Kantoo Lall* (2). On pages 170 and 171 their Lordships make clear the position. One quotation is sufficient: "Where joint ancestral property has passed out of a joint family under a sale in execution of a decree for the father's debt, his sons, by reason of their *duty* to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes." There is no suggestion here that the fact of the primary liability of the sons having been negatived in a suit makes any difference; and on principle it is clear that this cannot be so. The error that the Subordinate Judge has fallen into is in thinking that the liability of a son arises out of some direct liability to a creditor. Such liability may exist and a suit may be brought to enforce it. But the fact that in a suit against the son such primary liability is negatived, does not affect his

(1) 5 C. 148 (P. C.); 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 4 C.L. R. 226; 2 Shome's L. R. 242.

(2) 1 I. A. 321 at p. 333; 14 B. L. R. App. 187; 22 W. R. 56.

liability arising out of his *duty* towards his father. This view has been taken by the High Court of Allahabad in *Shiam Lal* v. *Ganeshi Lal* (3). In that case the suit had been brought against father and son on a promissory note and was dismissed against the son as he was no party to it. In a subsequent suit by the son for a declaration that the decree obtained against the father could not be executed against his interest in the family property in view of the fact that the suit had been dismissed against him, the defence was held bad. The Court held that the original suit left the son exactly in the position in which he would have been if he had never been impleaded at all. We are in entire concurrence with this view.

The result will be that the order of the lower Appellate Court is set aside and the order of the District Munsif dismissing the claim-petition restored. The counter-petitioners will have their costs in this Court and the lower Appellate Court.

Appeal allowed.

(3) 28 A. 288.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 223 OF 1913.

April 8, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji.

LAL SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THE COLLECTOR OF ETAH—DEFENDANT—RESPONDENT.

U. P. Court of Wards Act (III of 1899), s. 48—Attachment of property in execution of decree—Objection—Suit—Notice.

A Court of Wards attached certain property in execution of a decree. The judgment-debtors objected to the attachment and sued for a declaration of their right without giving any notice to the Court of Wards under section 48 to the Court of Wards Act:

Held, that, as the suit did not relate to the person or property of the Ward, no notice to the Court of Wards was necessary.

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

Dr. *Satish Chandra Banerji*, for the Appellant.

Mr. *A. E. Ryves*, for the Respondent.

JUDGMENT.—This appeal arises out of the following circumstances. The Court of Wards, as representing the estate of the minor Raja Surajpal Singh, were putting into execution a decree which admittedly is the property of the Ward. In execution certain property was attached. The appellants objected to the attachment, but their objection was overruled whereupon the present suit was brought for a declaration that the property was not liable to attachment in execution of the decree. The Court of first instance dismissed the claim on the ground that no notice was given as provided by section 48 of the Court of Wards Act (III of 1899) which was then in force. The lower Appellate Court confirmed the decree of the Court of first instance.

Section 48 is as follows:—"No suit relating to the person or property of any Ward shall be instituted in any Civil Court until the expiration of two months after notice in writing has been delivered to or left at the office of the Collector in charge of the estate, stating the name and place of abode of the intending plaintiff, the cause of action, and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left." It is admitted that no such notice was served in this case. It is contended on behalf of the appellants that inasmuch as the suit did not relate to the person or property of the Ward notice was unnecessary. It seems to us that this contention is sound. In the present suit the validity of the decree which belongs to the Ward is not challenged. The property which is sought to be sold in execution of the decree admittedly does not belong to the Ward. Under these circumstances, in our opinion, the present suit does not relate either to the person or the property of the Ward and we think that a notice was, therefore, unnecessary.

We allow the appeal, set aside the decrees of both the Courts below and remand the case to the Court of first instance through the lower Appellate Court with directions to readmit it under its original number on the file and proceed to determine the same according to law. Costs here and hitherto will be costs in the cause.

Appeal decreed; Cause remanded.

NAGAR DAMODHARA SHANGHOG *v.* RAMAPPAYA.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 28 AND 37 OF 1911.

July 29, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.

IN No. 28 OF 1911.

NAGAR DAMODHARA SHANGHOG—PLAINTIFF—APPELLANT

versus

RAMAPPAYA AND OTHERS—DEFENDANTS—RESPONDENTS.

IN No. 37 OF 1911.

RAMAPPAYA AND ANOTHER—DEFENDANTS NOS. 1 AND 3—APPELLANTS

versus

NAGAR DAMODHARA SHANGHOG AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 4, 5, 8, 9, 27—RESPONDENTS.

Trust—Dedication of property, what constitutes—Share of income, whether can be dedicated—Charge on family property—Evidence.

In order to constitute a dedication, it is not necessary that any specific property should be set apart. A share of the income derivable from the family properties may be dedicated.

Where, therefore, a family owns a temple and appoints *poojaris* to carry on worship in the temple and spends a sufficient portion of the income from the family lands, the dedication is complete and the whole family property remains charged with the payment of the amount actually expended for carrying on the worship in the temple.

Appeal against the decree of the Court of the Temperariy Subordinate Judge of South Canara, in Original Suit No. 31 of 1909, (Original Suit No. 21 of 1908 on the file of the District Court).

IN No. 28 OF 1911.

Messrs. *M. C. Parthasarathy Aiyangar*, *K. Ramanath Shenai*, *K. P. Madhava Rao* and *K. P. Lakshmana Rao*, for the Appellant.

Mr. *K. Naraina Rao*, for the Respondents.

IN No. 37 OF 1911.

Mr. *K. Naraina Rao*, for the Appellants.

Messrs. *M. C. Parthasarathy Aiyangar*, *K. Ramnath Shenai*, *K. P. Madhava Rao* and *K. P. Laksmana Rao*, for the Respondents.

JUDGMENT.—The first question that arises for decision is, whether the Subordinate Judge is right in holding that the properties in suit are subject to a charge of 1400 *paras*.

It is found by the Subordinate Judge that the family owns the temple and that the daily *pooja* and the ceremonies are conducted out of the income of the family property. It is also found that 1400 *paras* at least is necessary to carry on the worship and the ceremonies. It is argued before us that as no specific property has been set apart, there is no endowment and the Subordinate Judge is, therefore, wrong in holding that there was a trust of charge for that amount in favour of the temple. It is not necessary that any specific property should be set apart. A share of the income derivable from the family properties may be dedicated. The family properties will then become subject to a charge for that amount and whoever takes the family properties by partition or alienation, will take it subject to that charge. Whether the amount has been set apart by the family is a question of fact to be decided upon the evidence. There is a *poojari* and the worship has been carried on for more than 50 years. In these circumstances we are unable to say that the Subordinate Judge was wrong in holding that the family have set apart 1400 *paras* for the ceremonies in the temple.

It was then contended that part of this amount consists of certain payments made in the family house itself and not in the temple. No such objection was taken in the lower Court. The Subordinate Judge's finding is that this amount is necessary to carry on the ceremonies in the temple and we are not satisfied that the finding is erroneous.

The Subordinate Judge also finds that certain debts are binding and others not binding. Both appeal against this finding. The creditors are not parties to this suit and in their absence, the question cannot be finally decided. We are, therefore, of opinion that the Subordinate Judge's decision on this point should be modified. We set aside his finding on the 6th issue and amend the decree by substituting with the consent of parties for paragraph 5 the following

"That the debts that may be due by the family be borne equally by the plaintiff and 1st defendant's branch".

We disallow the objections as to mesne profits. With this modification we confirm the decree. We think in the circumstances of the case that the parties should bear their own costs throughout.

Decree modified.

GOBIND RAO *v.* KAMTA PRASAD.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 656 OF 1913.

April 14, 1914.

Present:—Mr. Justice Rafique and Mr. Justice Piggott.

GOBIND RAO AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

KAMTA PRASAD—DECREE-HOLDER—RESPONDENT.

Bundelkhand Land Alienation Act (II of 1903), *s.* 9 *—Suit for foreclosure—Whether defendants members of agricultural tribe—Reference to Collector—Collector finding against defendants but refusing to take action under section* 9*—Case returned to Civil Court—Power of Civil Court—Decree absolute.*

In a suit for foreclosure of a mortgage by conditional sale the defendant pleaded that he was a member of an agricultural tribe. The Court, holding that this was a point to be considered after a preliminary decree for foreclosure had been passed, passed that decree. When the decree-holder applied for a decree absolute, the Court referred the case to the Collector under clause 3 of section 9 of the Bundelkhand Land Alienation Act. The Collector held that the judgment-debtor was not a member of an agricultural tribe. But the question being raised before him as to whether the decree-holder would not accept a mortgage for a term of years in lieu of a foreclosure decree, he made a note of the terms of the mortgage. The mortgage was executed by the judgment-debtor, but the decree-holder refused to accept it. The Collector thereupon returned the record to the Civil Court without taking any further action:

Held, that the Civil Court had no option but to continue the proceedings before it independently of the provisions of the Bundelkhand Land Alienation Act and to pass a decree absolute for foreclosure.

Execution second appeal from a decree of the District Judge of Jhansi.

The Hon'ble Pandit *Motilal Nehru*, for the Appellants.

The Hon'ble Dr. *Sundar Lal*, for the Respondent.

JUDGMENT.—This is a second appeal by certain judgment-debtors in an execution case. The suit in which the decree in question was passed was a suit for foreclosure on a mortgage by conditional sale dated the 11th of March 1877. There was a long array of defendants; but for the purposes of this appeal it is sufficient to say that the first defendant was the heir of the original mortgagor, whereas another set of defendants, who are now appellants before us, were the heirs of one Gopal Rao who acquired by a transfer subsequent to the mortgage of 1877 a portion of the equity of redemption. Before the Court in which the suit was instituted the defendants of both these sets pleaded that they were members of an agricultural tribe within the meaning of the Bundelkhand Land Alienation Act (Local Act II of 1903). The Court held that this was a point to be considered after a preliminary decree for foreclosure had been passed, and such a decree was passed on the 26th of January 1910. When the decree-holder applied for a decree absolute, the Court recorded an order to the effect that inasmuch as the judgment-debtors appeared to be members of an agricultural tribe, the case must be referred to the Collector under clause 3 of section 9 of the Bundelkhand Land Alienation Act. As regards the first defendant, the heir of the original mortgagor, his case has been dealt with by the Collector under the section above referred to and we are not concerned with it now. With respect to those judgment-debtors who represented the subsequent transferee, Gopal Rao, the Collector held that they were not members of an agricultural tribe within the meaning of the Act. It would seem, however, that a question was raised before the Collector as to whether the decree-holder would not accept a mortgage for a term of years from those judgment-debtors also, in lieu of enforcing his strict right to obtain a foreclosure decree. The Collector made a note of the terms on which the decree-holder was prepared to accept such a mortgage and gave these judgment-debtors one week's time within which to execute the same. They did not comply with this order, but appealed to the Commissioner against the decision of the Collector that they were not members of an agricultural tribe. The Commissioner apparently intended to hold that they were members of an agricultural tribe, but based his decision on the finding that when the judgment-debtors appeared before him they professed themselves willing to execute a usufructuary mortgage as directed by the Collector. He returned the record to the Collector with directions to "allow a mortgage to be given for twenty years as originally directed." The case having thus come back to the Collector's Court, the judgment-debtors in question did execute a mortgage; but the decree-holder took exception to the terms of that mortgage and refused to accept it. The Collector, thereupon, returned the record to the Civil Court without taking any further

action which can in any way be regarded as falling under the provisions of section 9 of the Bundelkhand Land Alienation Act. The question then arose in the Civil Court, whether the decree-holder could or could not be given a decree absolute for foreclosure in respect of the share of these judgment-debtors in the property originally mortgaged. The Court of first instance held that no such decree could be passed ; but this finding has been reversed by the District Judge on appeal and a decree for foreclosure passed. The appeal before us is against the order of the District Judge. We have been through the record and considered the arguments addressed to us. On behalf of the appellants we are asked to consider the question whether they should or should not be held to be members of an agricultural tribe under the Bundelkhand Land Alienation Act, and arguments are advanced in favour of the contention that they are so. The real question, however, is as to the effect of the Collector's order returning the record to the Civil Court. Rightly or wrongly the Collector has throughout adhered to the position that these particular judgment-debtors were not members of an agricultural tribe. He at no time put the decree-holder to the option provided by clause 2 of section 9 of the Act. He has in fact refused to allow these judgment-debtors the benefit of the Act. Under these circumstances the District Judge was right, in our opinion, in holding that the Civil Court had no option but to continue the proceedings before it independently of the provisions of the Bundelkhand Land Alienation Act. There was a conditional decree for foreclosure against these judgment-debtors, and the Collector, upon a reference duly made to him, has not passed any order which can be regarded as giving the judgment-debtors the benefit of the Bundelkhand Land Alienation Act. It follows that a decree absolute for foreclosure must inevitably be passed in respect of the share held by these judgment-debtors. We accordingly dismiss this appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2213 OF 1912.

July 23, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Napier.

KOTA BOLABHADRA PATRO—DEFENDANT No. 2—APPELLANT

versus

KHETRA DOSS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 35—Usufructuary mortgage by father—Decree against father—Joint possession with son—Partition, right of—Transfer of Property Act (IV of 1882), ss. 2, 44.

Where a usufructuary mortgage effected by a Hindu father was found valid only to the extent of his interest and a decree was passed in favour of the mortgagee for joint possession with the mortgagor's son, who objected on the ground that no such decree could be passed except in a suit for partition:

Held, Per *Oldfield, J.*, (*Napier, J.*, dissenting), that the mortgagee was not entitled to a decree placing him in possession under Order XXI, rule 35 (2), of the Code of Civil Procedure, but only to a decree declaring his rights to possession and entitling him to institute a suit for partition to recover it.

Deendyal Lal v *Jugdeep Narain Singh*, 3 C. 198 (P. C.); 1 C. L. R. 49, 4 I. A. 247; 3 Sar. P. C. J. 730; 3 Suth. P. C. J. 468; 1 Ind. Jur. 604, followed.

Per *Napier, J.*—The mortgage passing only the mortgagor's unascertained share, the mortgagee can only have a decree for common possession. Section 44 of the Transfer of Property Act provides for partition as a means of making the possessory right available and Order XXI, rule 35, provides a means of giving possession which will not injure another person who is also legally in possession.

Second appeal against the decree of the District Court of Ganjam, in Appeal Suit No. 3 of 1911, preferred against that of the District Munsif of Aska in Original Suit No. 966 of 1909.

Mr. *T. Prakasam*, for the Appellant.

Mr. *P. Nagabhushanam*, for the Respondents.

JUDGMENT.

OLDFIELD, J.—The lower Appellate Court has given a decree to the plaintiffs for joint possession with the 2nd defendant, the appellant, of the plaint lands, as regards the share of the 3rd defendant, the plaintiffs' mortgagor.

It is objected that no decree against the 3rd defendant's share should have been passed except in a suit for partition and that in any case the form of the decree appealed against is wrong.

The facts found by the lower Appellate Court were that the plaintiffs having obtained

a mortgage with possession from the 3rd defendant, the 2nd defendant's father, were prevented from enjoying the property by the latter and that the mortgage, being good to the extent of the 3rd defendant's share, must be enforced to that extent.

No exception has been taken in the appeal grounds to the absence of any finding as to the truth of the plaintiffs' allegations that they gave a lease to a tenant, who was ousted by the 2nd defendant, nor did they in fact allege that they were ever in physical possession. Nor is it material that the judgment under appeal contains references to the existence of one Narasu Patro, who may have a co-parcener's interest in the suit lands, in whose absence according to the 2nd defendant no decree affecting them could be given, for these references contain no definite finding as to Narasu's rights, regarding which there was no issue or pleading before the Court, and the 2nd defendant has never suggested hitherto that he should have been made party and does not suggest it in his grounds of appeal.

The decree against the share of the 3rd defendant, the executant of the suit document, stands on the same footing as other decrees made in suits to enforce an alienation of joint family property by which the share of the managing member alone is held bound on the ground that the legitimacy of the alienation is not established.

The remaining question is of the form of the decree, one for joint possession, executable (as the judgment specifies) by the procedure provided in Order XXI, rule 35, clause (2), of the Code of Civil Procedure. The possession which is obtainable under that rule is physical and would enable the plaintiffs to exercise all their rights as mortgagees, subject to those of the other joint tenants. It is urged that section 44 of the Transfer of Property Act which authorises the giving of such possession is controlled by section 2 of the Transfer of Property Act and cannot affect the rules of Hindu Law, amongst them those relating to the rights of an alienee of an undivided share of family property. That right has been held in a series of decisions, beginning with *Deodyal Lal* v. *Jugdeep Narain Singh* (1), not to extend to immediate recovery of possession, but only to a declaration and to recovery by means of partition proceedings. The share of which the plaintiffs are at present entitled to possession, that of the 3rd defendant, is unascertained. It may, no doubt, equitably be eventually ascertained as the land covered by their mortgage. But that it will be so cannot be said with certainty, until proper proceedings have taken place, in which any persons, with superior equitable claims, have had a chance of coming forward. In these circumstances, I would allow the appeal to the extent of substituting for the decree granted by the lower Court one declaring the plaintiffs' right to possession under their mortgage of the 3rd defendant's share in the plaint lands and their right to institute a partition suit to recover it. I would dismiss the appeal in other respects. In view of the extent to which the appeal has succeeded I would order that the appellant pay the respondents' costs.

(1) 3 C. 198 (P. C.); 1 C. L. R. 49, 4 I. A. 247; 3 Sar. P. C. J. 730; 3 South P. C. J. 468; 1 Ind. Jur. 604.

NAPIER, J.—The only point on which I disagree with my learned brother is as to the form of the decree that should be given in this suit. It seems to me that as usufructuary mortgagees their only right is to possession for the purpose of working out the amount due from the mortgagor. Not being in possession they are bound to ask for possession and cannot confine themselves to a suit for a declaration. If the mortgagor had owned the whole interest the plaintiffs would have got a decree for possession of the whole property. The mortgage only passing the mortgagor's unascertained share they can only have a decree for common possession. Section 44 of the Transfer of Property Act provides for partition as a means of making their possessory right available and Order XXI, rule 35, provides a means of giving possession which will not injure another person who is also legally in possession. In my opinion to hold otherwise would be to introduce a form of decree, that is, a declaratory decree unknown in suits by a mortgagee on a mortgage; for, it seems to follow that if in this case a declaration only can be given, in all suits by a usufructuary mortgagee to enforce his mortgage rights over a share this form of decree only could be given. I would dismiss this appeal with costs.

BY THE COURT.—The result is that the second appeal is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 121 OF 1913.

May 8, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

RAM SARUP SAHA—DEFENDANT—APPELLANT

versus

KARAM ULLAH KHAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Pre-emption—Price alleged to be paid fictitious—Evidence.

When it is alleged in a pre-emption suit that the sale-price is fictitious and put in the deed for defeating pre-emption, the pre-emptor, notwithstanding the evidence that the amount stated in the deed was paid before the Sub-Registrar, can show that the market-price is far below that stated in the sale-deed. But it is open to the vendee to show the circumstances why he was ready to give and did give the actual price mentioned in the deed

Second appeal from a decree of the Additional District Judge of Gorakhpur, at Basti.

Mr. *Haribans Sahai*, for the Appellant.

Mr. *Muhammad Ishaq*, for the Respondents.

JUDGMENT.—The only question in this appeal is that of consideration. The consideration according to the sale-deed was Rs. 399. Evidence was given in the Court below to show that the market-value put at the very highest would not amount to Rs. 200. So far as the finding of the lower Appellate Court is a finding of fact as to the consideration, it is binding upon us in second appeal.

It is argued, however, on behalf of the appellant that as Rs. 399 was actually paid before the Sub-Registrar and inasmuch as there was no evidence that any of this sum was given back, the Court was bound to hold that that was the true consideration. Reliance is placed upon the case of *O'Conor* v. *Ghulam Haidar* (1). This ruling is, in our opinion, contrary to a series of rulings

(1) 28 A. 617.; 3 A. L. J. 365; A. W. N. (1906) 155.

of this High Court, and was expressly dissented from in the case of *Abdul Majid* v. *Amolak* (2). In our opinion when it is alleged that the sale price is fictitious and put into the deed for the purpose of defeating pre-emption, it is open to the pre-emptor to give evidence to show that the market-price is far below that stated in the sale-deed. If he gives such evidence to the satisfaction of the Court, the latter is quite justified in arriving at its own conclusion as to what is the real consideration, and this notwithstanding that it is proved that the amount stated in the deed was paid before the Sub-Registrar. It is, of course, open to the vendee to show that there were special circumstances why he was ready to give and did give the actual price mentioned in the deed.

We dismiss the appeal with costs.

Appeal dismissed.

(2) 29 A. 618, 4 A. L. J 531; A. W. N. (1907) 202.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL NO. 37 OF 1913.

January 19, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C.

RAM DAYAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

SARJU PRASAD—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s 14—Under-valuation of property, if not deliberate, reckless or mala fide, whether ground for exclusion of time.

The plaintiff instituted a suit for pre-emption in respect of a sale-deed executed for an alleged consideration of Rs. 2,000. The plaintiff valued his claim at Rs. 400, but subsequently admitted that the market-value of the disputed property was Rs. 1,000. The Sub-Judge, relying on the plaintiff's statement, returned the plaint for presentation to the proper Court and it was presented on the same day in the Court of the Munsif.

Held, that as there was nothing to show a deliberate or reckless under-valuation of the property in order to secure some improper advantage or a *mala fide* desire to institute the suit in a wrong Court, section 14 of the Limitation Act applied to the case and the plaintiff was entitled to the exclusion of the time during which he had been prosecuting the proceedings in the Court of the Sub-Judge.

Appeal against the order of the Sub-Judge, Kheri, dated 18th June 1913, reversing

that of the Munsif, Kheri, dated 1st March 1913.

Babu *Rudra Dutta Sinha*, for the Appellants.

Babu *Ishwari Prasad*, for the Respondent.

JUDGMENT.—This was a suit for pre-emption and was originally instituted in the Court of the Subordinate Judge of Kheri. The plaintiff then valued his claim at Rs. 400, but subsequently admitted that the market-value of the disputed property was Rs. 1,000. The consideration entered in the sale-deed, which gave rise to the suit for pre-emption, was Rs. 2,000. The Subordinate Judge, relying on the statement of the plaintiff, returned the plaint for presentation to the proper Court on the 20th June 1912, without recording any finding as to the actual market-value of the disputed property. The plaintiff thereafter presented the plaint on the same day in the Court of the Munsif of Kheri, who dismissed the suit on the ground that section 14 of the Indian Limitation Act did not save limitation and that the claim was barred by time. The lower Appellate Court reversed that order and remanded the case to the Court of first instance for a trial on the merits.

I see no reason to disturb that order. In suits for possession the value of the subject-matter of the suit is the value of the property claimed, but in suits for pre-emption the determination of the actual value is always a matter of some difficulty. The consideration mentioned in the sale-deed is very often inflated to defeat pre-emption. There is nothing in this case to show that there was a deliberate or reckless under-valuation of the property in order to secure some improper advantage, for the Court-fee did not vary and was payable on five times the revenue.

In *Ramjiwan Mal* v. *Chand Mal* (1) it was held by Straight and Mahmood, JJ., that section 14 of the Indian Limitation Act applied where, from a *bona fide* mistake of fact, the suitor was misled into litigating in a wrong Court; and in *Brij Mohan Das* v. *Mamm Bibi* (2) a Full Bench of the Allahabad High Court laid down that that section was wide enough to cover cases where a plaintiff was prosecuting his suit in a wrong Court in consequence of a *bona fide* mistake of law. The plaintiff in the present case was obviously misled by the consideration entered in the sale-deed and thought it safer to institute the suit in a higher Court, lest the consideration actually paid may be found to be higher than what was alleged by him in the plaint.

In *Thakur Seodat Singh* v. *Bishunath Singh* (3) Chamier, A. J. C., observed that in suits for pre-emption the plaintiff's valuation determined the *forum* except in cases where it was proved that the plaintiff had misrepresented the true value with the intention of getting a trial in a different Court from that intended by the Legislature or had acted recklessly in valuing his suit or had adopted a wrong method of valuation. In *Madho Das* v. *Ramji Patak* (4) Edge, C. J., and Banerji, J., foresaw the difficulty which would arise in suits for pre-emption in regard to the above matter, and said: "Take, for instance, a suit for pre-emption. The plaintiff brings his suit, for example, in the Court of a Munsif claiming pre-emption at a price of Rs. 700, honestly believing that that was the sale price and honestly, so far as he was concerned, alleging that the price in the sale-deed of Rs. 1,500 was false and fictitious. Now it appears to us that in that suit the Munsif would have jurisdiction to decree pre-emption at a price of Rs. 1,500, if he found that the price alleged in the sale-deed was the true price, and that his jurisdiction to make a decree would not be ousted by that finding. If it were not so, see what the result might be. The Munsif would return the plaint to be presented in the Court of the Subordinate Judge. The Subordinate Judge taking a different view of the evidence might come to the conclusion that Rs. 1,500, the price alleged in the sale-deed, was a fraudulent and fictitious price, and that the true price was that alleged by the plaintiff, *viz.*, Rs. 700. If the argument of the defendant in this case is correct, the Subordinate Judge in such a case would have to return the plaint to the plaintiff, so that he might comply with section 15 of the Code of Civil Procedure by presenting his plaint again in the Court of lowest jurisdiction, namely, in the Court of the Munsif, who had held previously that he had

(1) 10 A. 587; A. W. N. (1888) 258.
(2) 19 A. 348 (F. B.); A. W. N. (1897) 86
(3) 6 O. C. 255.
(4) 16 A. 286 at p. 289; A. W. N. (1894) 84.

no jurisdiction." The defendants-vendees have urged in this case that the property is worth Rs. 2,000 and was sold for that sum. The Courts below have not yet determined or recorded a finding as to the true value of the property.

A *mala fide* desire to institute the suit in a wrong Court cannot, therefore, be attributed to the plaintiff, and, as held in a very similar case by Banerji and Tudball, JJ. [*Jadu Rai* v. *Ganesh Parashad* (5)], section 14 of the Indian Limitation Act applies, and the plaintiff is entitled to the exclusion of the time during which he had been prosecuting the proceedings in the Court of the Subordinate Judge.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(5) 3 Ind. Cas. 79; 6 A. L. J. 741.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 138 OF 1913.

May 8, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

KEDAR NATH—PLAINTIFF—APPELLANT

versus

SOHAN LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Easements Act (V of 1882), s. 15—User—Interruption—Period of 20 years—Period prior to interruption, whether can be added.

Where the user is interrupted, the user for a further full period of twenty years must be shown in order to establish a right of easement under section 15 of the Easements Act. The period of user prior to the interruption cannot be added on.

Letters Patent Appeal from the following judgment of

RYVES, J.—In this case it has been found by the lower Appellate Court that for more than twenty years before suit the water from the defendant's house has flowed through a particular channel which the plaintiff seeks to close. The learned Additional Subordinate Judge goes on to say:—"I inspected the locality and in fact it is admitted that there is no other outlet for the defendants to flow their water." It seems to me that these findings of fact are conclusive, and the result is that the appeal fails and is dismissed with costs.

Mr. *J. M. Banerji*, (for Dr. *Satish Chandra Banerji*), for the Appellant.

Mr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff claims an injunction to restrain the defendants from causing water to flow through the plaintiff's premises. The defence was a right of easement by prescription. It was necessary for the defendants to show that the right of easement claimed had been peaceably and openly enjoyed without interruption for a period of 20 years. The Court of first instance decreed the plaintiff's claim. The lower Appellate Court reversed the decree of the Court of first instance holding that the defendant had a right of easement. The learned Judge of this Court held that the decision of the lower Appellate Court was a finding of fact and dismissed the appeal.

No doubt so far as the decision of the lower Appellate Court rested on a finding of fact, it is binding on this Court in second appeal. We find, however, that in the year 1894 the predecessor-in-title of the defendants brought a suit claiming that the flow of the water had been interfered with by the present plaintiff or his predecessor-in-title. It is true that in the main the plaintiff in that case rested his claim on his own ownership of certain land as entitling him to discharge the water. The Court of first instance held against him. On appeal he urged that even if he was not the owner of the property, he had a right of easement. The lower Appellate Court confirmed the Court of first instance and further held that enjoyment had not been proved for a sufficient period to establish a right of easement. The decision was affirmed by the High Court.

It is absolutely clear to us that in 1894 and during the entire period during which that litigation was proceeding, that is up to the 3rd of July 1896, the defendant or his predecessor-in-title was certainly not "quietly, peaceably and without interruption" enjoying the right he claims. The learned Subordinate Judge says: "Of course there is an observation in the judgment of the Hon'ble High Court that the plaintiff

had failed to prove the flow of water for 20 years. It may have been so then, but some 17 years have now gone by and the deficiency, if there was any, has been amply made good." We need hardly point out that if the user is interrupted, it is necessary to show a further full period of 20 years in order to establish a right of easement under section 15 of the Easements Act. It is impossible to add on to the period of user proved any time prior to the interruption.

We must allow the appeal, set aside the decree of this Court and the lower Appellate Court and restore the decree of the Court of first instance with costs.

Appeal allowed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 76 OF 1913.

June 12, 1914.

Present:—Mr. Justice Beaman and Mr. Justice Hayward.

BANDOO KRISHNA KULKARNI—PLAINTIFF—APPELLANT

versus

NARSINGRAO KONHERRAO DESHPANDE—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 37- Execution of decree - Court of Wards made party to execution proceedings—Competency of Court to proceed with execution.

The Court passing a decree has jurisdiction to proceed with its execution, notwithstanding that after the decree the Court of Wards becomes a party to the execution proceedings.

First appeal from the decision of the First Class Subordinate Judge, at Belgaum, in Darkhast No. 443 of 1909.

Mr. *Jayant G. Rele*, for the Appellant.

Mr. *Nilkanth Atmaram*, for the Respondent.

JUDGMENT.—The only question arising in this first appeal is whether the Court of the Subordinate Judge had jurisdiction to proceed with the execution of its own decree. When the suit was instituted no Government servant was a party to it, and it was not until after the decree that the Court of Wards was added. In terms, therefore, section 32 of the Civil Courts Act does not apply. But it is contended in-

ferentially with reference to section 37 of the Civil Procedure Code that where a party is added in execution, who, had he been a party when the suit wherein the decree was passed was instituted, would have deprived the Court of its jurisdiction, that Court ceases to have jurisdiction for all purposes of executing its own decree. That contention gained some colour from section 37. But we find that the facts here cannot be distinguished in any material particular from the facts in *Gopal Apaji* v. *Kesharrao Konherrao*, First Appeal No. 29 of 1913, decided by Scott, C. J., on 30th September 1913, where a Bench of this Court decided that the Court which passed the decree had jurisdiction to proceed with the execution, notwithstanding that after the decree the Court of Wards had become a party to the execution proceedings. And we see no reason to doubt that that case was correctly decided, nor why, by giving a different decision here on the same facts, we should encourage uncertainty and a conflict of opinion. We, therefore, think that the present appeal must be allowed, and the Court below be directed to proceed with the execution of the decree. The appellant must have the costs of this appeal.

Appeal allowed.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER No. 571 OF 1912.

January 28, 1913.

Present:—Mr. Justice Chitty and Mr. Justice Teunon.

KUMAR SATYA NARAIN SINGH, MINOR, BY HIS NEXT FRIEND AND UNCLE, SASI BHUSHAN SINGH—PLAINTIFF—APPELLANT

versus

Srimati Rani KESHABATI KUMARI, DEFENDANT 1ST PARTY, WHO APPEARED, AND GAJADHAR PRASAD SINGH AND CHANDRA DAYAL BARMAN, DEFENDANTS 2ND PARTY AND DEVSI HIRJI, DEFENDANT 3RD PARTY, WHO DID NOT APPEAR IN THIS APPEAL—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XL, r. 1 (2)—Party in possession of property in dispute—Gross mismanagement—Waste—Receiver.

SATYA NARAIN SINGH *v.* KESHABATI KUMARI.

Order XL, rule 1 (2), of the Civil Procedure Code, 1908, refers to a case of removal of property from the possession or custody of a person other than the parties to the suit. But as between the parties to a suit in which the main question is, who is entitled to the immediate possession of the subject-matter of the suit, there is no bar to the appointment of a Receiver, if a proper case is made out for the appointment.

The only object and effect of appointing a Receiver should be to maintain the property in its present condition pending the litigation, and for that period, at any rate, to avoid further waste.

Where it was clearly proved that the estate was being grossly mismanaged and that if the management continued the whole estate would be jeopardized:

Held, that a clear case for the appointment of a Receiver was made out.

Appeal against the order of the Subordinate Judge of Zillah Sonthal Parganas, dated the 6th of November 1912.

Dr. *Rash Behary Ghosh* (with Babus *Mahendranath Roy*, *Hemendranath Sen*, *Sarat Chandra Mukerjee* and *Sachidananda Gupta*), for the Appellant.

Messrs. *S. P. Sinha* and *B. C. Mitra*, Counsel, (with Babus *Lachmi Narain Singha* and *Gunada Charan Sen*), for the Respondents.

JUDGMENT.—This is an appeal from an order of the Subordinate Judge of Dumka rejecting the plaintiff's application for the appointment of a Receiver. The plaintiff, who is still a minor, has by his next friend brought this suit for construction of a document purporting to be the Will of his father, Raja Udit Narain Singh, for a declaration that two documents, dated 8th March 1898 and 14th August 1905, respectively, are void and inoperative, so far as they purport to curtail the plaintiff's rights, and for possession of the properties left by his deceased father. The plaintiff also asks for administration of his father's estate, for the appointment of a Receiver and for an injunction restraining the defendants from dealing with the estate. The defendants are Rani Keshabati Kumari, widow of Raja Udit Narain Singh, Gajadhar Parshad Singh and Chandra Doyal Baram, whom defendant No. 1 purported to appoint trustees by the deed of 14th August 1905, and Devsi Hirji who has taken a lease of the forests on the estate from defendant No. 1.

Raja Udit Narain Singh died on 10th April 1896. On 8th March 1898, his widow adopted the plaintiff. The plaintiff is now about 19 years of age. As the plaintiff is under guardianship, he will not attain majority until he is 21 years of age. The estate left by Raja Udit Narain is valued at about rupees 26 lakhs. The net annual income is admittedly well over rupees 1 lakh. The main grounds put forward by the plaintiff for the appointment of a Receiver are (1) that the defendant No. 1 is a *purdanashin* lady of little education, entirely incapable of managing the estate herself; (2) that the estate is in fact being grossly mismanaged by defendant No. 1 in conjunction with the other defendants; (3) that in particular, defendant No. 1 has granted to defendant No. 4 a lease for cutting timber from the forest for railway sleepers, which is quite improvident and against the interest of the estate, and (4) that defendant No. 1 has been and still is borrowing recklessly and at exorbitant rates of interest to such an extent as to endanger the estate. The Subordinate Judge has found that the case of mismanagement, particularly in the matter of the dismissal and subsequent re-employment of Mr. Falkner, has been made out against defendant No. 1; that the charge of reckless borrowing at what he terms "illegal" interest has been proved; and that the whole situation is one of confusion. He, however, considers himself helpless by reason of certain rules of law which, in his opinion, prevent the Court from appointing a Receiver in this case. The learned Subordinate Judge is, we think, in error in the view that he takes of the law. Order XL, rule 1 (2), for instance, clearly refers to a case of removal of property from the possession or custody of a person other than the parties to the suit. Here one of the main questions in the case is whether the plaintiff is entitled to immediate possession against defendant No. 1, or whether she is entitled to retain possession for her life.

Nor is there any necessity to prejudge the case in any way by appointing a Receiver, the only object and effect of so doing should be to maintain the estate in its present condition pending the suit and for that period at any rate to avoid further waste.

We have carefully perused the evidence tendered on this application and heard the arguments of Counsel for defendant No. 1 against the appointment of a Receiver. We are of opinion that a clear case has been made out for such appointment. There has

been and still is gross mismanagement of the estate by defendant No. 1, and if the present state of things be allowed to continue the whole estate will be jeopardized. It was argued that defendant No. 1 had borrowed only on personal security and had not so far charged the estate. If, however, she borrows in such reckless fashion as to absorb the whole legitimate income of the estate, it is obvious that the estate itself will immediately suffer. It cannot much longer be kept intact. We do not think that any useful purpose would be served by discussing in detail the facts disclosed in the several affidavits. No satisfactory reply has been vouchsafed by defendant No. 1 or rather by those who profess to be looking after her affairs to the specific charges put forward on behalf of the plaintiff. We accordingly allow this appeal and direct that a Receiver be appointed as prayed by the plaintiff.

An application was made to the Vacation Bench by defendant No. 1 for the transfer of this suit to the original side of this Court. That application was refused, mainly as it was obviously made to obstruct or delay the present application for a Receiver. Further, it was considered unnecessary and inexpedient to remove it to this Court. Now, however, both sides agree that it would be well to transfer the case to another district, that the trial may be held before a Subordinate Judge of more experience. We agree in this view and order accordingly that the suit be transferred to the Court of the first Subordinate Judge of Bhagalpur for disposal.

We think that it is advisable that this Court should nominate the Receiver at once and thus prevent further delay in this matter. Of the various names suggested that of Babu Murli Lal appears to us to be most suitable. He is a wealthy man, resides in Bhagalpur and appears to be a good man of business. He is also willing to give the requisite security which in this case will be large. We accordingly appoint Babu Murli Lal as the Receiver in this case subject to his furnishing security to the extent of a lakh of rupees to the satisfaction of the Subordinate Judge of Bhagalpur. We confer on the Receiver such powers as are contained in Order XL, rule 1 (*d*), of the Code of Civil Procedure. We fix his remuneration at 10 per cent. on the gross collections, such percentage to cover all charges for collections, establishment and the Receiver's remuneration but not the costs of actual litigation.

Costs of this appeal must be costs in the case. We fix the hearing fee at 10 gold *mohurs*.

Let the record be sent down at once.

Appeal allowed.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 37 OF 1913.

April 3, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

KISHUN SAHAI—PLAINTIFF—APPELLANT

versus

GANGA BUX AND ANOTHER—DEFENDANTS—RESPONDENTS.

Practice—Defendant's plea not stated in written statement but contained in robkai *drawn up at first hearing, whether can be considered.*

In a suit for defendant's ejectment from a house the defendant did not allege in his written statement that he had built the house with the license of the plaintiff. However, a *robkar* was drawn up at the first hearing wherein the defendant said that the plaintiff had permitted him to occupy the land fifteen years before the suit in lieu of service rendered by him and that the defendant had erected some buildings on the land:

Held, that the plea raised in the *robkar* could be considered by Courts.

Letters Patent Appeal from the following judgment of

GRIFFIN, J.—This appeal arises out of a suit instituted by the plaintiff, a *zemindar*, against the defendants for ejectment from a house in their occupation and to recover rent. The plaintiff alleged that the defendants had signed a *kirayanama* in his favour. The Court of first instance found that the defendants executed a *kirayanama* without understanding its nature, held that the defendants were not liable for rent but should be ejected as licensees from the house. Both parties appealed, with the result that the defendants' appeal succeeded and the plaintiff's suit was dismissed *in toto*. The lower Appellate Court held that the defendants were not liable to ejectment by reason of the

fact that they as licensees of the plaintiff had erected on the land made over to them by the plaintiff certain buildings of a permanent nature. In appeal it is contended that the Court below has gone wrong in applying section 60 of the Easements Act to the case, inasmuch as the defendants had not alleged that they had built with the license of the plaintiff. The plaintiff takes his stand on the written statement put in by the defendants. On behalf of the latter it is pointed out that on the first hearing a *robkar* was drawn up in which the defendants stated that the plaintiff had allowed them to occupy the land fifteen years before the suit in lieu of service rendered by them and that the defendants had erected some buildings on the land. This was the *robkar* which, no doubt, the lower Appellate Court had in mind when he set out the pleadings of the defendants. There was evidence to support the defendants' plea and on that evidence he has found in favour of the defendants. On the finding of the Court below it appears to me that the lower Appellate Court was right in the decision it has arrived at. I dismiss this appeal with costs.

Mr. *Hamilton*, for the Appellant.

Mr. *Shafi-uz-zaman*, for the Respondents.

JUDGMENT.—We agree with the view taken by the learned Judge of this Court and dismiss the appeal with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECTION 115 APPLICATION NO. 18 OF 1914.

April 24, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C.

LACHMAN DAS—PLAINTIFF—APPELLANT

versus

NARAIN—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 23—Agreements to stifle prosecution in respect of offence of public nature, validity of—Compromise in respect of offences of public nature but involving civil liability to injured party, validity of.

An agreement to stifle a prosecution in respect of an offence of a public nature is against public policy and illegal. Agreements of that class, being founded upon the suppression of criminal offences, have a tendency to subvert public justice, and it is a well-recognised rule that a person who has a public duty to perform should not be allowed to cause public injury in order to make a profit for himself. But there is no obligation on a person to forego his private rights and in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are of a public nature, to compromise or settle his private damage in any way he may think fit.

Where the consideration for a promise is to abstain from or withdraw a criminal prosecution for a non-compoundable offence, the promise cannot be enforced. But in cases like those of criminal breach of trust or embezzlement where there is always a civil liability, a bond can be taken in acknowledgment of that civil liability, provided the stifling of the prosecution forms no part of the consideration.

Appeal against the order of the Additional Judge of the Court of Small Causes, Lucknow, dated 13th January 1914.

JUDGMENT.—This was a suit for the recovery of money due on a bond executed by the defendant. The defendant pleaded that the bond in suit was obtained from him by undue influence and that he had not received the consideration. It appears that the defendant was in the service of the plaintiff and that the plaintiff suspected and believed the defendant to have abstracted a gold chain worth Rs. 76 from a bundle given to him to be carried. He filed a complaint against him under section 408 of the Indian Penal Code which was eventually withdrawn on the defendant executing a bond for Rs. 40 on account of the value of the article misappropriated.

The learned Judge of the Court below found that the bond was executed for consideration and was not obtained by undue influence, but could not be enforced because the object of its execution was to compound an offence.

An agreement to stifle a prosecution in respect of an offence of a public nature is against public policy and illegal, because the effect of it is to take the administration of the law out of the hands of Judges and to put it in the hands of a private individual [*Collins* v. *Blantern*(1)]. Agreements of that class, being founded upon the suppression of criminal prosecution, have a tendency to subvert public justice, and it is a well-recognized rule that a person who has a public duty to perform should not be allowed to cause public injury in order to make a profit for himself [*Windhill Local Board of Health* v. *Vint* (2)]. But

(1) 1 Sm. L. C., 11th Ed. at p. 369; 2 Wils. 341.

(2) 45 Ch. D. 351; 59 L. J. Ch. 608; 63 L. T. 366; 38 W. R. 738.

there is no obligation on a person to forego his private rights, and as observed by Tindal, C. J., in *Keir* v. *Leeman* (3), in all offences which involve damages to an injured party, for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit.

An offence punishable under section 408 of the Indian Penal Code has been declared by section 345 of the Criminal Procedure Code to be non-compoundable, and illustration (*i*) appended to section 23 of the Contract Act shows that where the consideration for a promise is to abstain from or withdraw a criminal prosecution for such an offence, the promise cannot be enforced [cf. *Dalsukhram* v. *Charles Debrettom* (4) and *Srirangachariar* v. *Ramasami* (5)].

In *Kessowji* v. *Hurjivan Mulji* (6) it was accordingly held that a guarantee taken from a third party for the payment to creditors of the debts due to them in consideration of the creditors abstaining from taking criminal proceedings against the debtor was void as against public policy; but a man to whom a civil debt was due could take securities for that debt from his debtor, even though the debt arose out of a criminal offence and a prosecution was threatened, provided he did not in consideration of such security agree not to prosecute and such an agreement would not be inferred from the creditors using strong language.

In *Jai Kumar* v. *Gauri Nath* (7) Stanley, C. J., and Knox, J., held that where a *bona fide* debt existed and the transaction between the parties involved a civil liability as well as possibly a criminal act, a promissory note given by a debtor constituted a valid agreement.

In cases of criminal breach of trust or embezzlement, there is always a civil liability and a bond can be taken in acknowledgment of that civil liability, provided the stifling of the prosecution forms no part of the consideration. The margin of difference is sometimes very narrow, specially where the amount for which a bond is taken does not exceed the amount due. But there is nothing in law or equity to disqualify a debtor from entering into a settlement about the amount due by him or admitted to have been embezzled, though a prosecution may be pending against him in respect of the same. The business of the Criminal Court is to refuse to allow a withdrawal, if the offence is non-compoundable.

In *Nanak Chand* v. *Durant* (8) the Punjab Chief Court held that it was not unlawful for a master to take a pro-note from a servant or agent for amounts found to have been embezzled by the latter, that a mere threat of a prosecution would not invalidate it and that it became unlawful or invalid only when the consideration therefor, wholly or partially, was an agreement not to prosecute. In *Sheikh Najebar Rahman* v. *Syed Muktashed Husain* (9) Carnduff, J., held that an agreement to pay the amount embezzled in regard to which a criminal prosecution was pending, with the object of obtaining a withdrawal of a prosecution, not compoundable, was not legally enforceable, though the compromise was suggested by the Magistrate himself, but Chapman, J., confined his judgment to the ground that the consideration of the bond was found by the lower Court to be a promise to withdraw from the prosecution in the case. In *Flower* v. *Sadler* (10) it was held by the Court of Appeal that in order to render illegal the receipt of securities by a creditor from his debtor, where the debt had been contracted under circumstances which might render the debtor liable to criminal proceedings, it was not enough to show that the creditor was thereby induced to abstain from proceeding. Where a debt is actually due or a civil liability is otherwise enforceable, there is nothing illegal in the creditor obtaining payment or the debtor promising to make payment or discharge the liability, provided no improper means are used for the purpose. The consideration of the bond in suit in this case was the liability incurred by the breach of trust to make good the value.

The application is, therefore, allowed, and the plaintiff's claim decreed with costs here and below. The defendant will bear his own costs throughout.

Application allowed.

(3) 9 Q.B. 371 at p. 395; 72 R.R. 298 at p. 311; 15 L J. Q. B. 359; 10 Jur. 742; 115 E. R. 1315; 72 R R. 298.
(4) 28 B. 326; 6 Bom. L. R. 73.
(5) 18 M. 189; 4 M. L. J. 106.
(6) 11 B. 566.
(7) 28 A. 718; 3 A. L. J. 506; A. W. N. (1906) 212.
(8) 9 P. R. 1906; 19 P. L. R. 1906.
(9) 15 Ind. Cas. 259; 16 C. W. N. 854; 40 C. 113.
(10) (1882) 10 Q. B. D. 572; 46 J. P. 503.

BAI FATMA *v.* RANDER MUNICIPALITY.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 383 OF 1913.

March 4, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Davar.

BAI FATMA—PLAINTIFF—APPELLANT

versus

THE RANDER MUNICIPALITY—DEFENDANT—RESPONDENT.

Bombay District Municipal Act (III of 1901*), s.* 92*—Requiring to keep open space in re-building—Improvement of public road—No regular line determined—Set-back not obtainable—Owner's right to re-build in spite of condition to set back.*

On an application under the Bombay District Municipal Act, III of 1901, for permission to re-build a house, the permit was granted subject to the condition of keeping an open space so as to leave a width of road considerably more than the width of the public road at that locality for the improvement of the said public road. No regular line had been determined either for the existing street or for the future as contemplated in section 92 of the Act:

Held, that under the circumstances a set-back could not be obtained under section 92 and that the owner of the house was entitled to an injunction restraining the Municipality from pulling down the house built in contravention of the condition laid down by it.

Second appeal from the decision of the District Judge of Surat, confirming that of the Subordinate Judge of Surat.

Mr. *Inverarity* (with him Mr. *Manubhai Nanabhai*), for the Appellant.

Mr. *Strangman*, Advocate-General, (with him Mr. *M. K. Mehta*), for the Respondent.

JUDGMENT.—The plaintiff being the owner of a house in Rander applied to the Municipality for permission to re-build it on the 25th of April 1911. The Municipality in reply to her application on the 5th of June 1911 prescribed conditions, presumably under section 96 (2) of the District Municipal Act. The permit was granted to her, subject to conditions noted on the back, for pulling down the building and building a new building on the land by keeping a space so as to leave a width of road 14 feet and a half on the south side of the building, in pursuance of the order passed by the Managing Committee on the 6th of May 1911, and the first condition of the permit is that "For the improvement of the said road you must leave on that side a space in length and in width 14 feet and build the house," and the 7th condition states: "As your building stands on the public road you should take precautions to see that the water from your roof does not fall upon persons passing by that way."

Now the public road at the time of the permit was considerably less than 14 feet, namely, 8 feet 4 inches. The power of the Municipality under the section to prescribe the location of the building is given in relation to 'any street existing or projected as they think proper.' They have prescribed the location of the building in relation, not to the existing street, but to a street which may come into existence in the future. But we do not think that on the admitted facts it can be said that there is a projected street 14 feet in width, for there is no regular line determined either for the existing street or for the future as contemplated in section 92. The permit clearly shows that the first condition is not for the purpose of sanitation or for the purpose of ventilation, but simply for the improvement of the street by widening it, and the object is to get a set-back which cannot be obtained under section 92, because the conditions contemplated in that section do not yet exist. The result is that if the condition of the permit were complied with the plaintiff would have to give up or keep vacant and unproductive a considerable portion of her land, and the Municipality would have the opportunity of paying compensation for it at any time they might feel disposed to do so, which would be contrary to the provisions of section 92 which contemplate that when a set-back is determined upon, compensatian shall be paid to the owner. The case is very similar to *Queen-Empress* v. *Veerammal* (1).

We think that the plaintiff is entitled to the relief which she prays, namely, an injunction restraining the defendants from pulling down the building or any portion thereof, or from putting in force their notice of the 12th of September 1911. The defendants must pay the costs throughout. The decree of the lower Appellate Court is set aside.

Decree set aside.

(1) 16 M. 230; 1 Weir 733.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1075 OF 1912.

April 20, 1914.

Present:—Justice Sir P. C. Banerji, KT.

CHIRAUNJI LAL—PLAINTIFF — APPELLANT

versus

KALLO AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 90—Document not 30 years old when produced, but 30 years old when evidence taken—Genuineness, presumption of.

There is no presumption as to the genuineness of a document which was not 30 years old at the time when it was produced, though it was 30 years old when the case was tried and the evidence was recorded.

Second appeal from the Additional Subordinate Judge of Aligarh.

Mr. *Haidar*, for the Appellant.

Mr. *Ibn-i-Ahmad*, for the Respondents.

JUDGMENT.—This was a suit to eject the defendants from certain houses which the plaintiff claimed to be his property and in regard to which he alleged that the defendants were his tenants but had denied his title. The defendants stated that the property did not belong to the plaintiff, that they were never the tenants of the plaintiff. In support of his claim the plaintiff produced a *kirayanama*, *i. e.*, an agreement to pay rent, dated the 29th July 1881. This document was produced along with the plaint. The suit was finally fixed for hearing on the 15th of June 1911, the previous date fixed for hearing being the 8th of May 1911, but it was dismissed for default of appearance. On that date the document was not 30 years old. The suit was restored but was again dismissed for default of appearance. This dismissal was subsequently set aside and the case was heard on the merits. The plaintiff examined witnesses to prove the document. The Court of first instance apparently did not believe the witnesses, because it relied upon the presumption which arises under section 90 of the Evidence Act in respect of a document more than 30 years old. It accordingly decreed the claim. On appeal the lower Appellate Court set aside the decree of the Court of first instance upon the findings that the plaintiff had failed to prove the title of himself and his predecessor in respect of the property in suit, that the *kirayanama* had not been proved to be genuine and that it had not been proved that the defendant ever paid rent to the plaintiff. The learned Subordinate Judge disbelieved the whole of the plaintiff's evidence.

It is contended in this second appeal that the lower Appellate Court ought to have presumed the document to be genuine under section 90 of the Evidence Act. Under that section the Court has a discretion. In this case, as stated above, when the document was produced it was not 30 years old. Furthermore the plaintiff brought forward evidence to prove it and that evidence has been disbelieved by the lower Appellate Court. Under these circumstances that Court was justified in not presuming the document to be genuine simply because it purported to be 30 years old at the time when the case was tried and the evidence was recorded. Besides this, the findings of the lower Appellate Court to which I have referred above are adverse to the plaintiff. They may be right or they may be wrong, but being findings of fact, are binding on this Court in second appeal.

This appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1602 OF 1912.

April 29, 1914.

Present:—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

GADIPARTHI PEDA SUBBAYYA AND OTHERS—DEFENDANTS—APPELLANTS

versus

CHIRUMAMELLA LAKSHMIDEVAMMA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Property given to Hindu widow by husband's relations without retention of reversionary interest—Succession—Descent, mode of.

Where a document executed by a widow's husband's brother's sons recites that "neither we nor our heirs will have any objection to your dealing as you please with the one-third share allotted to you," it clearly indicates that the executants do not intend to retain anything in the nature of a reversion in the property given.

Such property passes on the widow's death to her daughters, and on the death of a daughter, passes on to the survivor, and a suit

for possession by a granddaughter during the life-time of the other daughter will not lie.

Venkataramkrishna Rau v. *Bhujanga Rau*, 19 M. 107; 6 M. L. J. 16, followed.

Second appeal against the decree of the District Court of Guntur, in Appeal Suit No. 450 of 1911, preferred against that of the Additional District Munsif of Guntur, in Original Suit No. 135 of 1910.

Mr. *P. Venkataramana Row*, for the Appellants.

Mr. *B. Somayya*, for Mr. *P. Narayanamurthi*, for the Respondents.

JUDGMENT.

MILLER, J.—The nature and extent of the estate taken by Peramma in items 1, 2 and 8 of the schedule to the plaint, the property with which we are concerned, is to be ascertained on a construction of Exhibit A, an instrument by which, on her husband's death, his brother's sons, the 17th and 18th defendants, gave her one-third of his property. I do not think there can be much doubt that on the true construction of that document she became absolutely entitled to the property given to her: the expression "neither we nor our heirs will have any objection to your dealing as you please with the one-third share allotted to you"—this, I think, is a correct, though not a literal, translation of the portion of the instrument —seems to me to show that the 17th and 18th defendants did not intend to retain anything in the nature of a reversion in the property given. That being so, on Peramma's death the property devolved on her two daughters, Adamma and Nagamma, and on Adamma's death, her share of it devolved on Nagamma, her sister, who is the 19th defendant in the suit [See *Venkataramakrishna Rau* v. *Bhujanga Rau* (1)]. The plaintiff who is Adamma's daughter rests her case on an alleged relinquishment by Nagamma of her right in the property, an operation by which, according to the plaintiff, the property has passed to herself as the next heir of Peramma.

Nagamma's written statement disclaimed interest in the property and she did not appear at the trial, but the District Munsif says that 2nd and 3rd defendants, who are the plaintiff's brothers, denied the relinquishment.

The District Munsif framed an issue on the question (the 6th issue), but the plaintiff offered no evidence and the Court found against her. From that finding she did not appeal to the District Judge.

The course the suit has taken suggests some intrigue between the plaintiff and the 19th defendant, but there is no evidence as against the 2nd and 3rd defendants that there was any relinquishment by the 19th defendant. I think that, in these circumstances, we must hold that the plaintiff is not entitled to present possession of the property and that her suit ought to have been dismissed.

In the plaint we find two allegations in the nature of alternatives:—(1) that Nagamma has relinquished her rights and (2) that the plaintiff's mother Adamma had, by adverse possession, acquired all Nagamma's rights. Neither of these cases has been made out.

In my opinion, in these circumstances, we have no alternative but to reverse the decrees of the lower Courts and dismiss the plaintiff's suit. The suit will be dismissed, but the parties will bear their own costs throughout.

SADASIVA AIYAR, J.—I entirely agree.

Decree set aside.

(1) 19 M. 107; 6 M. L. J. 16.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 580 OF 1913.

May 4, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

KAMTA PARSHAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

GULZAR SINGH—PLAINTIFF—RESPONDENT.

Pre-emption—Wajib-ul-arz—*Custom of pre-emption on simple sale only*—*Mortgage by way of conditional sale*—*Ripening into complete transfer by foreclosure suit*—*Right of pre-emption.*

Where the evidence of the custom of pre-emption is a *Wajib-ul-arz*, which deals first with the case of a simple sale and makes provision for pre-emption in the case of such a sale and then deals with the case of a conditional mortgage, it would be quite wrong to hold that the custom applying to the case of a simple sale equally applies to a transfer of property which takes place after a mortgage by conditional sale has ripened into a complete transfer by a foreclosure suit.

INATULLAH DAFTRY *v.* MOISON ALI.

Second appeal from a decree of the Subordinate Judge of Ghazipur.

Mr. *Govind Prasad*, for the Appellants.

Mr. *S. N. Sen*, for the Respondent.

JUDGMENT:—This appeal arises out of a suit for pre-emption. Practically speaking the only evidence in support of the alleged custom of pre-emption was an extract from the *Wajib-ul-arz*. The pre-emption clause is as follows:

"Of the co-sharers if any co-sharer wants to sell or mortgage his share, then he should do so first to near relations, then to near co-sharers, and when none of them takes, then he may transfer it to a stranger. If a co-sharer does not take, then the near relations and the co-sharers according to the above order have the right to take it by right of pre-emption and the mode for redeeming a mortgage is this, that when the mortgagor or his heir pays the amount of the mortgage-money entered in the deed, he may take back the mortgaged share. If any co-sharer has mortgaged or made a conditional mortgage of his share to a stranger and the term of the mortgage or sale be about to expire and the notice for foreclosure has been issued, then another co-sharer owing to the poverty of the mortgagor can pay up the above mortgage-money and take possession of the mortgaged share; when the original mortgagor gets into affluent circumstances, then he may pay up the mortgage-money and redeem the share."

In the present case the pre-emptor is a co-sharer in the same *thok* with the vendor; whilst the vendee is a co-sharer in the same *mahal* but in another *thok*. On the 29th of March 1910, a mortgage was executed in favour of the defendant-vendee by way of a conditional sale. On the 19th of July 1911, a decree for foreclosure was made. On the 10th of May 1912, the decree was made absolute. On the 5th of June 1912, possession was taken and on the 18th of June 1912, the present suit was instituted.

In our opinion the evidence in the present case was wholly insufficient to establish the existence of a custom by which the plaintiff was entitled to get possession of the property in question after a decree absolute for foreclosure had been made. It is said on behalf of the respondent that once the decree absolute was made, then the transaction amounted to a sale and that the right to pre-empt as in the case of simple sale arose. In our opinion where the evidence of the custom is the *Wajib-ul-arz*, and this deals first with the case of a simple sale and makes provision for pre-emption in the case of such a sale and then deals with the case of a conditional mortgage, it would be quite wrong to hold that the custom applying to the case of a simple sale equally applied to a transfer of property which takes place after a mortgage by conditional sale has ripened into a complete transfer by a foreclosure suit. A very similar case arose in *Raja Ram Singh* v. *Paras Ram Singh* (1) decided by this Court on the 7th of July 1911.

We allow the appeal, set aside the decrees of both the Courts below and dismiss the plaintiff's claim with costs.

Appeal allowed.

(1) 11 Ind Cas. 628.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2104 OF 1912.

April 29, 1914.

Present:—Mr. Justice Woodroffe and Mr. Justice Mullick.

Shaikh INATULLAH DAFTRY—DEFENDANT—APPELLANT

versus

Shaikh MOISON ALI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Eastern Bengal Tenancy Act (I of 1908 B. C.), s. 22 (2)—Occupancy holding, transfer of, to co-sharer landlord—Recognition of transfer by other landlords—Suit for possession by co-sharer landlord—Limitation—Bengal Tenancy Act (VIII of 1885), Sch. III, Art 3

Where an occupancy holding is transferred to a co-sharer landlord and such transfer is recognised by the other landlords and rent received by them in respect of it, such recognition will amount to evidence either of the holding being a transferable one or of the fact that, though voidable at their instance, it has been validated by their recognition In either view section 22 (2) of the Eastern Bengal Tenancy Act applies to such a case and the special rule of two years' limitation, Schedule III, Article 3 of the Bengal Tenancy Act does not govern it.

Appeal against the decree of the Sub-Judge, Mymensingh, dated 23rd April 1912, affirming that of the Munsif, first Court, Bajitpur, dated 13th June 1911.

FACTS.—The plaintiffs sued for possession of two plots of land on declaration of title. These plots were numbered 2 and 3. Plaintiff said that he purchased plot No. 2, which

is part of plot No. 1, from two brothers Jotoe and Moloe, who were occupancy *raiyats*, and his purchase was recognised by all the *maliks* including himself and the defendant No. 1 and that similarly plot No. 3, which was an adjoining peice of waste land, was settled with him by all the *maliks*; and that the defendant No. 1 had dispossessed him from these two plots. The defendant denied plaintiff's title and pleaded two years' special limitation. Both the Courts found against the defendant and decreed the plaintiff's suit. On appeal to the High Court, it was contended that the plaintiff's suit was barred under the special law of two years' limitation provided by the Bengal Tenancy Act. It was conceded, however, that this rule of limitation would not apply if section 22 (2) of the Eastern Bengal Tenancy Act applied.

Babu *Gopal Chandra Das*, for the Appellant.

Babu *Mohini Mohan Chatterjee*, for the Respondent.

JUDGMENT.

WOODROFFE, J.—It has been urged on behalf of the appellant that the suit is barred under the special law of limitation of two years provided by the Tenancy Act. It is conceded, however, that if section 22 (2) of the Bengal Tenancy Act applies then in so far as the plaintiff would not in such case be a *raiyat*, the special limitation would not be applicable. The contention, however, is that section 22 (2) does not apply because this refers to a transfer of the occupancy rights and, therefore, assumes that the holding of the occupancy *raiyat* is capable of transfer. As regards this, however, it must be noted that the Court has found that the plaintiff's purchase was recognised and that rent has been received from him by his co-proprietors. The fact may be looked at in one of two ways—either such evidence of recognition may be regarded as evidence that the holding is one which can be transferred, or it is a case in which co-proprietors have validated a transfer which had previously taken place and which is possibly voidable at their instance. In either case it seems to me that section 22 would apply.

Section 22 (2) provides (I am referring to the Eastern Bengal Tenancy Act) that "if the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, such person shall have no right to hold the land as a *raiyat*, but shall hold it as proprietor or permanent tenure-holder, as the case may be, and shall pay to his co-sharers a fair and equitable sum for the use and occupation of the same."

I would, therefore, modify the decree which declares the plaintiff's *raiyati* right into a decree which affirms the plaintiff's right by purchase from the original tenant and declare that as such purchaser he is entitled to hold the lands so purchased on payment to his co-sharers of a fair and equitable sum for the use and occupation of the same.

There is nothing in the judgment before us which tells us the actual amount of the rent paid by the original tenant and subsequently by the plaintiff.

Subject to this modification which does not affect the merits of this appeal, the appeal must be dismissed with costs.

MULLICK, J.—I agree.

Decree modified.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 140 OF 1913.

May 1, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

BISHESHAR DAYAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

JAWALA PRASAD AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s 30—Grain-pit purchased through commission agents—Re-sold by same agents—Intention of purchasers to re-sell it—Transaction, whether gambling.

A grain-pit which in fact existed with its contents was originally purchased by the plaintiffs. It was sold to various persons and eventually was purchased by the plaintiffs as commission agents on behalf of the defendants. Subsequently the defendants being unwilling or unable to pay the purchase-money, the grain-pit was re-sold by the plaintiffs at a loss. The probabilities, to the knowledge of the plaintiffs, were that the defendants would re-sell the contents of the grain-pit through the plaintiffs as commission agents, getting the benefit of any rise in prices and suffering any fall. The plaintiffs sued the defendants for loss in price and commission:

Held, that the plaintiffs were not prevented by the provisions of section 30 of the Contract Act from recovering the moneys which they had to pay to the vendor of the grain-pit.

BISHESHAR DAYAL *v.* JAWALA PRASAD.

Forget v. *Ostigny*, (1895) A. C. 318; 64 L. J. P. C. 62; 11 R. 474; 72 L. T. 399; 43 W. R. 590; *Jagat Narain* v. *Sri Kishan Das*, 8 Ind. Cas. 783; 33 A. 219; 7 A. L. J. 1146, followed.

Second appeal from a decree of the District Judge of Meerut.

Dr. *Satish Chandra Banerji* (with him the Hon'ble Dr. *Tej Bahadur Sapru*), for the Appellants.

Mr. *B. E. O'Conor* (with him Mr. *Gulzari-lal*), for the Opposite Party.

JUDGMENT.—This appeal arises out of a suit in which the plaintiffs claimed money from the defendants as payable to them in connection with the sale of the contents of a grain-pit. The plaintiffs in their plaint alleged that they were commission agents and were employed by the defendants to purchase the grain-pit, that they did purchase it on behalf of the defendants but that subsequently the defendants being unwilling or unable to pay the balance of the purchase-money or to give security, the grain-pit was re-sold at a loss, and their claim is made up of their commission and the difference between the price at which the pit was purchased and re-sold. The defence was that the transaction was a gambling transaction, and further that the pit was re-sold without the authority of the defendants. The Court of first instance granted a decree to the plaintiffs, holding that the transaction was not in the nature of an agreement by way of wager, within section 30 of the Indian Contract Act. The lower Appellate Court held that the transaction was a gambling transaction and that the money could not be recovered. Hence the present appeal.

In our opinion the actual facts have been ascertained by the Court of first instance and the lower Appellate Court has not in any way dissented from such findings of facts. No doubt it has drawn certain legal inferences from those facts. The facts are as follows: The grain-pit in question with its contents did in fact exist. It originally was purchased by the plaintiffs. It was sold to various persons, and eventually was purchased by the plaintiffs as commission agents on behalf of the defendants. It is contended on behalf of the respondents that all these sales were mere paper transactions and that the plaintiffs themselves were all along the owners of the grain-pit. This clearly is not so and is not the finding of either of the Courts below. The defendants by their written statement admitted that the plaintiffs were commission agents. They also admitted that the grain-pit in question was purchased on their behalf by the plaintiffs as their commission agents. We have looked into the evidence of the principal defendant, Parmanand, and we find that what the learned Subordinate Judge says at page 11 about the transaction is quite justified. It may be assumed for the purposes of the present case that there was very small probability of the defendants ever clearing the grain-pit and that the probabilities were that they would re-sell the contents of the grain-pit through the plaintiffs as commission agents getting the benefit of any rise in prices or suffering any fall. It may also be assumed that the plaintiffs were aware that this was the intention of the defendants. Parmanand in his evidence admits that there were a number of other transactions of similar nature and that upon one occasion he actually took delivery of grain and cleared the pit. The question that we have to decide is, whether under these circumstances the plaintiffs are prevented by the provision of section 30 of the Indian Contract Act from recovering the moneys which they had to pay to the vendor of the grain-pit. In our opinion they are not. On the facts stated above the case is very similar to the case of *Forget* v. *Ostigny* (1) and also to the case of *Jagat Narain* v. *Sri Kishan Das* (2). On the principle of these cases it cannot be said that the claim of the plaintiffs is based on an "agreement by way of wager."

It is contended that the grain-pit was sold unlawfully and without the authority of the defendants. We have looked into the contract, and we find that there was an express provision that if there was any question as to the solvency of the purchaser and if he failed to pay the balance of the purchase-money or to give security, the contents of the pit might be re-sold. The learned Subordinate Judge says: "Parmanand admits that the plaintiffs made demands and that he had no money to pay, and was offering to make *itminan*. His partner, Jwala Prasad, made promises of payment, but did not or could not keep them." Under these circumstances and having regard to the terms of the contract, it is quite clear that the contents of the grain-pit

(1) (1895) A. C. 318; 64 L. J. P. C. 62; 11 R. 474; 72 L. T. 399; 43 W. R. 590.

(2) 8 Ind. Cas. 783; 33 A. 219; 7 A. L. J. 1146

were liable to be re-sold and accordingly the defence on this ground cannot be sustained.

The result is that we allow the appeal, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance with costs.

Appeal allowed.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

July 22, 1914.

Present:—Lord Moulton, Lord Parker of Waddington, Sir John Edge, and Mr. Ameer Ali.

EKRADESHWAR SINGH—APPELLANT

versus

Musammat JANESHWARI BAHUASIN—RESPONDENT.

*Custom—Durbhanga Raj—Descent, rules of—Primogeniture—*Babuana *grant—*Sohag *grant—Distinction between the two—Succession—Hindu Law—*Mitakshara *—Mithila School—Joint family—Separation—Partition —Co-parcenary rights—Exclusion of females—*"Auras putra poutradik," *meaning of—Custom not enforced in one instance, effect of—Accretions to* babuana *grant—Evidence—Oral or documentary—Statement of deceased as to custom, when admissible—Evidence Act (I of 1872), s.* 32.

The Durbhanga Raj is an ancient and impartible *raj*, and by the *kulachar*, or family custom, the right of succession to the *guddi* and to the properties of *raj reasat* descends according to the rule of lineal primogeniture. The younger sons of a Maharaja of Durbhanga are styled Babus, and by the *kulachar* each younger son is entitled by way of a *babuana* grant to a portion of the *raj reasat* for the maintenance of himself and his male descendants in the male line, and the wife of a younger son of a Maharaja of Durbhanga gets, by way of a *sohag* grant, the usufruct of a portion of the *raj reasat* for the maintenance of herself and her male descendants in the male line. In each case the property, village or villages granted, continues to form part of the *raj reasat*, from which it is never separated; it is entered in the Government Revenue Registers under the name of the Maharaja for the time being of Durbhanga as the proprietor, and the property so granted reverts to the Maharaja for the time being of Durbhanga on the failure of male descendants in the male line of the grantee. *Babuana* grants and *sohag* grants differ essentially in their nature from absolute grants and are subject to the *kulachar* under which they are authorized and in accordance with which they are made. The family of the Durbhanga Raj are Hindus, and except in so far as customs of the family and its branches exist and apply, the members of the family are governed by the Mithila School of Hindu Law, which, so far as it applies to this case, may be taken as following the *Mitakshara* of the Benares School.

A separation between members of a joint Hindu family followed by a partition between them of the ancestral property which would not put an end to the co-parcenary rights in the property, is unknown to the Hindu Law.

Evidence, oral or documentary, as to statements of a deceased person as to the custom in a family is not admissible, if it appears that such statements were made after a controversy as to the custom had arisen.

A *babuana* grant in the Durbhanga Raj is made to a male, while a *sohag* grant is made to a female; there is no difference so far as the right to succession to the property is concerned between a *babuana* grant and its incidents and a *sohag* grant and its incidents. In the one case the grant is made for the benefit of the grantee and his male descendants in the male line, in the other case the grant is for the benefit of the grantee and her male descendants in the male line; in each case, females, widows and daughters and the descendants of daughters are by the custom applying to such grants excluded from the succession, and on the failure of such male descendants in the male line the property granted reverts to the Maharaja of Durbhanga for the time being.

Babuana grants cannot be made under the ordinary Hindu Law, but they are authorized by the custom which excludes females from succession. The words *auras putra poutradik* as used in these grants or *sanads* are words of limitation consistent with the custom, and not words of general inheritance.

Babuana and *sohag* lands descend in the family of Durbhanga, not to one male heir only, but to all the existing male heirs in the male line of the grantee as co-parceners.

A well established custom in the family cannot be defeated by the fact that in one case the custom was not enforced.

Where a *babuana* grant was made to a younger son of a Maharaja of Durbhanga and a *sohag* grant to his wife and after his, and his wife's death his two sons got the property partitioned between themselves and on the death of one of the sons, his widow entered into possession of her husband's share.

Held, on the suit of the surviving son for possession of the immoveable grant properties, the accretions thereto and mesne profits, moveables or accumulations, that the custom in the family of the Durbhanga Raj by which females are excluded from the succession to *babuana* property and to *sohag* property, applies in this case notwithstanding the separation and the partition which was effected by the plaintiff and his late brother, and that consequently on the death of his brother, the plaintiff became entitled to the possession and enjoyment of the *babuana* property and of the *sohag* property which his brother held at the time of his death.

Held, further, that the immoveable properties which were acquired from the income and profits of the *babuana* properties are to be considered as accretions to the *babuana* properties and that the plaintiff, on his brother's death, became entitled to the possession and enjoyment of the same but that he was not entitled to moveable property or accumulations;

EKRADESHWAR SINGH v. JANESHWARI BAHUASIN.

Held, also, that the defendant was entitled to money maintenance only.

The right under the *Mitakshara* of co-parceners in Hindu ancestral property to have the joint property partitioned, is now unquestionable unless the property is held under a grant, or is subject to a custom, which expressly or impliedly prohibits any partition of the property which would have the effect of defeating the object of the grant or the custom.

Appeal from a judgment and decree of the Calcutta High Court, dated August 2nd, 1909, reversing those of the Additional Subordinate Judge of Bhagalpur, dated August 15th, 1908, reported in 3 Ind. Cas. 207.

FACTS are fully stated in their Lordships' judgment as well as in the High Court judgment reported in 3 Ind. Cas 207. Briefly they are:—

In 1850, Rudar Singh, then Raja of Durbhanga, granted to Netreshwar Singh the *Pargana* Nisankhpur Kusha and to Nitrabati, the wife of the latter, Madhapur, as a *sohag* gift. The income from the properties was large and further lands were bought. Netreshwar left two minor sons, Ekradeshwar and Janeshwar. Netrobati having previously died, on coming of age in 1896 these two brothers separated. In 1906 Janeshwar died and his widow, Janeshwari Bahuasin, took possession of his properties. Ekradeshwar then claimed the properties of his brother by virtue of the family custom by which females were excluded from inheritance and brought a suit in the capacity of a surviving co-parcener under the Hindu Law or in the alternative as the nearest male heir. Janeshwari Bahuasin contended that though there was a *kulachar* or family custom affecting the succession by females to the Durbhanga Raj itself, there was no such custom which governed or affected the devolution or succession of or to *babuana* or *sohag* properties and that they were governed in that case by the *Mithila* School of Hindu Law. *Babuana* properties were self-acquired in the hands of the original grantee and were subject to alienation by Will. The Subordinate Judge decided as did the High Court that there was no right of survivorship as alleged by Ekradeshwar, the brothers being separate in interest, but on the question of succession by virtue of a customary incident of the property said to exclude a widow's right of inheritance, the High Court reversing the finding of the lower Court decided against the existence of such family custom. An appeal was then preferred to His Majesty in Council.

Sir *Erle Richards*, *K. C.*, and Mr. *Dunne*, for the Appellant, contended that both Courts in India had found that the *babuana* and *sohag* properties never ceased to remain a portion of the *raj*. In the *sanad* by Rudar Singh, dated February 13th, 1850, the grant was by way of maintenance as *babuana*. The amount payable as Government revenue was to be paid to the *raj* which in its term was to pay it to the Government. There were grants to females which were for life and to revert to the *raj* after their demise.

The *sohag* property in question was given to Bahuasin and her sons and grandsons. The whole custom of the family showed that females were excluded from inheritance. The High Court said that when the partition was effected it changed the value of the grant. There were cases in which widows did not succeed. There were two cases of widows not succeeding, one in 1856 and the other in 1858. In 1859 there was another case, that of Basdev's widow.

[MR. AMEER ALI:—Your contention is succession *inter se* which has nothing to do with the *raj*.]

There were cases of Tulapat's widow and that of Raja Ram's widow, who were excluded from inheritance. Excepting the case of Ghanlata, who was the widow of Ghansham Singh, there was not a single case in the family in which a widow had succeeded to her husband's property in conformity with the ordinary rules of the Hindu Law. The custom of excluding females from inheritance was to govern the succession to *babuana* and *sohag* properties, and all accretions thereto. The partition between the appellant and his late brother could not and did not displace or affect the *kulachar* as a rule of succession in the Durbhanga Raj. The *babuana* and *sohag* properties were in the hands of the grantees and their descendants ancestral and subject to the same rule of succession as the *raj* from which it was never detached as otherwise the very object of such grants to keep the grantees-*babus* in a condition of respectability would be defeated.

Reference was made to *Baboo Gunesh Dutt Singh* v. *Maharaja Moheshur Singh* (1);

(1) 6 M. I. A. 164 at p. 197; 1 Sar. P. C. J. 521; 1 Eng. Rep. 61.

Durgadut Singh v. *Maharaja Sir Rameshwar Singh Bahadur* (2); *Rama Kantadas Mohapatra* v. *Shamanand Das Mohapatra* (3) and *Ram Chandra Marwari* v. *Mudeshwar Singh* (4).

Messrs. *De Gruyther, K. C.*, and *Kenworthy Brown*, for the Respondent, contended that the first question was whether grants to *babus* by Rajas of impartible estates were to be regarded as ancestral or self-acquired. Grants took the properties out of the *raj* and, therefore, the *babuana* and *sohag* grants were absolute estates and admittedly not impartible as the *raj* itself. The appellant admitted that although *babuana* properties were not descendable to any female or to any descendant through a female, the properties were not governed by the rule of the primogeniture. There was no custom which excluded the widow from succeeding her husband.

[LORD MOULTON:—We have evidence of members of the family that no female ever succeeded].

The custom was that as long as males were in existence possession lasted and after their death passed on to the females.

[MR. AMEER ALI:—When a *babuana* grant is made, the grantee takes it subject to no law but absolutely].

The case was governed by the Hindu Law and not by custom.

[LORD MOULTON:—You say that custom cannot be proved unless there are many instances and those cannot be in existence unless there is custom].

[MR. AMEER ALI:—The question is what becomes after partition].

The onus to prove custom lay on the appellant. The presumption was in favour of the Hindu Law. The Courts in India rightly held that the appellant was not entitled to succeed by right of survivorship. The High Court was right in holding that the custom alleged by the appellant was not proved and the decision of the Subordinate Judge to the contrary was based on inadmissible evidence by section 32, clause 4, of the Evidence Act. The appellant was not entitled to lands purchased with the proceeds of the *babuana* and *sohag* properties nor to moveables.

Reference was made to *Baboo Ganesh Dutt Singh* v. *Maharaja Muheshur Singh* (1); *Durgadut Singh* v. *Maharaja Sir Rameswar Singh Bahadur* (2); *Ram Chandra Marwari* v. *Mudeshwar Singh* (4); *Laliteshwar Singh* v. *Bhabeshwar Singh* (5) and Mayne's Hindu Law, sections 207, 275, 5 and 32.

Sir *Erle Richards* in reply.

JUDGMENT.

SIR JOHN EDGE.—The suit in which this appeal to His Majesty in Council has arisen was brought on the 20th December 1906, in the Court of the Subordinate Judge of Bhagalpur, by Babu Ekradeshwar Singh, who is the appellant here, against *Musammat* Janeshwari Bahuasin, who is the widow of the plaintiff's younger brother, Babu Janeshwar Singh. The plaintiff and his brother were sons of Netreshwar Singh, who was a younger son of Maharaja Rudar Singh of Durbhanga.

The plaintiff claimed a declaration that he was entitled to the properties in suit which were owned by and in the possession of his deceased brother, a decree for possession of those properties, for mesne profits, and other reliefs. The property claimed consisted of the share which the plaintiff's brother had obtained on a partition between them of immoveable property which had been granted by a *babuana* grant to their father, of immoveable property which had been granted by a *sohag* grant to their mother, of immoveable property alleged to be accretions to the *babuana* property, and of accumulations. The plaintiff's claim was based on an alleged custom in the family of the Durbhanga Raj by which widows and other females were excluded from all rights to the possession of lands held under *babuana* grants or *sohag* grants. It was alleged by the plaintiff that the properties which had been purchased by his father and by his brother, had been purchased with profits which had been derived from the *babuana* property and were to be treated as accretions to that property. The defendant, who was in possession, denied the existence of any such custom and by her written statement put the plaintiff to proof of his title to possession.

(2) 4 Ind. Cas. 2; 36 I. A. 176 at p. 177; 13 C. W. N. 1013; 6 M. L. T. 68; 11 Bom. L. R. 901; 6 A. L. J. 847; 36 C. 943; 10 C. L. J. 233; 19 M. L. J. 567.

(3) 1 Ind. Cas. 754; 36 I. A. 49; 13 C. W. N. 581; 6 A. L. J. 364; 9 C. L. J. 497; 11 Bom. L. R. 530; 36 C. 590; 19 M. L. J. 239; 6 M. L. T. 84.

(4) 33 C. 1158; 10 C. W. N. 978.

(5) 35 C. 823; 12 C. W. N. 958; 8 C. L. J. 124.

The Durbhanga Raj is an ancient and impartible *raj*, and by the *kulachar*, or family custom, the right of succession to the *guddi* and to the properties of the *raj reasat* descends according to the rule of lineal primogeniture. The younger sons of a Maharaja of Durbhanga are styled Babus, and by the *kulachar* each younger son is entitled by way of a *babuana* grant to a portion of the *raj reasat* for the maintenance of himself and his male descendants in the male line, and the wife of a younger son of a Maharaja of Durbhanga gets, by way of a *sohag* grant, the usufruct of a portion of the *raj reasat* for the maintenance of herself and her male descendants in the male line. In each case the property, village or villages granted, continues to form part of the *raj reasat*, from which it is never separated; it is entered in the Government Revenue Registers under the name of the Maharaja for the time being of Durbhanga as the proprietor, and the property so granted reverts to the Maharaja for the time being of Durbhanga on the failure of male descendants in the male line of the grantee. *Babuana* grants and *sohag* grants differ essentially in their nature from absolute grants, and are subject to the *kulachar* under which they are authorised and in accordance with which they are made. The family of the Durbhanga Raj are Hindus, and except in so far as customs of the family and its branches exist and apply, the members of the family are governed by the *Mithila* School of Hindu Law, which, so far as it applies to this case, may be taken as following the *Mitakshara* of the Benares School.

Maharaja Rudar Singh of Durbhanga, by a *babuana* grant granted to his son Babu Netreshwar Singh by way of maintenance as *babuana*, the *dehat milkiat* appertaining to *Pargana* Nisankhpur Kusha, together with *dasturat malikana*. That grant has not been put in evidence in this suit, but the fact that the grant was made is proved by a *sanad*, dated 7th *Phagun Badi* 1257, which was granted by Maharaja Rudar Singh to his eldest son Maheshwar Singh. That *sanad* was registered in the registry of Mozuffarpur on the 13th February 1850. The *sanad* shows that *babuana* grants had also been made by Maharaja Rudar Singh to two others of his younger sons, and contains the following directions:—

"The said Maharaj Kumar Babus shall continue in possession of the said *parganas*, and the Government revenue, which shall be due on account thereof, will be paid by them to you, and you will pay the same to the Government along with the Government revenue of the Raj. The said *babus* shall live in a style befitting the position of *babus* and you shall treat them according to your sense of propriety as a Raja, and in a manner befitting their position as *babus*."

On the death of Maharaja Rudar Singh his eldest son Maheshwar Singh succeeded to the *guddi* and the *raj reasat*, and became Maharaja of Durbhanga. Maharaja Maheshwar Singh by a *sanad*, dated 6th *Aghan Sudi* 1259 *Fasli* (A. D. 1852), granted to Bahuasin Sohagin *Mouzah* Madhapur as a *sohag* gift. As translated in this record the *sanad* contains the following clause:—"You and your sons and grandsons, etc., shall cultivate or get cultivated the *mouzah* aforesaid, and enjoy the usufruct thereof yourself." Bahuasin Sohagin was the wife of Babu Netreshwar Singh and the mother of the plaintiff and of his late brother. She is referred to in the record as *Musammat* Netrobati Bahuasin.

The plaintiff's mother died in 1879. His father died in 1883, when the plaintiff and his brother were minors. Until the separation of the brothers and a partition between them, the effect of which will later be considered, the plaintiff and his brother were co-parceners in the *babuana* property, which according to Hindu Law was in their joint possession ancestral property, subject, however, to such family custom as applied to it. Similarly, the *sohag* property was ancestral property in which, at the time of the separation and partition, the plaintiff and his brother were co-parceners. The plaintiff came of age in 1888, and was put in possession of the *babuana* property and the *sohag* property as manager for the family consisting of himself and his brother. The younger brother came of age in 1896. Soon after the younger brother came of age disputes arose between the brothers, they separated and each brought a suit against the other to obtain partition of the property in which they were co-parceners. Decrees for partition were made, and in 1900 the property was partitioned between the brothers.

The younger brother died without issue on

the 18th April 1906, leaving surviving him his wife, who is the defendant to this suit. On her husband's death she took possession of the property which he held at the time of his death. Her right to the possession of that property is disputed in this suit on the ground that by a family custom she as a widow, although entitled to money maintenance, was excluded from any right to the possession of that property.

The *kulachar* or family custom under which the plaintiff claimed is thus described by him in his plaint:—

"1. That the family, to which the plaintiff and the defendant's husband belong, has held from time immemorial the properties known as *raj reasat* of Durbhanga, and constituting an impartible *raj*, and is governed by the *kulachar* or family custom in the matter of succession and inheritance as hereinafter mentioned.

"2. That by such *kulachar* and family custom females, either widows or daughters and heirs in the female line, are altogether excluded from succession.

"3. That so far as the said *raj reasat* is concerned, the same descends according to the rule of lineal primogeniture on the eldest son of the last holder, the other sons obtaining portions of the *raj* for maintenance and support by way of *babuana* grants.

"4. That in the event of the last holder of the said *raj* dying without male issue, natural or adopted, his younger brother, or in the absence of brother, his nearest agnate, according to the rule of lineal primogeniture, succeeds to the said *raj* to the exclusion of widows and other females.

"5 That the incidents of the said *babuana* properties are, that the name of the Maharaja Bahadur of Durbhanga for the time being stands recorded in the Government Register as the propietor of the *mouzahs* comprised in the said properties, and it remains a part and parcel of the said *raj*, and the *babus* holding the said properties pay the Government revenue and other public demands payable in respect of the said *mouzahs* to the said Maharaja who pays the same to Government; and that the said *babus* and their male heirs in the male line remain in possession and enjoyment of the said *mouzahs*; and that on the extinction of the heirs male of the grantees in the male line, the said *mouzahs* together with all acquisitions, moveable and immoveable, made from the income thereof, revert to the said *raj*.

"6. That by virtue of the *kulachar* aforesaid and the incidents of the said *babuana* grants, on the death of any male descendant in the male line of any *babu* or younger scion of the said *raj* family to whom a *babuana* grant as aforesaid has been made, without male issue, natural or adopted, his nearest agnate among the other male descendants in the male line of the said grantee succeeds to his share in the said *babuana* grant together with all accretions thereto as aforesaid.

"7. That in accordance with the custom of the family of Raj Durbhanga usufructs of some village or villages out of the *raj* properties are granted to females of the family on the occasion of their marriages or other ceremonies. The rule of succession and other incidents connected therewith are the same as that of *babuana*; the villages granted to them descend to males of their body in unbroken male line; and on the extinction of male issue the said village or villages revert to the *raj*."

The plaintiff put forward the following as an explanation of the separation and partition between him and his brother:—

"16. That after the husband of the defendant attained majority, and in consequence of disagreement between him and the plaintiff, they separated and divided amongst themselves the major portion of the aforesaid properties and *sohag* property merely for the sake of convenience and undisturbed enjoyment of usufruct without prejudice to their co-parcenary rights as junior members of the Raj Durbhanga family; but they being of junior branch of the Durbhanga Raj family, their status as co-parceners in the Durbhanga Raj family did not come to an end, nor did such partition in any way affect or alter the nature and incident of their tenure of the said grant.

"17. That the husband of the defendant died on the 18th April 1906 without any issue, and leaving plaintiff his full brother, and the defendant his widow.

"18. That according to the *kulachar* or family custom referred to above obtaining in the Durbhanga Raj family including the junior branches thereof, the defendant has no right or title to the estate left by her

husband; and the plaintiff as the surviving male heir in the family of the grantee Maharajkumar Babu Netreshawar Singh and also as a co-parcener in the Durbhanga Raj family, is entitled to succeed to and to the possession of the estate left by the husband of the defendant, representing his share of the said grant and accretions thereto; and that the defendant is only entitled to suitable maintenance out of the same; and that she is not entitled to succeed to and possess the said estates, properties and effects as is falsely pretended by her."

It may be observed that a separation between members of a joint Hindu family followed by a partition between them of the ancestral property which would not put an end to their co-parcenary rights in the property, is unknown to the law. As the plaintiff was a party to the suits in which the decrees under which the partition was effected were made, he is not in a position to deny as against his brother's widow that partition did in fact take place. He may, however, have intended by his plaint to represent that the partition between him and his brother had not the ordinary legal effect of a partition between co-parceners, and that the custom of the Durbhanga Raj family which would exclude widows from the succession when the members of a branch remained joint, would equally apply to exclude the widow of a separated member of a branch.

The Subordinate Judge found, as the fact was, that there had been complete separation between the brothers in food, worship, and estate, and consequently that at the time of the death of the younger brother in 1906 the plaintiff had no co-parcenary interest in any of the property in suit. The correctness of that finding has not been questioned in this appeal. The Subordinate Judge also found that there is a valid custom in the junior branches of the family of the Durbhanga Raj, including the family to which the parties to the suit belong, that widows do not inherit *babuana* properties, and that the succession and inheritance in the case of *sohag* grants are governed by the custom which governs the succession and inheritance in the case of *babuana* grants, and he held that notwithstanding that there had been complete separation between the brothers the custom applied. He gave the plaintiff a decree for possession of some of the immoveable properties which the plaintiff claimed, for certain moveable property and for mesne profits. From that decree the defendant, the respondent here, appealed to the High Court of Judicature at Fort William in Bengal. The learned Judges before whom the appeal came found that although the subjects of *babuana* and *sohag* grants would on the failure of male heirs in the male line of the grantee revert to the Maharaja of Durbhanga for the time being, the plaintiff had failed to prove any custom by which the widow of a childless and separated *babu* was not entitled during the continuance of *babuana* or *sohag* grant to hold for a Hindu widow's interest the property which her separated husband had held under a *babuana* or *sohag* grant, and, consequently, applying the rules of the ordinary Hindu Law, those learned Judges decided that the plaintiff had failed to prove as against the defendant that he was entitled to the possession of any of the property in suit, and by their decree set aside the decree of the Subordinate Judge and dismissed the suit. From that decree this appeal to His Majesty in Council has been brought.

Some statements deposed to by witnesses who were called, and some of the documents which were put in, were not admissible as evidence in this suit. It seems to have been overlooked at one period of the suit that evidence, oral or documentary, as to statements of a deceased person as to the custom in a family is not admissible if it appears that such statements were made after a controversy as to the custom had arisen. There is, however, abundant evidence to prove what was the custom in this family of the Durbhanga Raj which applied to *babuana* grants and *sohag* grants and to accretions to *babuana* immoveable property.

Their Lordships are of opinion that the Subordinate Judge arrived at a correct conclusion on the evidence that the custom governing the succession to and the inheritance of *sohag* property is the same as the custom governing the succession to and the inheritance of *babuana* property. In the High Court Mr. Justice Richardson held that *sohag* property is similar in its nature and incidents to *babuana* property, and is governed by similar considerations, and Mr. Justice Sharfuddin did not dissent from that view. Their Lordships find that, except

that a *babuana* grant is made to a male while a *sohag* grant is made to a female, there is no difference so far as the right to succession to the property is concerned between a *babuana* grant and its incidents and a *sohag* grant and its incidents. In the one case the grant is made for the benefit of the grantee and his male descendants in the male line, in the other case the grant is made for the benefit of the grantee and her male descendants in the male line; in each case, females, widows and daughters and the descendants of daughters are by the custom applying to such grants excluded from the succession, and on the failure of such male descendants in the male line the property granted reverts to the Maharaja of Durbhanga for the time being. The general evidence as to custom upon which their Lordships have found that widows are excluded from the succession to *babuana* and *sohag* properties, includes, and is strongly supported by, instances in this family of Durbhanga of widows, who would otherwise have been entitled to a Hindu widow's interest, having been excluded from, or not having claimed, possession on the death of their husbands.

In some of the *babuana sanads* which are in evidence in this suit the words which have been regarded in the Court below as words of limitation, are in the vernacular *auras putra poutradik*. As to those *sanads* Mr. Justice Sharfuddin in his judgment in this case said:—

"From the copies of *sanads* (Exhibits 20A, 20B, 20C, 20D, and 20E) it is clear that female children and daughters' sons were excluded from the inheritance of the *babuana* properties. The expressions used in the *sanads* are *auras putra poutradik*, which means sons born of the loins. I take it to mean that so long as there is one descendant of this description, the properties granted are not to revert to the *raj*."

That construction is consistent with the evidence as to those *babuana* grants to which their Lordships attach importance, and their Lordships are unable to regard them as words of general inheritance which would include female as well as male heirs. In this connection the attention of their Lordships has been drawn to the judgment of this Board in *Ramlal Mookerjee* v. *The Secretary of State for India in Council* (6) in which it was held that in Bengal in a gift to a man the vernacular words *putra poutradi krame* would be read as words of general inheritance, and would include female as well as male heirs where by law the estate would descend to such heirs. *Babuana* grants could not be made under the ordinary Hindu Law, but they are authorised by the custom which excludes females from the succession. Their Lordships must regard the words *auras putra poutradik* as used in these *sanads* as words of limitation consistent with the custom, and not as words of general inheritance.

Their Lordships having found that under the custom which applies to the branches of this family widows are excluded from all right to succeed to *babuana* property or to *sohag* property, it is necessary to consider whether that custom, which has been proved to apply where the members of the branch remain joint, can, without evidence that it has been applied where the members of a branch have separated in food, worship, and estate, be held to exclude the widow of a childless and separated member from a Hindu widow's interest in the *babuana* and *sohag* properties which had been held by her husband as his separate property. In this case it is clear that until the brothers separated the *babuana* and *sohag* properties were held by them, subject to the terms of the grants and the custom, as joint ancestral property in which their rights were those of co-parceners.

The right under the *Mitakshara* of co-parceners in Hindu ancestral property to have the joint property partitioned is now unquestionable unless the property is held under a grant, or is subject to a custom, which expressly or impliedly prohibited any partition of the property which would have the effect of defeating the object of the grant or the custom. It has been contended that there can be no partition of *babuana* or of *sohag* property in this family of Durbhanga, and that to allow that *babuana* and *sohag* property could be partitioned would be to frustrate the very object with which *babuana* grants and *sohag* grants have been made and the very object with which the custom in the family of the Durbhanga Raj authorised the making of such grant by the Maharaja for the time being of Durbhanga, that object being to provide by a grant of lands suitable maintenance, having regard

(6) 8 I. A. 46; 7 C. 304; 10 C. L. R. 349; 4 Sar. P. C. J. 225; 5 Ind. Jur. 327.

to the position of the family, for the grantee, and his or her male descendants in the male line, and to relieve the Maharaja of Durbhanga from the possibility of having from time to time to provide for such descendants maintenance by gifts of money.

In support of the contention that there can be no partition of *babuana* property reference has been made to the judgment of this Board in *Durgadut Singh* v. *Maharaja Sir Ramashwar Singh Bahadur* (2). That case related to a *babuana* grant in this family of Durbhanga. Their Lordships in that case stated that those who for the time being are entitled to be maintained out of *babuana* property "cannot have it divided amongst them by proceedings in the nature of partition." The statement referred to, although doubtless correct, cannot be regarded as an authority binding in this appeal, as it was made upon a concession as to facts which were not proved, and which certainly would not be proved by the evidence in this suit. The concession which was made by Counsel in that case was that lands which had been granted to Kirkat Singh by a *babuana* grant descended to the eldest male heir of the grantee to be held, or managed, by the person to whom they descended for the maintenance of the family. The evidence in this suit proves that *babuana* and *sohag* lands descend in the family of Durbhanga, not to one male heir only, but to all the existing male heirs in the male line of the grantee as co-parceners.

Apart from the general evidence that females are excluded from the succession to *babuana* and *sohag* properties there is little evidence, and that apparently merely evidence of opinion, that the rule as to the exclusion of females from a succession applies where there has been a partition. It is probable that there have been few instances in this family of Durbhanga of a separation in food, worship and estate in which this question as to the right of a female to succeed to *babuana* or *sohag* property could have arisen. It is doubtful that with the exception of the present case and the case of *Musammat* Ghanlata, who was the widow of Babu Ghansham Singh, there has been any case in which a separated and sonless member of a branch of the Durbhanga family had a wife who survived him.

Musammat Ghanlata's case occurred in a branch which descended from Maharaja Madho Singh, from whom the present Maharaja of Durbhanga descended through Maharaja Rudar Singh who made the *babuana* grant in this case. Ramput Singh, who was a younger son of Maharaja Madho Singh, had a *babuana* grant; he had six sons, one of whom was Dharamput. Dharamput had by his wife Dharamlata a son Ghansham Singh, who had by his wife *Musammat* Ghanlata two daughters but no son. Ghansham's daughters married and had male issue. Ghansham Singh separated from his uncles and cousins and obtained possession of his father's sixth share of the *babuana* property of that branch. On Ghansham Singh's death his widow *Musammat* Ghanlata entered into possession of his one-sixth share of the *babuana* property as hers by right of inheritance, and in the presence and with the knowledge of the agnates of her deceased husband she was registered as the proprietor of that one-sixth share, and held possession of it for 16 years until she died. A few days before she died *Musammat* Ghanlata executed an *ekrarnama* in which she stated that by custom she had no title to the share and alleged that she had been permitted to hold possession of it merely by way of maintenance. It is obvious that she executed the *ekrarnama* as a compromise to secure, if possible, 400 *bighas* of the lands for her grandsons, who were sons of her daughters. No explanation satisfactory to their Lordships of the reason why *Musammat* Ghanlata was allowed to take and to hold possession of her late husband's one-sixth share, and why the custom was not enforced in her case, has been forthcoming. It is possible that, owing to the novelty of the position, the parties who were concerned were in some doubt as to their rights under the custom. However that may have been, their Lordships are of opinion that a well-established custom in the family cannot be defeated by the fact that in one case the custom was not enforced. The subsequent history of Ghansham's one-sixth share, so far as it is known to their Lordships, is inexplicable.

Their Lordships hold that the custom in this family of the Durbhanga Raj by which females are excluded from the succession to *babuana* property and to *sohag* property applies in this case notwithstanding the separation

and the partition which was effected by the plaintiff and his late brother, and consequently that on the death of the brother the plaintiff became entitled to the possession and enjoyment of the *babuana* property and of the *sohag* property which his brother held at the time of his death. Their Lordships agree with the Subordinate Judge, for the reasons stated by him, that the immoveable properties which were acquired from the income and profits of the *babuana* properties are to be considered as accretions to the *babuana* properties and they hold that the plaintiff became, on his brother's death, entitled to the possession and enjoyment of those immoveable properties. Their Lordships are not satisfied that the plaintiff proved a title to the possession of any of the moveable property or accumulations which he claimed. The defendant was and is entitled to money maintenance, and as no substantial offer of adequate maintenance was made, their Lordships consider that the claim for mesne profits should be disallowed.

Their Lordships will humbly advise His Majesty that the decree of the High Court should be set aside; that the appellant should have a decree for the possession of the immoveable properties in suit, excepting Nos. 15, 19, and 21 of Schedule 3, and No. 10 of Schedule 4 (A), and that in other respects the decree of the Subordinate Judge should be varied by dismissing the suit; that it be declared that the respondent is entitled to be paid monthly during her life, unless the property reverts in the meanwhile to the Maharaja of Durbhanga for the time being, future maintenance at the rate of Rs. 15,000 per annum, such maintenance to be a charge upon the immoveable properties which the appellant will recover by the order in this appeal; and that no costs be allowed to either side in the High Court or in the Court of the Subordinate Judge.

Their Lordships consider that if the appellant and his brother had not effected a partition this litigation might have been avoided. No costs of this appeal will be allowed to either side.

Appeal allowed.

Solicitors for the Appellant: Messrs. *W. W. Box & Co.*

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

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 280 OF 1913.

July 13, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Napier.

K. VILVANATHA MUDALIAR—DEFENDANT—APPELLANT

versus

MANNAR NAIDU—PLAINTIFF—RESPONDENT.

[*Civil Procedure Code (Act V of 1908), O. XLI, r. 1, cl. (3)—Madras Estates Land Act (I of 1908), ss. 112, 114 and 192—Objection to attachment—Dismissal of suit on preliminary point—Appeal to District Court—Remand—Appeal against remand order, competency of.*

No appeal lies to the High Court against a remand order passed by the District Court in a suit under sections 112 and 114 of the Madras Estates Land Act I of 1908.

Appeal against the order of the District Court of Chingleput, in Appeal Suit No. 27 of 1913, preferred against that of the Deputy Collector of Saidapet, in Summary Suit No. 39 of 1912.

FACTS.—The suit out of which the appeal arose was instituted by the respondent against the appellant, his landlord, objecting to the attachment of the lands in his holding under sections 112 and 114 of the Madras Estates Land Act I of 1908, on the grounds *inter alia* that no proper *pattahs* had been tendered and that the amount for which attachment had been effected was excessive, and hence opposed to the provisions of a permanent *pattah* granted by the respondent and his deceased mother to the plaintiff. The respondent contended that the rate of rent was *res judicata* by reason of the decision in Summary Suit No. 103 of 1910 on the file of the Deputy Collector, Saidapet, and that under the provisions of sections 52 (3) and 53 (1) of the Madras Estates Land Act, the *pattah* decreed in that suit for *Fasli* 1319 continued in force for *Fasli* 1320 also. The plaintiff replied that the decree in Summary Suit No. 103 of 1910 was obtained by fraud and was not binding on him.

The Deputy Collector, however, without deciding any of the other points, upheld the last contention of the defendant and dismissed the suit. On appeal by the plaintiff, the District Judge of Chingleput also concurred with the Deputy Collector as regards the *pattah* for *Fasli* 1319 remaining in force for *Fasli* 1320 also, but thought that as the plaint-

iff had attacked the decree in Summary Suit No. 103 of 1910 as having been obtained by fraud, he ought to have been afforded an opportunity of amending the plaint by giving the particulars of fraud, and so remanded the suit. Against this order of remand the defendant preferred this civil miscellaneous appeal to the High Court.

Mr. *O. P. Venkataraghavachariyar* (with him Mr. *C. Venkata Subramanya*), for the Respondent, raised a preliminary objection that no appeal lay and relied on section 192 of the Madras Estates Land Act and the decision reported as *Krishnaswamy Aiyar* v. *Vaithilinga Tambiran* (1).

Mr. *G. S. Ramachandra Iyer*, for the Appellant, prayed that the appeal may be converted into a civil revision petition which their Lordships declined to do.

JUDGMENT.—No appeal lies. *Vide* section 192 of the Madras Estates Land Act. The appeal is dismissed with costs.

Appeal dismissed.

(1) 12 Ind. Cas. 146.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 115 OF 1912.

May 15, 1914.

Present:—Sir Henry Richards, KT. Chief Justice, and Mr. Justice Tudball.

BABBU AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SITA RAM—PLAINTIFF—RESPONDENT.

Consideration, admission of—Onus of proof—Receipt of consideration in deed—Presumption.

Where a mortgage-deed is proved to have been executed and the document contains an acknowledgment of the receipt of the consideration, it is a strong *prima facie* evidence that the consideration had been actually received, and is evidence not only against the mortgagors but also against persons claiming under them subsequent to the date of the mortgage. The presumption, of course, can be rebutted, and the mere fact that a Court was not satisfied with the evidence which the plaintiff adduced in addition to the acknowledgment would not absolve the defendants from producing evidence to show that nothwithstanding the acknowledgment in the body of the deed there was no consideration in fact.

Letters Patent Appeal from the following judgment of

BANERJI, J.—This was a suit for sale upon a mortgage made on the 23rd of September 1898 by the defendants, Drigpal Singh and Bhagwan Singh in favour of the plaintiff and the defendant, Manni Lal. The fifth defendant is a subsequent mortgagee. Defendants Nos. 4 to 6 are subsequent transferees of part of the mortgaged property. The defendants other than the mortgagors alleged that they had no knowledge of the mortgage. The mortgagors admitted execution of the bond, but denied receipt of consideration. The Court of first instance found that the mortgage-bond which was a registered document had been duly executed by the mortgagors. As to consideration it cast the burden of proof on the plaintiff and holding that the plaintiff had not discharged the burden, dismissed the claim. The lower Appellate Court rightly held that since receipt of consideration was admitted in the document itself and also before the Sub-Registrar the burden of proof as to non-receipt of it lay on the defendants, but it says that as the plaintiff gave evidence and that evidence is not credible, the suit must fail. I do not agree with the learned Judge of the lower Appellate Court on this point. As defendants-executants admitted receipt of consideration both in the document itself and before the Sub-Registrar, it was for them to prove that the admission was untrue. If the evidence adduced by the plaintiff proved that consideration was not paid, that is to say, that the defendants' admission was untrue, of course, the defendants could rely on that evidence; but in this case the plaintiff himself pledged his oath and one witness stated that consideration had been paid. The lower Appellate Court disbelieves their statement. Assuming that they did not state the truth it cannot be said that their statements proved that consideration was not paid and that the defendants' admissions were in fact untrue. The defendants made no attempt to examine witnesses. The plaintiff need not have adduced any evidence and if their evidence was not sufficient to prove payment of consideration, it did not disprove the admission made by the defendants. The lower Appellate Court was, in my opinion, wrong in holding that payment of consideration had not been proved. In the face of the defendants' admission which stood unrebutted, such a finding could not be arrived at. There is no

BABBU SITA RAM.

other question involved in this appeal. I accordingly allow the appeal, set aside the decrees of the Courts below and decree the plaintiff's claim with costs in all Courts.

Messrs. *Sital Prasad Ghosh* and *Girdharilal Agarwala*, for the Appellants.

Mr. *Braj Nath Vyas*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit on foot of a mortgage, dated the 23rd of September 1898. There were a number of defendants besides the mortgagors. The present appellants, Babu and Sukhnandan Lal, were defendants as purchasers of a portion of the mortgaged property. The Court of first instance, according to the judgment of the lower Appellate Court, threw the onus of proving the payment of consideration upon the plaintiffs, and held that they had not discharged this onus and accordingly dismissed the suit. The lower Appellate Court itself also dismissed the suit stating that while the Court of first instance was wrong in throwing the onus upon the plaintiffs, still the witnesses having been examined and not believed the suit was rightly dismissed.

A learned Judge of this Court finding that there was an acknowledgment of the money in the deed itself (and apparently believing that there was no other evidence adduced on behalf of the defendants), held that both the Courts below were wrong and decreed the plaintiff's claim.

We entirely agree with the remarks of the learned Judge of this Court. Where a mortgage-deed is proved to have been executed and the document contains an acknowledgment of the receipt of the consideration, this is a strong *prima facie* evidence that the consideration had been actually received, and is evidence not only against the mortgagors but also against persons claiming under them subsequent to the date of the mortgage. The presumption, of course, can be rebutted, and the mere fact that a Court was not satisfied with the evidence which the plaintiff adduced in addition to the acknowledgment, would not absolve the defendants from producing evidence to show that notwithstanding the acknowledgment in the body of the deed there was no consideration in fact. We would like here to point out that as a general rule the Subordinate Courts ought to hear the evidence on both sides. Their decisions are not always final. If they do not hear the evidence on both sides in cases in which appeals lie, the defendant may be put in the awkward position of having the case decided on appeal against him although his evidence has not been heard. To some extent we rather suspect that this is what happened in the present case. Evidently the learned Munsif was very dissatisfied with the plaintiff's evidence. We find, however, on referring to the record that one witness was examined on behalf of the defendants who deposed to facts which, if believed, would go to show that there was no consideration for the bond in suit. Also that he mentioned some persons who could corroborate this statement, and that these persons were summoned as witnesses. The facts were evidently not brought under the notice of the learned Judge of this Court owing very likely to the fact that the Pleader on behalf of the present appellants had died and they were unrepresented when the appeal was before him. We might also mention that the plaintiff and the appellant, Sukhnandan Lal, had come to terms and that the decree as against Sukhnandan could only have been in the terms of the compromise.

We allow the appeal, set aside the decree of this Court and also of the lower Appellate Court, and remand the case to the Court of first instance with directions to proceed to hear the evidence for the defence and to decide the case according to law. The Court will be entitled after hearing the defendants' evidence, if it thinks it necessary so to do, to hear any further evidence which the parties may adduce. Costs here and heretofore including both hearings in this Court will be costs in the cause.

Appeal allowed; Cause remanded.

KRISHNASAWMY PILLAI v. KOTHANDARAMA NAICKEN.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2335 OF 1913.

August 13, 1914.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumarasawmy Sastri.

KRISHNASAWMY PILLAI—DEFENDANT —APPELLANT

versus

KOTHANDARAMA NAICKEN AND OTHERS —PLAINTIFFS—RESPONDENTS

Trust—Revocation—Trusts Act (II of 1882), s. 78.

A valid trust once created is irrevocable by any subsequent act of the author of the trust.

Newton v. *Askew*, 11 Beav. 154; 50 E. R. 772; *Ellison* v. *Ellison*, 6 Ves. 656; 6 R. R. 19; 31 E. R. 1243; 2 Wh. & T. L. C., 7th Ed., 835; *In re Shum's Trusts*; *Prichard* v. *Richardson*, 91 L. T. 192, *Suppammal* v. *The Collector of Tanjore*, 12 M. 387, *Muhammad Aziz-ud-Din Ahmad Khan* v. *The Legal Remembrancer, North-Western Provinces and Oudh*, 15 A. 321; A. W. N. (1893) 109; *Hidait-oon-nissa* v. *Syud Afzul Hossein*, 2 N. W. P. H. C. R. 420; *Pullaya Chetty* v. *Vedchella Pillai*; 11 Ind. Cas. 24; (1911) 2 M. W. N. 376; 10 M. L. T. 44; *Mahadava Iyar* v. *Sankara Subramania Iyer*, 12 Ind. Cas. 546; (1911) 2 M. W. N. 382; *Abdul Rajak* v. *Bai Jimbabai*, 14 Ind. Cas. 988; 14 Bom. L. R. 295, followed.

Second appeal against the decree of the Court of the Subordinate Judge of Negapatam, in Appeal Suit No. 694 of 1912, preferred against that of the District Munsif of Negapatam, in Original Suit No. 46 of 1911.

Messrs. *G. S. Venkatarama Aiyar*, and *G. S. Ramachandra Aiyar*, for the Appellant.

Messrs. *C. S. Venkatachariar* and *E. Doraiswamy Aiyar*, for Mr. *K. Narasimha Aiyar*, for the Respondents.

JUDGMENT.—The facts of this case are not in dispute. On the 11th November 1894 one Neelayathakshi executed a deed of trust (Exhibit I) by which she settled certain properties on a temple. She constituted herself the trustee during her life-time and provided in the said deed for the carrying out of the trust by certain individuals after her death. She died on the 12th April 1907. On the day previous to her death she executed a Will (Exhibit IV) by which she purported to revoke Exhibit I and to make a new disposition of her properties. The dispositions themselves were in favour of the temple to which she had given the properties comprised in Exhibit I. The present suit is brought for a declaration that the Will of 1907 is inoperative and has not the effect of revoking the trust of 1894; and that under the terms of the trust-deed the plaintiffs are entitled to possession.

The question for consideration is whether there was a complete dedication of the properties under Exhibit I to the temple and, if so, whether it was competent to Neelayathakshi to revoke the trust. We think there was a complete dedication. In the document itself she says: "I have given away by this deed of gift this day to the said Sri Nilayathakshi Ambal the said shops etc." It is true that later on she says: "I shall establish a *kattalai* in my name for charity in the night time." This clause should not be construed as indicating an intention to settle the property only in future. It only indicates that the details in respect of the dedicated property shall be settled later on. Much stress was laid upon the statement in Exhibit I to the effect that this deed of gift and some other documents "which are the title-deeds for the said shop" have been handed over to Kothandarama Naicken. It is not disputed that the deeds were not handed over. From this it is argued that the settlor never fully carried out the dedication. It is in evidence that this lady contemplated that she would die almost immediately; but she recovered and lived for a considerable time. She, therefore, rightly held possession of this document as under the terms of the trust she was herself to be the trustee during her life-time. We do not think that the fact that the deed of gift was not handed over, is any indication of the terms of the trust not having been given effect to.

There is further the fact that in the year 1906 she purported to cancel Exhibit I by a registered document Exhibit III. Exhibit III says: "I have hereby cancelled the deed of gift which has been executed by me on the 11th November 1894 to the name of Sri Nilayathakshi Ambal." It is clear from this recital that the lady treated Exhibit I as a valid dedication; only she thought she had power to revoke it. She says: "I am not now willing to act according to that deed of gift." The fact mostly relied upon by the learned Vakil for the appellant is that after Exhibit I Neelayathakshi dealt with the property as if it was her own and never carried out any of the terms of the trust contained in Exhibit I. The argument is that Exhibit I was simply a paper transaction which was never intended to have effect. If there has been a valid dedication the sub-

sequent conduct of the settlor will not render it nugatory. At the time of the settlement all that was necessary to give effect to the wishes of the settlor had been done. If the terms of the settlement are not carried into effect it will make the settlor liable for breach of trust. It will not destroy the once validly created settlement. Under the Indian Trusts Act (II of 1882) which, no doubt, applies in terms only to private trusts, it is not open to a settlor to revoke a completed settlement. The English Law is to the same effect. See *Newton* v. *Askew* (1), *Ellison* v. *Ellison* (2). Our attention has not been drawn to any case in which it has been held that after a valid dedication to public uses it is open to the settlor to revoke it. On the other hand in Tudor on Charities it is stated that there can be no revocation after a valid dedication to charitable uses, and the case of *In re Shum's Trusts, Prichard* v. *Richardson* (3) is quoted in support of it. It was broadly argued by Mr. Ramachandraier that according to decided cases if the terms of the trust have not been given effect to, it must be presumed that there has been no valid dedication. The case of *Suppammal* v. *The Collector of Tanjore* (4) is chiefly relied upon for this proposition. In the first place it is to be remembered that in that case the property dedicated was the joint family property of two brothers one of whom alone executed the deed of trust. It is true that the language of Parker, J., would seem to indicate that when the trust was not carried out the document must be regarded as of no effect; but the learned Judge also referred to the fact that it was by one of the undivided brothers that the settlement was made. We do not think that the learned Judges intended to lay down as a matter of law that where the terms of a trust have not been given effect to, the defaulting trustee can claim to revoke the trust.

The case of *Muhammad Aziz-ud-din Ahmad Khan* v. *The Legal Remembrancer to North-Western Provinces and Oudh* (5) proceeds upon grounds which are peculiar to Muhammadan Law. The author of the trust never parted with possession until his death; and, as under the Muhammadan Law, in cases of gifts and trusts possession is essential, it was held in that case that there was no complete dedication to public uses by the mere execution and registration of the document. On the other hand in the case reported as *Hidait-oonnissa* v. *Syud Afzul Hossein* (6) it has been held that where a voluntary settlement has been completed it is not open to the settlor to revoke it. The cases of *Pullayya Chetty* v. *Vedachella Pillai* (7) and *Mahadeva Aiyar* v. *Sankara Subramania Aiyar* (8) distinctly lay down that in cases of public trusts there can be no revocation if there has been a complete dedication of a property. The case of *Abdul Rajak* v. *Bai Jimbadabai* (9) supports this view. We must, therefore, hold that as, on the execution of Exhibit I, there was a complete dedication of the property to the temple, it was not open to the settlor Neelayathakshi to revoke that dedication by the Will which she executed prior to her death. The decision of the Subordinate Judge is right and we dismiss the second appeal with costs of the plaintiff.

Appeal dismissed.

(1) 11 Beav. 145; 50 R. R. 772.
(2) 6 Ves. 656; 6 R. R. 19; 31 E. R. 1243; 2 Wh. & T. L. C., 7th Ed., 835.
(3) 91 L. T. 192.
(4) 12 M. 387.
(5) 15 A. 321; A. W. N. (1893) 109.
(6) 2 N. W. P. H. C. R. 420.
(7) 11 Ind. Cas. 24; (1911) 2 M. W. N. 376; 10 M. L. T. 44.
(8) 12 Ind. Cas 546; (1911) 2 M. W. N. 382.
(9) 14 Ind. Cas. 988; 14 Bom. L. R. 295.

PUNJAB CHIEF COURT.
FULL BENCH.

SECOND CIVIL APPEAL No. 1289 OF 1910.

April 10, 1914.

Present:—Mr. Justice Johnstone,
Mr. Justice Rattigan and
Mr. Justice Shah Din.

ARJAN SINGH—PLAINTIFF—APPELLANT

versus

LACHMAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation—Adoption—Suit to recover possession of immoveable property as adopted son—Limitation Act (IX of 1908), Sch. I, Arts. 118, 119, 144.

When a person (Hindu or Muhammadan) sues for possession of immoveable property alleging that he is the adopted son of the last proprietor and his adoption is denied, his suit is governed, not by Article 119, but by Article 144 of the first Schedule of the Indian Limitaion Act, 1908.

ARJAN SINGH *v.* LACHMAN SINGH.

Gujar Singh v. *Puran*, 71 P. R 1901; *Ganesha Singh* v. *Nathu*, 20 P. R. 1902; 11 P. L. R. 1902; *Bhupa* v. *Nigahia*, 68 P. R. 1903; 13 P. L. R. 1904, *Ram Narain* v. *Maharaj Narain*, 3 P. R. 1904; 43 P. L. R. 1904 and *Muhammad Niaz-ud-din* v. *Muhammad Umar Khan*, 1 P. R. 1907; 31 P. W. R. 907, overruled.

Muhammad Umar Khan v. *Muhammad Niaz-ud-din*, 13 Ind. Cas. 344; (1912) M. W. N. 77; 11 M. L. T. 76; 9 A. L. J. 137; 15 C. L. J. 172; 12 P. L. R. 1912; 22 M. L. J. 240; 14 Bom. L. R. 182; 16 C. W. N. 458 (P. C.); 126 P. R. 1912; 6 P. W. R. 1912; 39 C. 418; 39 I. A. 19; *Velaga Mangamma* v. *Bandlamudi Veerayya*, 30 M. 308; 17 M. L. J. 182; 2 M L. T. 178 and *Thakur Tirbhuwan Bahadar Singh* v. *Rimeshar Bakhsh Singh*, 28 A. 727; 33 I. A. 156; 10 C. W. N. 1065; 8 Bom. L. R. 722; 16 M. L. J. 440; 3 A. L. J. 695; 4 C. L. J. 405; 1 M. L. T. 265; 9 O. C. 377, followed.

Dheru Singh v. *Sidhu*, 56 P. R. 1903 (F. B); 93 P. L. R. 1903; *Surjan Singh* v. *Kharak Singh*, 96 P. R. 1908; 79 P. W. R. 1908; *Nathu* v. *Rahman*, 11 Ind. Cas. 11; 198 P. L. R. 1911; 44 P. R. 1911; 85 P. W. R. 1911; *Lali* v. *Murlidhar*, 24 A. 195; A. W. N. (1902) 10; *Chandania* v. *Salig Ram*, 26 A. 40; A. W. N. (1903) 163; *Jagannath Prasad Gupta* v. *Ranjit Singh*, 25 C. 354, and *Ram Chandra Mukerjee* v. *Ranjit Singh*, 27 C. 242; 4 C. W. N. 405, referred to.

Jagadamba Chaodhrani v. *Dakhina Mohun Roy*, 13 C. 308 (P. C.); 13 I. A. 84, *Mohesh Narain Munshi* v. *Taruck Nath Moitra*, 20 C. 487 (P. C); 20 I. A. 30; *Lachman Lal Chowdhri* v. *Kunhaya Lal Mowar*, 22 C. 609 (P. C.); 22 I. A. 51; *Parvathi Ammal* v. *Saminatha Gurrukkal*, 20 M. 49; *Srinivas* v. *Hanmant Pande*, 24 B. 260 (F. B.); 1 Bom. L. R. 799; *Shrinivas Sarjerao* v. *Balwant Venkatesh*, 20 Ind. Cas. 162; 15 Bom. L. R. 533; 37 B. 513; and *Ratnamasari* v. *Akilandammal*, 26 M. 291 (F. B.); 13 M. L. J. 27, dissented from.

Second appeal from the decree of the Divisional Judge, Amritsar, dated the 3rd August 1910, reversing that of the Munsif, second Class, Gurdaspur, dated the 17th March 1910, decreeing plaintiff's claim.

The Hon'ble Mr. *Shadi Lal*, R. B., for Mr. *Santanam*, for the Appellant.

Pandit *Ram Bhaj Datta*, for the Hon'ble Mr. *Muhammad Shafi*, K. B., for the Respondents.

ORDER OF REFERENCE.

SCOTT-SMITH AND RATTIGAN, JJ.—(*Dated 11th February* 1914.)—Karam Singh owned the land in dispute. On 14th of March 1898, he sold it to the defendants-respondents. Karam Singh died on the 4th of March 1899, leaving a widow *Musammat* Bhag Bhari who succeeded to his other property. In 1906 his reversioners brought a suit in regard to the sale to defendants and got a declaratory decree to the effect that it should only affect their reversionary rights to the extent of Rs. 148-12-0. Arjan Singh, plaintiff-appellant, brought the present suit for possession of the land alleging himself to be the adopted son of Karam Singh. Both the lower Courts have found the factum of adoption proved. Its validity was apparently never questioned. The first Court held the suit to be within time, it having been brought within twelve years of the death of Karam Singh. It also held that plaintiff was not bound by the decree in the previous suit brought by the reversioners, and eventually gave him a decree for possession of the land conditional upon payment of Rs. 49. The lower Appellate Court held that the suit of the plaintiff was barred by time as he could not succeed without proving the validity of his adoption, for which purpose he had only six years under Article 119 of the second Schedule of the Indian Limitation Act. It cited *Ram Narain* v. *Maharaj Narain* (1) as an authority in support of its view that Article 119, and not Article 144, of the second Schedule applied.

Plaintiff has applied to this Court on the revision side and his application has been admitted as an appeal under section 70 (1) (*b*) of the Punjab Courts Act. The question before us is whether, when a plaintiff sues for possession of immoveable property upon the ground that he is the adopted son of the deceased proprietor and his adoption is denied, his suit is governed by Article 119 or Article 144 of the second Schedule of the Limitation Act. Before discussing the question of limitation we clear the ground by disposing of Mr. Shadi Lal's argument that even if Article 119 applies the suit is not time-barred, because there had been no interference with plaintiff's right as an adopted son within the meaning of the Article. In support of his contention he referred to *Ningava* v. *Ramappa* (2) and *Chandania* v. *Salig Ram* (3). We have consulted these rulings, but we do not think that they are applicable to the present case. We are satisfied that there was an interference with the rights of the plaintiff as the adopted son of Karam Singh by the defendants from the moment of Karam Singh's death. In regard to limitation,

(1) 3 P. R. 1904; 43 P. L. R. 1904.
(2) 28 B. 94; 5 Bom. L. R. 708.
(3) 26 A. 40; A. W. N. (1903) 163.

Surjan Singh v. *Kharak Singh* (4) is a case relating to Article 118 of the second Schedule. Therein it was held by this Court, differing from previous rulings and following the Privy Council case reported as *Thakur Tirbhuwan Bahadar Singh* v. *Rameshar Bakhsh Singh* (5), that Article 118 of the second Schedule is not applicable to a suit by a reversioner to recover possession of immoveable property in the hands of a defendant under an alleged adoption, and that the proper limitation for a suit of this nature is twelve years under Article 144 of the Schedule. The ruling of the Privy Council in *Thakur Tirbhuwan Bahadar Singh* v. *Rameshar Bakhsh Singh* (5) was again followed by the Privy Council in *Muhammad Umar Khan* v. *Muhammad Niaz-ul-din* (6), and *Surjan Singh* v. *Kharak Singh* (4) was followed by this Court in *Nathu* v. *Rahman* (7).

It is urged on behalf of the respondents that these rulings all have reference to Article 118 of the second Schedule, and that *Ram Narain* v. *Maharaj Narain* (1) is a case in reference to Article 119 and is directly applicable to the present case. For the respondents *Srinivas Sarjerao* v. *Balvant Venkatesh* (8), wherein the correctness of the ruling reported as *Shiriniras* v. *Hanmant* (9) was affirmed, is also cited. These rulings are certainly in favour of the respondents. *Chandania* v. *Salig Ram* (3) supports the appellant and so does the ruling reported as *Appara Manigaran* v. *Muthusawmi Pillai* (10).

As at present advised we are inclined to the view that Article 119 is not applicable to the present suit for possession. We think this is in accordance with the Privy Council rulings reported as *Thakur Tirbhuwan Bahadar Singh* v. *Rameshar Bakhsh Singh* (5) and *Muhammad Umar Khan* v. *Muhammad Niaz-ud-din* (6). The ruling reported as *Ram Narain* v. *Maharaj Narain* (1) has, however, never been overruled and we think the question should be settled in an authoritative manner. We, therefore, refer the following question for decision to the Full Bench.

"When a plaintiff sues for possession of immoveable property stating himself to be the adopted son of the last proprietor and his adoption is denied, is his claim governed by Article 119 or Article 144 of the second Schedule of the Indian Limitation Act?"

Mr. *Pestonji Dadabhoy*, K. S., for the Appellant.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Respondents.

JUDGMENT OF THE FULL BENCH.

SHAH DIN, J.—(*9th April* 1914.)—The question referred to the Full Bench is as follows:—

"When a plaintiff sues for possession of immoveable property stating himself to be the adopted son of the last proprietor and his adoption is denied, is his claim governed by Article 119 or Article 144 of the second (first) Schedule of the Indian Limitation Act"?

Before the decision of their Lordships of the Privy Council in *Thakur Tirbhuwan Bahadar Singh* v. *Rameshar Bakhsh Singh* (5) was published, there was a conflict of opinion among the various High Courts in this country as to the correct interpretation to be placed upon Articles 118 and 119 of the second Schedule to the Limitation Act of 1877. With reference to certain observations which had been made by their Lordships in *Jagadamba Chaodhrani* v. *Dakhina Mohan Roy* (11), *Mohesh Narain Munshi* v. *Taruck Nath Moitra* (12) and *Lachman Lal Chowdhri* v. *Kanhaya Lal Mowar* (13), the Madras and Bombay High Courts held that Articles 118 and 119 of the said Act applied not only to suits for a declaration that an alleged adoption was invalid or never in fact took place or that an adoption was valid, as the case may be, but also to suits for possession of immoveable property in which the plaintiff could not

(4) 96 P. R. 1908; 79 P. W. R. 1908.
(5) 28 A. 727; 33 I. A. 156; 10 C. W. N. 1065; 8 Bom. L. R. 722; 16 M. L. J. 440; 3 A. L. J. 695; 4 C. L. J. 405; 1 M. L. T. 265; 9 O. C. 377.
(6) 13 Ind. Cas. 344; (1912) M. W. N. 77; 11 M. L. T. 76; 9 A. L. J. 137; 15 C. L. J. 172; 12 P. L. R. 1912; 22 M. L. J. 240; 14 Bom. L. R. 182; 16 C. W. N. 458 (P. C.); 126 P. R. 1912; 6 P. W. R. 1912; 39 C. 418; 39 I. A. 19.
(7) 11 Ind. Cas. 11; 44 P. R. 1911; 85 P. W. R. 1911; 198 P. L. R. 1911.
(8) 20 Ind. Cas. 162; 15 Bom. L. R. 533; 37 B. 513.
(9) 24 B. 260 (F. B.); 1 Bom. L. R. 799.
(10) 4 Ind. Cas. 1167; 5 M. L. T. 262.
(11) 13 C. 308 (P. C.); 13 I. A. 84.
(12) 20 C. 487 (P. C.); 20 I. A. 30.
(13) 22 C. 609 (P. C.); 22 I. A. 51.

succeed without displacing an alleged adoption of the defendant by proving that it was invalid or never in fact took place, or without proving that an adoption (set up by the plaintiff) was valid. *Parvathi Ammal* v. *Saminatha Gurrukkal* (14), *Ratnamasari* v. *Akilandammal* (15), *Srinivas* v. *Hanmant* (9). On the other hand, the Calcutta and Allahabad High Courts held that the remarks of their Lordships of the Privy Council in the three cases above cited had not a direct bearing upon Articles 118 and 119 of the Limitation Act of 1877, and that those Articles applied only to suits for a declaratory decree as to the invalidity or validity of an adoption, as the case may be, and not to suits for possession of immoveable property, notwithstanding that the plaintiff might have to prove the invalidity of an adoption or to establish its validity as the basis of his title to such property. The latter class of suits were, according to the Calcutta and Allahabad High Courts, governed by Article 144 of the Limitation Act, *Jagannath Prasad Gupta* v. *Ranjit Singh* (16), *Ram Chandra Mukerjee* v. *Ranjit Singh* (17), *Lali* v. *Murlidhar* (18) and *Chandania* v. *Salig Ram* (3). In our own Court the majority of the Judges adopted the same view as was held by the Madras and Bombay High Courts, *Gujar Singh* v. *Puran* (19), *Ganesha Singh* v. *Nathu* (20), *Bhupa* v. *Nigahia* (21), *Ram Narain* v. *Maharaj Narain* (1), *Niaz-ud-din Khan* v. *Muhammad Umar Khan* (22). Sir William Clark, C. J., however, expressed a different view in *Dheru Singh* v. *Sidhu* (23). Since the publication of the decision of their Lordships of the Judicial Committee in *Thakur Tirbhuwan Bahadar Singh* v. *Rameshar Bakhsh Singh* (5), the Madras High Court has held in *Valaga Mangamma* v. *Bandlamudi Veerayya* (24) that Article 118 of the Limitation Act, 1877, applies only to declaratory suits in respect of adoption and not to suits for possession of immoveable property, the period of limitation applicable to the latter class of suits being that prescribed by Article 144 of the said Act. The Madras decision has been followed by our own Court in *Surjan Singh* v. *Kharak Singh* (4) and *Nathu* v. *Rahman* (7), and although the rulings in the two last mentioned cases have reference to Article 118 of the Limitation Act, the *ratio decidendi* of these rulings applies, in my opinion, equally to a suit like the present in which the plaintiff sues for possession of immoveable property on the ground that he is the adopted son of the last male owner and the suit is brought more than six years after his rights as an adopted son had been interfered with.

On behalf of the respondents Mr. Muhammad Shafi has strenuously contended that the observations of their Lordships of the Privy Council in *Thakur Tirbhuwan Bahadar Singh* v. *Rameshar Bakhsh Singh* (5), with reference to which the Madras High Court and this Court have held that Article 118 of the Limitation Act applies merely to a suit for a declaration of the invalidity of an alleged adoption and not to a suit for possession of immoveable property in which adoption is set up as a defence, have been misunderstood; and that those observations cannot be taken to mean that the Judicial Committee has in any way departed from the principle applicable to cases falling within the purview of Articles 118 and 119 of the Limitation Act which was laid down in *Jagadamba Chaodhrani* v. *Dhakina Mohan Roy* (11), *Mohesh Narain Munshi* v. *Taruck Nath Moitra* (12) and *Lachman Lal Chowdhri* v. *Kanhaya Lal Mowar* (13). The learned Counsel has argued that the admission of Mr. Cohen to which reference is made in the third paragraph at page 739 of the report of their Lordships' judgment had reference to his (Mr. Cohen's) argument as to acquisition of title by his client within the meaning of section 2 of the Limitation Act of 1877 by reason of the lapse of twelve years since the date of his adoption before the said Act came into force, and that Mr. Cohen never admitted, and could not, therefore, have been understood to admit, that Article 118 of the Limitation Act of 1877 applied only to declaratory suits and not to a suit for possession like the one which had been filed by the opposite party in that case. Speaking for myself, I think that there is much force in Mr. Shafi's contention and his argument

(14) 20 M. 40.
(15) 26 M. 291 (F. B.); 13 M. L. J. 27.
(16) 25 C. 354.
(17) 27 C. 242; 4 C. W. N. 405.
(18) 24 A. 195; A. W. N. (1901) 10.
(19) 71 P. R. 1901.
(20) 20 P. R. 1902; 11 P. L. R. 1902.
(21) 68 P. R. 1903; 13 P. L. R. 1904.
(22) 1 P. R. 1907; 31 P. W. R. 1907.
(23) 56 P. R. 1903 (F. B.); 93 P. L. R. 1903
(24) 30 M. 308; 17 M. L. J. 182; 2 M. L. T. 178.

derives considerable strength from what Mr. Justice Chandavarkar has said on the same subject in his very lucid judgment in *Shrinivas Sarjirao* v. *Balwant Venkatesh* (8). But, in my opinion, the matter is made much clearer in the very recent decision of their Lordships in the case of *Muhammad Umar Khan* v. *Niaz-ud-din Khan* (6). In delivering the judgment of their Lordships in that case Sir John Edge says at page 432 (p. 345 of 13 Ind. Cas.):—

"Although their Lordships consider that the question of an adoption was an immaterial issue, they think it advisable to say that the omission to bring within the period prescribed by Article 118 of the second Schedule of the Indian Limitation Act, 1877, a suit to obtain a declaration that an alleged adoption was invalid, or never, in fact, took place, is no bar to a suit like this for possession of property. Their Lordships need only refer to *Thakar Tirbhuran Bahadar Singh* v. *Rameshar Bakhsh Singh* (5). Under the general Muhammadan Law an adoption cannot be made; an adoption, if made in fact by a Muhammadan, could carry with it no right of inheritance."

Now the judgment of their Lordships was delivered on appeal from the judgment and decree of this Court in the case of *Niaz-ud-din Khan* v. *Muhammad Umar Khan* (22); and it will be found that in the judgment of this Court, which was delivered by Mr. Justice Johnstone, there was a full discussion of the question whether Articles 118 and 119 of the Limitation Act of 1877 were applicable only to declaratory suits or also to suits for possession of immoveable property in which the validity or invalidity of an adoption comes into question, and it was held that the Privy Council decision in *Jagadamba Chaudhrani* v. *Dhakhina Mohan Roy* (11) which had been followed by the Madras and Bombay High Courts and also by this Court, was authority for holding that a suit for possession was governed by the said Articles of the Limitation Act equally with suits for a declaration (see pages 13 to 15 of the report). After discussing the questions whether the defendant Niaz-ud-din Khan had or had not been adopted by *Musammat* Zainab, and also whether the suit brought by the plaintiffs, although it was one for possession of immoveable property and not one for a mere declaration of invalidity of an alleged adoption, was or was not governed by Article 118 of the Limitation Act, 1877 Mr. Justice Johnstone said at page 17 "Finally, then, my view is that the adoption of defendant by *Musammat* Zainab was not inherently invalid, and so Article 118 fully applies and the suit is barred."

It was with reference to this view of Mr. Justice Johnstone as regards the applicability of Article 118 of the Limitation Act to the suit of the plaintiffs that their Lordships of the Privy Council expressed their opinion in the passage quoted above; and this expression of opinion is, it seems to me, of special significance on the question of the true construction of Article 118 (and, by parity of reasoning, of Article 119) of the Limitation Act of 1877. The language used by their Lordships in the paragraph under consideration shows to my mind that their Lordships, in view of the conflict of decisions cited in the judgment of this Court on the true nature and scope of Article 118 of the Limitation Act, 1877, desired to express their opinion clearly and definitely on the point of limitation involved so as to put an end to that conflict; if that was not the intention of their Lordships it was perfectly needless for them to express themselves as they did, because, as their Lordships point out, the "question of an adoption was an immaterial issue" in the case, and, therefore, an expression of opinion as to whether the suit of the plaintiffs was or was not barred under Article 118 of the Limitation Act was uncalled for. In my opinion the closing sentence of the paragraph does not, as has been argued by Mr. Muhammad Shafi, govern and limit the general applicability of the principle laid down in the preceding portion of that paragraph. It appears to me that their Lordships intended to lay down a general rule that a suit by a plaintiff for possession of immoveable property was not barred simply because he had omitted to bring within the period prescribed by Article 118 of the Indian Limitation Act, 1877, a suit to obtain a declaration that an alleged adoption of the defendant was invalid or never, in fact, took place; and with reference to the facts of the case before them, their Lordships further pointed out by way of strengthening the argument as to the inapplicability of Article 118 to a suit for

possession that "under the general Muhammadan Law an adoption cannot be made; an adoption, if made in fact by a Muhammadan, would carry with it no right of inheritance." This last observation does not mean, it seems to me, that if the alleged adoption is that of a person governed by Hindu Law or by the Customary Law of the Punjab that in that case even a suit for possession which involves the question of the invalidity of his adoption would be governed by Article 118 of the Limitation Act of 1877.

I cannot see any distinction in principle between Article 118 and Article 119 of the Limitation Act as regards the application of the rule of prescription governing cases of adoption, and in the published decisions of the various High Courts which have been cited and discussed before the Full Bench no such distinction has been drawn. At the present moment all the High Courts, with the single exception of the Bombay High Court, are agreed that a suit for possession of immoveable property is not governed by Articles 118 and 119 of the Limitation Act, and our own Court has recently adopted the same view. For the reasons given, my answer to the reference is in the affirmative ; in other words, I would hold that when a plaintiff sues for possession of immoveable property alleging that he is the adopted son of the last proprietor and his adoption is denied, his suit is governed, not by Article 119, but by Article 144 of the first Schedule of the Indian Limitation Act.

JOHNSTONE, J.—I concur.

RATTIGAN, J.—I concur.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1683 OF 1912.

August 12, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

ARUNACHALA MUDALI—PLAINTIFF—APPELLANT

versus

GOVINDARAJA MUDALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Res judicata—*Former suit against* Taluq *President for cancellation of order—Second suit against private parties for declaration of title—Same land—Second suit, whether barred.*

Where the former suit of the plaintiff against the Union Chairman and the *Taluq* Board President for the cancellation of an order forbidding the erection of his warp on a land, failed on the ground of limitation, he is not prevented by the rule of *res judicata* from suing to establish his title to the land as against private parties and procuring the removal of the *koradus*.

Second appeal against the decree of the District Court of Chingleput, in Appeal Suit No. 306 of 1911, preferred against that of the Court of the District Munsif of Chingleput, in Original Suit No. 645 of 1909.

FACTS.—The plaintiff brought a suit against a Union Chairman and the President of the *Taluq* Board for the cancellation of an order issued by the former whereby he was forbidden to erect his warp on a particular land. The defendants pleaded that the land was a public street and that the suit was barred by limitation. The suit was eventually dismissed on the latter ground. The plaintiff subsequently instituted the present suit against certain private individuals, who claim the land as their private property, for establishing his title to the same and for the removal of certain *koradus* erected by the defendants thereon. The defendants pleaded that the decision in the prior suit was *res judicata*. Both the lower Courts held that the matter in dispute was *res judicata* and dismissed the suit. The plaintiff thereupon preferred this second appeal to the High Court.

Mr. *T. R. Venkatarama Sastriar* for Mr. *L. A. Govindaraghava Iyer*, for the Appellant:—The lower Courts are clearly in error The matter could never be *res judicata*, for the very simple reason that the parties to the present suit were not parties to the prior suit nor did they claim under them. The scope of the two suits is entirely different. The first suit was against certain public officers

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and was intended to get rid of an order of the Union Chairman, and it failed on the ground of limitation. The present suit was to establish the title to the land as against private individuals.

Mr. *T. R. Krishnaswami Iyer*, for the Respondents:—The subject-matter of both suits was the same and the object of both suits is to establish the right of the plaintiff to errect his warp on the suit land. The matter was clearly *res judicata*.

JUDGMENT.—In our opinion the matter in dispute cannot be held to be *res judicata* for the simple reason that the parties to Original Suit No. 61 of 1899 on the file of the Court of the District Munsif of Chingleput are not the parties to the present suit, or parties under whom the latter claim. The plaintiff, no doubt, is the same in each; but in Original Suit No. 61 of 1899, the defendants were the Union Chairman and the *Taluq* Board President, contending that the disputed land was public street, while in the present suit the defendants are private persons claiming the said land as their private property. It may be added that the latter suit was simply brought for the cancellation of the Chairman's order forbidding the erection of the plaintiff's warp. It failed on the ground of limitation. This does not prevent the plaintiff from suing to establish his title to the land as against private parties and procuring the removal of the *koradus*.

The second appeal must be allowed and the suit remanded to the original Court for disposal on its merits.

Costs throughout will abide the result.

Appeal allowed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 1562 OF 1912.

July 2, 1913.

Present:—Mr. Justice Kensington,
and Mr. Justice Beadon.

NANAK CHAND—PLAINTIFF—APPELLANT

versus

JIWAN MAL—DEFENDANT—RESPONDENT.

Court Fees Act (VII of 1870), s. 7 (iv) (c), Sch. I, Art. 1, Sch. II, Art. 17 (iii)—Declaratory suit to cancel registered release-deed—Ad valorem *Court-fees to be paid—Civil Procedure Code (Act V of 1908), O. VII, r. 11 (b)—Deficiency in Court-fees not made up when ordered—Suit not to be dismissed—Plaint to be rejected—Costs awarded not to be excessive.*

The plaintiff sued on a stamp of Rs. 10 for a declaration that a release-deed (*faraghkhati*) executed by him in favour of his brother and subsequently registered be considered cancelled. Time was granted for making up the deficiency in Court-fees, which was not made up, and the suit was, therefore, dismissed:

Held, (1) that the plaintiff was bound to stamp his plaint *ad valorem* with reference to the amount, whatever it may be, at which he elects to value his relief;

(2) that in case of the refusal of the plaintiff to pay the required Court-fee, the proper order to pass was one for rejection of the plaint under rule 11 (*b*) of Order VII of the Code of Civil Procedure.

Where a plaint is rejected at an early stage in the trial, there is no justification for allowing excessive costs to the defendant, especially when the parties have been endeavouring up to that stage of the trial to come to terms by private arrangement.

First appeal from the decree of the District Judge, Shahpur, dated the 6th July 1912, dismissing the claim.

Mr. *Nanak Chand*, for the Appellant.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.—This suit was instituted on the 25th January 1912 on a stamp of Rs. 10 as one for a declaration that a release-deed (*faraghkhati*), dated 17th June 1911 and registered on the 19th December 1911, be considered cancelled.

At the first hearing the defendant pleaded that the suit should be stamped on the jurisdictional value of Rs. 15,000. There was no replication to this plea, and on the 1st June 1912 the Court decided that the plea was correct and that full stamp duty must be paid. Time was eventually given up to the 6th July and the plaintiff then stated that he was unable to pay the required fee. The Court thereon dismissed his suit with costs by the very brief judgment under appeal and drew up a formal decree in these terms.

The case is before us as if it was a first appeal from a decree, and the first point to be decided is, whether the District Judge was right in holding that the suit required to be stamped *ad valorem* on Rs. 15,000, at which sum plaintiff valued his relief in the plaint.

The parties are brothers living at Bhera and conducting a business at Merowal some five miles away. The ostensible meaning of the suit is that plaintiff desires to avoid the terms of the Hindu joint family separation consequent on the deed in respect of which the suit is brought. His alleged reason is that he has discovered that the

property is worth not Rs. 6,000, as he originally supposed, but Rs. 30,000, and we are asked to believe that he was unaware of the facts when the deed was executed, in consequence of the comparatively recent death of the father of the parties in October 1908.

The plaintiff contends that his suit has been correctly stamped at Rs. 10 under Article 17 (*iii*) of Schedule II to the Court Fees Act, on the ground that no consequential relief is involved in a suit brought under section 39, Specific Relief Act. We consider that there is sufficient authority against this contention in *Samiya Mavali* v. *Minammal* (1), *Parvatibai* v. *Vishvanath* (2), and *Hakim* v. *Musammat Mahtab Kaur* (3). A mere declaration is useless to plaintiff without, at least, such further relief as is involved in sending the copy of the decree to the Registration Department, as required by the second paragraph of section 39, Specific Relief Act, while substantially the plaintiff is really suing for a larger money share in the joint family property than he would otherwise get. The only ruling at all in his favour which plaintiff's Counsel has been able to quote as in any way relevant, is that given in *Zinnatunnessa Khatun* v. *Girindra Nath Mukerjee* (4), but that case should be distinguished as being one for cancellation of a decree. We are satisfied that the District Judge was so far correct in holding that plaintiff was bound to stamp his plaint *ad valorem* with reference to the amount, whatever it may be, at which he elects to value his relief. It is observed that by paragraph 12 of his plaint plaintiff asked for any other relief to which he might be entitled as well as for cancellation of the deed.

But the lower Court has clearly gone wrong both in dismissing plaintiff's suit and in allowing extravagant Pleader's fee, costs to the defendant (Rs. 450), in the decree which has been wrongly drawn up as for dismissal of a suit. The proper order to pass was one for rejection of the plaint under rule 11 (*b*) of Order VII, Civil Procedure Code, and as this rejection took effect at an early stage in the trial, there was no justification for allowing excessive costs to the defendant, especially as the parties had been endeavouring up to that stage of the trial to come to terms by private arrangement.

The plaintiff's appeal is accordingly rejected on the question of stamp duty. It is accepted on other points and the lower Court's decree is set aside. The order of that Court is altered to one for rejection of the plaint, and the Pleader's fee, costs adjudged to defendant in that Court, will be reduced from Rs. 450 to Rs. 32.

The plaintiff is only partially successful before us and it is directed that the parties shall pay their own costs in the Chief Court.

Appeal accepted in part.

(1) 23 M. 490; 10 M. L. J. 240.
(2) 29 B. 207; 6 Bom. L. R. 1125.
(3) 109 P. R. 1893.
(4) 30 C. 788.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2271 OF 1910.

July 23, 1913.

Present:—Mr. Justice Coxe and Mr. Justice Roy.

KUMUD LAL ROY CHOUDHRY AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAMANI MOHON ROY—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 2, O. XX, r. 12 (2)—Suit for possession and mesne profits—Order by Appellate Court deciding question of possession but sending case back for ascertainment of mesne profits—Preliminary decree.

Sub-section (2) of rule 12, Order XX, of the Code of Civil Procedure, refers to the preparation of a final decree in respect of mesne profits, and this implies that the decision with regard to possession is a preliminary decree within the meaning of section 2 of the Code.

Appeal against the decree of the District Judge of Dacca, dated the 11th March 1910, modifying that of the Subordinate Judge, first Court of Dacca, dated the 24th September 1908.

Babus *Harendra Narain Mitter* and *Rajendra Chandra Guha*, for the Appellants.

Babus *Dwarka Nath Chuckerbutty* and *Gunada Charan Sen*, for the Respondent.

JUDGMEMT.—This was a suit for recovery of possession of certain property and mesne profits which has been decreed by the Court below. The defendants appeal.

JAMAL *v.* QADIR BAKHSH.

With regard to the question whether the plaintiff is entitled to recovery of possession, we think the appeal is clearly barred. That was decided in favour of the plaintiff and the defendants appealed and their appeal was dismissed on the 7th June 1909. The case was sent back to the lower Court to ascertain mesne profits which the first Court had disallowed. The wording of this order was not very precise, but it seems clear that it was an order passed under Order XX, rule 12, directing an inquiry. The question whether or not the plaintiff was entitled to possession of the land, was finally determined and decided between the parties by that decision and was no longer pending for determination. Sub-section (2) of rule 12 refers to the preparation of a final decree in respect of mesne profits and this implies that the decision with regard to the possession is a preliminary decree within the meaning of section 2 of the Code of Civil Procedure. So far, therefore, the appeal must fail.

As regards the question of mesne profits the parties have come to an agreement and in accordance with that agreement, we allow a decree for Rs. 624 without interest. The respondents will get their costs of this appeal.

The cross-objection is dismissed without costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 423 OF 1912.

February 20, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Shah Din.

JAMAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

QADIR BAKHSH AND OTHERS—DEFENDANTS—RESPONDENTS.

Suits Valuation Act (VII of 1887), ss. 3 and 4 and rules—Declaratory suit by occupancy tenant against landlord that latter was not entitled to recover from him more than a certain share of produce—Jurisdictional value—Fifteen times land revenue.

The plaintiffs, occupancy tenants, sued their landlords for a declaration that the latter are not entitled to recover from them by way of rent more than 1/16th share of produce known as *lichh*:

Held, that under the provisions of sections 3 and 4 of the Suits Valuation Act and rules, the jurisdictional value of the suit was clearly 15 times the land revenue payable for the land.

Second appeal from the decree of the Divisional Judge, Multan Division, dated the 23rd January 1912, affirming that of the District Judge, Muzaffargarh, dated the 12th July 1911, dismissing the suit.

Mr. *Badr-ud-Din Kureshi*, for the Appellants.

Mr. *Fazl-i-Elahi*, for the Respondents.

JUDGMENT.—The plaintiffs, who are occupancy tenants of certain land attached to Gulmadarwala well, situate in *Mauza* Bir Band, Tahsil Alipur, have sued the defendants, who are landlords of that land, for a declaration that the latter are not entitled to recover from them by way of rent more than 1/16th share of produce, known as *lichh*. The suit was valued for purposes of jurisdiction at 30 times the revenue of the land, amounting to Rs. 1,171-14-0, and both the Courts below have concurred in dismissing the suit.

The plaintiffs have preferred a further appeal to this Court, and on behalf of the respondents Mr. Fazl-i-Ilahi has raised a preliminary objection that the suit has been over-valued at Rs. 1,171-14-0, the proper value being $\frac{1}{2}$ of that amount, and that, therefore, no further appeal lay to this Court under section 40 (1) (*b*) (*ii*) of the Punjab Courts Act as it stood before it was amended by Act I of 1912. In support of his contention that the value of the suit is 15 times the land revenue, and not 30 times, Counsel relies upon Rule VI of the rules framed by the Local Government under section 3 (1), read with section 4 of the Suits Valuation Act, VII of 1887.

Mr. Badr-ud-Din, for the appellants, has argued that the provisions of the rule, relied upon by the respondents' Counsel, do not apply to a suit of this kind, which does not relate to an occupancy right, but in which the plaintiffs seek a declaration that the defendants are not entitled to receive from them by way of rent more than 1/16th share of the produce. He has urged that this suit is not covered by any of the rules framed under section 3 of the Suits Valuation Act or by section 4 thereof and, according to him, the value of the suit is the total value of the garden, houses and *banjar* land of which his clients are in possession as occupancy tenants.

We think that Mr. Badr-ud-Din's contentions have no force whatever, and that the

present suit which is one for a declaration and relates to occupancy land or interest in occupancy land, is clearly covered by section 4 of the Suits Valuation Act, which must be read with the rules framed under the provisions of section 3 to determine the value of the suit for purposes of jurisdiction. Under the provisions of the aforesaid sections and rules the jurisdictional value of the present suit is clearly 15 times the land revenue, which is less than Rs. 1,000, and since both the Courts below have concurred in dismissing the suit, no further appeal lies to this Court. The appeal is accordingly dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 3631 OF 1910 AND NOS. 82 TO 87 OF 1911.
RULES NOS. 2586 AND 2592 OF 1911.
January 16, 1914.

Present:—Mr. Justice Coxe and Mr. Justice D. Chatterjee.

GUR PROSAD SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GUR PROSAD LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, rr. 2, 9, O. II, r. 6—Misjoinder or non-joinder of parties—Suit not to be defeated—Proper order to be passed—Suit dismissed for misjoinder or non-joinder of parties—Second appeal incompetent.

No second appeal lies from the decree of a District Judge confirming on appeal the decision of the first Court dismissing a suit both for misjoinder of parties and of causes of action.

Under Order I, rule 9, the Court has no power to direct a suit to be defeated by reason of the misjoinder or non-joinder of parties, but under the circumstances it should take action under Order I, rule 2, and Order II, rule 6, of the Code of Civil Procedure.

Appeals against the decrees of the District Judge of Bhagalpore, dated the 8th July 1910, affirming those of the Munsif of Jamui, dated the 21st April 1910.

Babus *Provas Chunder Mitter* and *Susil Madhub Mullick*, for the Appellants.

Babus *Kulwant Sahai* and *Biraj Mohan Mojumdar*, for the Respondents in Appeal No. 3631 of 1910.

JUDGMENT.—These are appeals against the decisions of the District Judge of Bhagalpore confirming the decisions of the Munsif of Jamui. The effect of the decisions is to dismiss the plaintiffs' suits both for misjoinder of parties and for misjoinder of causes of action. A preliminary objection is taken that no appeal lies in these cases and this is not contested. The appeals must, therefore, be dismissed with costs. We assess the hearing fee at Rs. 8 in each case in which appearance is made.

A petition has been put in that the orders may be revised. Under Order I, rule 9, the Court has no power to direct a suit to be defeated by reason of the misjoinder or non-joinder of parties and we think that in the circumstances of this case it was the duty of the Court to take action under Order I, rule 2, and Order II, rule 6. It was stated in the plaint that the collection of rent was joint and this was not traversed in the written statement. But considering the difficulties which have been described in the judgment of the Munsif, we think that the plaintiff certainly should not have brought one suit for all the reliefs claimed in the case. Each suit related to three different estates in two of which one of the plaintiffs had no interest.

We think, therefore, the proper order to pass is that the plaintiff shall pay the defendant by the 16th February 1914 all costs incurred by the latter up to date, including the costs of the appeals, with the exception of the Court-fee on the plaints and the applications for rule irrespective of the final result. Then separate trials will be held, one set for the rent due to the first plaintiff in respect of *Patti* No. 1, one set for the rent due to the first plaintiff in respect of *Patti* No. 4 and one set for the rent due to both the plaintiffs with respect to *Mouza* Ambari Khurd. The plaints will be amended so as to show what lands are included within each of these estates. If the costs are not paid within the time specified, these rules will stand discharged with costs. We assess the hearing fee at half a gold *mohur* in each Rule.

Let the record be sent down at once.

Appeals dismissed; Rules made absolute.

JALAL DIN *v.* QAIM DIN.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1089 OF 1911.

March 19, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Shadi Lal.

JALAL DIN AND OTHERS—DEFENDANTS—APPELLANTS

versus

QAIM DIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Pre-emption suit—Plaint omitting to mention portion of property claimed—Amendment after expiry of period of limitation—Amendment allowable—Date of institution date of presentation of original plaint.

Where in a pre-emption suit, the plaintiff, by mere inadvertence, omitted to mention in the plaint a portion of the property claimed, and was subsequently allowed to amend his plaint after the expiry of the ordinary period of limitation:

Held, that there was nothing illegal in allowing the plaint to be amended.

Where a plaint has been rightly amended, the date of institution of the claim is the date of presentation of the original, and not of the amended, plaint.

New Fleming Spinning and Weaving Company v. *Kessowji Naik*, 9 B. 373 and *Patel Mafatlal* v. *Bai Parson*, 19 B. 320, referred to.

Second appeal from the decree of the Divisional Judge of Lahore, dated the 2nd June 1911, affirming that of the Subordinate Judge, first Class, Lahore, dated the 29th April 1910, decreeing plaintiffs' claim.

Bawa *Sewa Ram Singh* and Chaudhri *Nabi Bakhsh*, for the Appellants.

Lala *Parduman Das*, for the Respondents.

JUDGMENT.—On 7th April 1908 a property was sold consisting of 41 *kanals* 18 *marlas* of land, the second storey of a house, share in a well and share of *shamilat*. Suit for pre-emption was instituted on 30th March 1909, but in the plaint the property asked for was described merely as 41 *kanals* 18 *marlas* of land. On 12th May 1909 plaintiff applied for leave to amend, saying he had not intended to renounce any part of the claim, but had by a "*kitabi ghalti*" omitted the house. The Court ruled that such amendment was permissible by law and should be made. It was accordingly made, and the house was added; but still share of well and of *shamilat* was left out. This defect was pointed out by vendee's Pleader on 4th February 1910, and the plaint was on the same day returned for amendment, and it was put in, finally and ully amended, on 16th February 1910.

The first Court, having held that the making of these amendments after the expiry of the ordinary period of limitation for such a suit did not "bar the suit," proceeded to find for plaintiff on the main question and gave him a decree for pre-emption on payment of full price; *i. e.*, on payment of full price for the equity of redemption, leaving him to pay the rest of the purchase-money to the mortgagee at his own will and pleasure.

In appeal to the Divisional Court the vendees merely asked that the suit should be dismissed as time-barred, because it was only after expiry of the period allowed by law that the whole property was demanded and because in pre-emption suits the whole bargain must be sued for and not a part. The lower Appellate Court ruled, however, that the omissions in the original and first amended plaints were merely due to carelessness, that plaintiff's intention from the beginning was to sue for the whole bargain, and that the *character* of the suit was not changed by the amendments.

Having lost the day in that Court, the vendees instituted this further appeal, and we have heard arguments. In our opinion everything points to the conclusion that we have here merely a case of inadvertence and misdescription of property claimed. No doubt plaintiff offered only Rs. 999 out of the Rs. 1,365 stated as price in the sale-deed, and if he had offered this reduced sum on the ground that he only wanted part of the property, his suit would perhaps have failed; but nothing of this sort happened. He recognized Rs. 1,365 as the price stated for the property he claimed, but urged that of it Rs. 366 was fictitious; and from this it is clear that he wanted to take over the whole bargain.

Appellants' Pleader first discusses the law in regard to amending plaints as contained in Order VI, Civil Procedure Code. He argues that rule 17 of that Order only allows amendments of *pleadings*, and then, turning to rule 2, urges that the claim made by a plaintiff is not the same as his pleadings, which only include the "material facts on which the party pleading relies *for his claim*;" but this contention appears to us sophistical. Rule 1 of the same Order says: "Pleading shall mean plaint or written statement;" and it follows that rule 17 allows amendment of any part of

a plaint, of course provided the amendment does not alter the character of the suit or introduce a different cause of action.

The lower Appellate Court relied upon *Kisandas Rupchand* v. *Rachappa* (1) and *Barkat-un-Nisa* v. *Muhammad Asad Ali* (2). As regards the former ruling Mr. Sewa Ram Singh contends that it lays down (page 650) that amendment may be allowed only if it does not work injustice to the opposite party. Here, he says, by the lapse of a year, his clients had acquired a valuable right, pre-emption is in its nature not a natural but an artificial right, and it was unjust to allow an amendment calculated to deprive appellants of the valuable right aforesaid. Arguments of this sort may have some validity in cases in which the defects in a plaint were intentional; but we can see in the action of the first Court here no injustice to appellants on a reasonable view of all the circumstances.

The Allahabad ruling is met by the contention that there the defect in the original plaint was the omission of a minute fractional share in describing the share of the land sued for, while here the part omitted was distinct property different *in kind* from that included in the original prayer. This distinction certainly exists; but, in our opinion, this distinction is immaterial, the real test being, in our opinion, whether the omission was intentional or merely inadvertent. Nor do we think that the mere fact that on the plaint as originally framed Court-fee was paid only on the land mentioned in it, is proof that plaintiff did not, in reality, want the whole bargain.

We do not think our view requires any elaborate justification. We may, however, refer to *Muhammad Sadiq* v. *Abdul Majid* (3), where the test was taken to be whether the amendment introduced a new cause of action, and, as it did not, an amendment increasing the share sued for was allowed even after the period of limitation had expired; to *Sevugan Chetty* v. *Krishna Aiyangar* (4), where amendment by way of prayer *for further relief* was allowed after expiry of limitation; to *Jasmir Singh* v. *Rahmatulla* (5), in which the test was taken to be whether the matter to be added had been "purposely excluded" in the original prayer; to the discussion of the converse case in *Banarsi Das* v. *Haji Abdul Ghani* (6) and to such rulings as *New Fleming Spinning and Weaving Company* v. *Kessowji Naik* (7) and *Patel Mafatlal* v. *Bai Parson* (8), in which it has been laid down that, where a plaint has been rightly amended, the date of institution of the claim is the date of presentation of the original, and not of the amended, plaint.

For these reasons we agree with the lower Appellate Court and dismiss this appeal with costs.

Appeal dismissed.

(1) 4 Ind. Cas. 726; 33 B. 644; 11 Bom. L. R. 1042.
(2) 17 A. 288; A. W. N. (1895) 10.
(3) 10 Ind. Cas. 476; 33 A. 616; 8 A. L. J. 636.
(4) 13 Ind. Cas. 268; 36 M. 378; 10 M. L. T. 557; 22 M. L. J. 139.
(5) 7 P. R. 1896.
(6) 1 Ind. Cas. 397; 10 P. R. 1909; 13 P. W. R. 1909; 24 P. L. R. 1909.
(7) 9 B. 373.
(8) 19 B. 320.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3029 OF 1910.

March 4, 1913.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beacheroft.

RAM CHANDRA MARWARI—PLAINTIFF—APPELLANT

versus

DHADHAI SINGH—DEFENDANT—RESPONDENT.

Mortgage—Several mortgagees—Suit by one mortgagee to enforce part of security—All mortgagees made parties—Allegation that other mortgagees had received their share of mortgage money—Plaintiff undertaking to increase amount of claim and pay Court-fee, if other mortgagees' claim not satisfied—Suit as framed competent.

In a suit to enforce a mortgage security, one of the joint mortgagees sued to recover his own share of the mortgage money, on the allegation that the other mortgagees, whom he made defendants, had received from the mortgagors a sum of money sufficient to satisfy their dues. The plaint further stated that if any sum was due to the mortgagee-defendants, the plaintiff was prepared to increase the amount of the claim and pay Court-fees accordingly:

Held, that under the circumstances the suit must be deemed as essentially a suit for recovery of whatever was due on the mortgage security, and thus when all the mortgagees were parties thereto, it could not be defeated on the ground that the plaintiff could not sue for a portion of the mortgage money.

AMAR SINGH v. KARAM SINGH.

It was open to the mortgagee-defendants, if anything was due to them, to have themselves transferred from the category of defendants to that of plaintiffs.

Appeal against the decree of the District Judge of Bhagalpur, dated the 14th July 1910, affirming that of the Subordinate Judge of Bhagalpur, dated the 28th February 1910.

Dr. *Rash Behary Ghose*, Babus *Umakali Mukherjee*, *Asutosh Mukerji* and *Garudas Sinha*, for the Appellant.

Babus *Joges Chandra Roy*, *Lal Mohun Gangooly*, *Biraj Mohan Majumdar* and *Nares Chandra Sinha*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the plaintiffs in a suit to enforce a mortgage security, commenced more than four years ago and not yet tried on the merits because the defendants have hitherto succeeded in their preliminary objections which are of an entirely technical and unsubstantial character. The case of the plaintiffs is that the defendants second party and third party had five-sixths and one-sixth share respectively in a mortgage security executed by the defendants first party, and they allege that they have purchased the one-sixth share which belonged to the third party defendants. They state that they have been informed that the defendants second party have received from the mortgagors a sum of money sufficient to satisfy their dues, they consequently bring this suit to enforce the security, only in respect of the money due in their share. The Subordinate Judge has dismissed the suit as bad for misjoinder of parties and causes of action. Upon appeal the District Judge has affirmed the decree of dismissal on the ground that the mortgage security is not divisible and the plaintiffs are not competent to sue in respect of their share of the mortgage money. In our opinion this decree cannot be maintained.

The plaintiffs allege that to the best of their information the mortgagors have paid to some of the mortgagees, represented by the second party defendants, a five-sixth share of the mortgage debt, and, that consequently, only one-sixth of the entire amount is due; they sue to recover this sum. They further state that if any sum is due to the second party defendants, they are prepared to increase the amount of the claim and pay Court-fees accordingly. Under these circumstances the suit must be deemed as essentially a suit for recovery of whatever is due on the mortgage security. As pointed out by Sir George Jessel, M. R., in *Lake* v. *South Kensington Hotel Co.* (1), it is open to the second party defendants, if anything is due to them, to have themselves transferred from the category of defendant to that of plaintiffs. This course they have not adopted, and in this Court it was stated on their behalf that they were not prepared to do so because they question the title of the plaintiffs as mortgagees. The suit as framed cannot possibly be defeated when all the mortgagees are parties thereto, and the plaintiffs seek to recover whatever is due on the security: *Pyari Mohun Bose* v. *Kedarnath Roy* (2).

The result is that this appeal is allowed, the decrees of the Courts below discharged and the case remanded to the Court of first instance in order that the questions raised in the first part of the second issue and in the third, fourth and fifth issues may be tried. The appellants are entitled to their costs both in this Court and the Court of appeal below from the first party and second party defendants other than the infants.

Appeal allowed: *Cause remanded.*

(1) 11 Ch. D. 121; 48 L. J. Ch. 361; 40 L. T. 638; 27 W. R. 514.

(2) 26 C. 409; 3 C. W. N. 271.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION NO. 782 OF 1913.

February 19, 1914.

Present:—Justice Sir Alfred Kensington, KT., Chief Judge.

AMAR SINGH—DEFENDANT—PETITIONER

versus

KARAM SINGH—PLAINTIFF—RESPONDENT.

Master and servant—Conditions of service—Work on holidays—Dismissal for refusal to work—Forfeiture of fifteen days' wages—Discretion of Court to determine whether forfeiture justified or not—When dismissal legal—No damages allowable to servant.

Sundays are customary holidays, but it is open to any employer to stipulate to the contrary, and if his servants having accepted service on these conditions refuse to abide by their terms, they must take the consequences.

Where a servant, who was required according to the rules of his service to work on a Sunday, refused to do so, and was summarily dismissed:

FAZAL IMAM v. SUKOR MAHTON.

Held, that the master did not act illegally in summarily dismissing the servant, but he certainly acted harshly and the prescribed penalty of forfeiture of pay for fifteen days could not be reasonably exacted.

The Civil Courts have ample discretion to determine in any particular case whether such penalty may be justified or not.

Where the master is within his rights in dismissing the servant in the middle of the month even though he acts harshly, the Court is not justified in requiring him to pay the servant by way of damages for the remaining days of the month.

Petition, under section 25 of Act IX of 1887, for revision of the decree of the Judge, Small Cause Court, Lahore, dated the 30th April 1913, decreeing the claim in part.

Mr. *Jai Gopal*, for the Petitioner.

JUDGMENT.—The facts of this case are that plaintiff was employed in the defendant's printing press on a pay of Rs. 19 a month. By the printed rules for employees in the press they are required to work on holidays, including Sundays, in case of necessity, with an allowance of overtime pay if required to do this extra work, and liability to summary dismissal and forfeiture of 15 days' wages on refusal.

The plaintiff failed to work on Sunday, 19th May, when ordered to do so, and was in consequence dismissed on Monday, 20th. He claimed wages for 19 days, *plus* some overtime allowance, *plus* damages (pay for 15 days more) on dismissal, in all Rs. 22-4-9.

The Small Cause Court allowed Rs. 19-2-6, including pay for the whole month and such overtime allowance as was found due, finding that "Sunday is a holiday under Negotiable Instruments Act, and under general law of the land servants cannot be forced to work on that day."

The Negotiable Instruments Act has nothing to do with the matter and a vague reference to the general law of the land is equally irrelevant. Sundays are customary holidays, but it is open to any employer to stipulate to the contrary, and if his servants having accepted service on these conditions refuse to abide by their terms, they must take the consequences.

This requires to be made clear in the interests of employers.

The defendant did not here act illegally in summarily dismissing the plaintiff on the 20th May, but he certainly acted harshly and the prescribed penalty of forfeiture of pay for 15 days cannot be reasonably exacted. The Civil Courts have ample discretion to determine in any particular case whether such penalty may be justified or not. The Small Cause Court was, in my opinion, acting properly in declining to enforce the penalty in the present case.

But as the defendant was within his rights in dismissing plaintiff on the 20th, even though he acted harshly in so doing, the Court was not justified in requiring him to pay the plaintiff by way of damages for the period—21st to 31st May.

The revision is accordingly allowed in part. The plaintiff is allowed pay for 19 days, *plus* overtime allowance due to him during that period, making in round figures Rs. 12 in all. The decree in his favour is reduced to one for Rs. 12 and the parties having been both to blame for the dispute will pay their own costs throughout.

Petition accepted.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 3481, 3196, 3471 TO 3480 AND 3482 TO 3546 OF 1910.

March 26, 1913.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

FAZAL IMAM—PLAINTIFF—APPELLANT

versus

SUKOR MAHTON—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 29, 74, 147B —Compromise—Enhancement of rent in kind.

In the Record of Rights the rent which was payable in kind, was stated to be one-half of the produce. The landlord sued for more than a half share of the produce; the defendants did not resist the claim. In fact, the common case of both the parties was that for a long series of years the tenants had paid rent to the landlord at the rate alleged and they jointly prayed that a decree might be drawn up in terms of the petition of compromise filed by them:

Held, that neither section 29 nor section 74 of the Bengal Tenancy Act applied to the case.

Section 29 deals only with the case of enhancement of money rent of an occupancy *raiyat*.

Section 147B of the Bengal Tenancy Act also did not touch the matter, as the presumption of accuracy which attaches to an entry in the Record of Rights had been rebutted in the case.

Appeals against the decrees of the District Judge of Bhagalpur, dated the 1st July 1910,

affirming that of the Munsif of Jamui, dated the 2nd March 1910.

Babu *Umakali Mukherjee* and Moulvi *Muhammad Ishfaq*, for the Appellant.

JUDGMENT.—This is an appeal on behalf of the plaintiffs-landlords in a suit for rent. The substantial question for consideration is, whether the compromise into which the landlords and the tenants have entered is in contravention of sections 147A and 147B of the Bengal Tenancy Act. In the Record of Rights the rent which is payable in kind is stated to be one-half of the produce. In the present suit, however, the landlords claimed more than a half share of the produce; the defendants did not resist the claim. In fact, the common case of both the parties is that for a long series of years the tenants have paid rent to the landlords at the rate alleged, and they jointly prayed that a decree might be drawn up in terms of the petition of compromise filed by them. It thereupon became the duty of the Court to determine, under section 147A, sub-section 2, of the Bengal Tenancy Act, whether the terms of the compromise, if they had been embodied in a contract, could be enforced under the provisions of the Statute. The Courts below have held that the agreement was in contravention of sections 29 and 74 of the Bengal Tenancy Act. In our opinion, this view cannot possibly be maintained.

Section 29 deals with the case of enhancement of money rent of an occupancy *raiyat*. Here, as already stated, the rent is payable in kind, consequently section 29 has no application nor does section 74 govern the matter. The quantity of produce in excess of a half share, admitted by the tenants to be payable, is in no sense an illegal cess within the meaning of section 74; it is paid as part of the rent, though, no doubt, the landlords pay certain officers their salaries from the excess quantity of produce thus received by them from the tenants. As neither section 29 nor section 74 is applicable, there is no reason why a decree should not be drawn up in accordance with the terms of the compromise. We are further of opinion that section 147B does not touch the matter. That section merely shows that the Court shall have regard to the entries in the Record of Rights relating to the subject-matter in dispute. Here, the Court has considered the entries in the Recod of Rights; but it has also found upon the evidence that rent has been paid by the defendants to the plaintiffs for a long series of years at the rate claimed by the landlords. Consequently the presumption of accuracy which attaches to an entry in the Record of Rights has been rebutted in this case.

The result is that this appeal is allowed and the decrees of the Court below discharged. A decree will be drawn up in accordance with the terms of the petition of compromise. There will be no order for costs in any of the Courts because the tenants are not responsible for the view taken by the Courts below.

It is conceded that this judgment will govern the other Appeals Nos. 3196, 3471 to 3480 and 3482 to 3546 of 1910 in which similar decrees will be drawn up.

Appeals allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 111 OF 1912.

February 18, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Shah Din.

FAZL HUSAIN—DEFENDANT—APPELLANT

versus

MALIK JINDA—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (II of 1905), s. 11, proviso—'Tribe'—Lohars and Tarkhans same tribe in Village Harnauli, District Mianwali—Limitation qua second vendee—Six years—Additional grounds of appeal put in at a late stage disallowed—Practice.

In a pre-emption suit, the rule of limitation applicable to the case of a second vendee is Article 120 of the Limitation Act, which allows six years from the time of transfer to the said vendee.

Karam Dad v. *Ali Muhammad*, 16 Ind. Cas. 70; 28 P. W. R. 1913; 61 P. L. R. 1913; 31 P. R. 1913 (F. B.), followed.

The word 'tribe' in the proviso to section 11 of the Punjab Pre-emption Act should be construed broadly and each case should be decreed on its merits.

The *Lohars* and *Tarkhans* of the village Harnauli, District Mianwali, form one tribe within the meaning of the proviso to section 11 of the Punjab Pre-emption Act

Where additional grounds of appeal were put in the Chief Court more than two years after presentation of the appeal, none of which were taken in the lower Appellate Court, the Chief Court disallowed them summarily without discussion.

FAZL HUSAIN *v.* MALIK JINDA.

Second appeal from the decree of the Divisional Judge, Attock Division, at Campbellpur, dated the 6th November 1911, varying that of the District Judge, Mianwali, dated the 29th May 1911, decreeing the claim in part.

Messrs. *Badr-ud-Din Kureshi* and *Beechey*, for the Appellant.

Rai Bahadur Pandit *Sheo Narain* and Lala *Balwant Rai* (for Rai Sahib Lala *Sukh Dyal*), for the Respondents.

JUDGMENT.—These three appeals (Nos. 111, 112 and 180 of 1912) are intimately connected, as will presently appear, and they can be conveniently disposed of in one judgment. On 19th March 1910 Fateh Din for himself and his brother, Sharaf Din, sold the land in suit to Fazal Husain. On 18th and 20th March 1911 two suits for pre-emption were started, in one of which Malik Jinda was plaintiff and in the other Ghulam Muhammad; and as usual each pre-emptor was made a defendant in his rival's suit. There is now no dispute about the price, Rs. 1,500.

The vendee admitted superior pre-emptive rights in Malik Jinda; but neither he nor Malik Jinda would concede any such rights to Ghulam Muhammad. Malik Jinda based his claim on his being a member of an agricultural tribe and a landowner in *Mauza* Harnauli, in which the land in suit lies, while Ghulam Muhammad says he has the right claimed inasmuch as he is of the same 'tribe' as the vendors and is their collateral relative. The former, therefore, claims under section 11, Pre-emption Act, and the latter under the proviso to the section.

A variety of pleas was put in, and issues were drawn covering both suits, and the findings of the first Court may be summarised thus:—

(*a*) Ghulam Muhammad is of the same tribe as the vendors, though he is not related to them, and, therefore, he can exercise the right of pre-emption, as he otherwise also fulfils the terms of the proviso to section 11 aforesaid.

(*b*) As both Malik Jinda and Ghulam Muhammad are entitled, they must share, according to the Statute and the Revenue Records, in the bargain in the following proportions, namely, Malik Jinda $\frac{82}{162}$ of the land on payment of $\frac{82}{162}$ of Rs. 1,500 aforesaid, and Ghulam Muhammad $\frac{80}{162}$, on payment of $\frac{80}{162}$ of Rs. 1,500. Three months was the period allowed for deposit.

(*c*) If either pre-emptor fails to take up his bargain, the other may pay instead of him and take the whole, another three months being allowed for this further deposit.

(*d*) A fifth defendant Gheba had been added by the Court, because it had been pleaded that out of the area in suit (2,541 *kanals*) 20 *kanals* had been sold to him by vendee for Rs. 40 on 13th January 1911, the deed of sale being registered just in the nick of time, on 17th March 1911. Gheba was made a defendant more than a year after registration of sale-deed in suit, but the Court got out of the difficulty by ruling that the sale to Gheba was a fiction, and that, if real, it was fraudulently concealed, no time-bar, therefore, supervening on this account.

In both cases Fazal Husain vendee-defendant alone appealed to the Divisonal Court, Attock. That Court held that Ghulam Muhammad was not only of the same "tribe" as the vendors, but was also related in some way to them; that the sale to Gheba was no fiction and was not fraudulently concealed; that, therefore, the claim for the 20 *kanals* sold to Gheba is barred by time. That Court on these findings gave a decree for 2,521 *kanals* (instead of 2,541), noted that the whole of the money had been paid in, and allotted shares to the two pre-emptors thus—Malik Jinda 1,276 *kanals* for Rs. 753 and Ghulam Muhammad 1,245 *kanals* for Rs. 735, Rs. 12 being deducted from Rs. 1,500 as rateable value of 20 *kanals*. Appellant-defendant-vendee was cast in costs in the lower Appellate Court.

Against the decrees of the lower Appellate Court three appeals have been filed, namely, Nos. 111 and 112 of 1912 by defendant-vendee asking for dismissal of the suits, and No. 180 by Malik Jinda to have the decree of the first Court in his suit restored.

As originally filed Appeal No. 111, in Malik

Jinda's suit, raised only the question of time bar, a plea which Mr. Kureshi (for appellant) admits must fail in view of the Full Bench ruling in *Karam Dad* v. *Ali Muhammad* (1). According to that ruling the Article applicable to the case *qua* Gheba is 120, which allows six years: and thus the plea of time bar falls to the ground. Mr. Kureshi, however, has put in additional grounds of appeal, which were admitted by a Judge in Chambers "subject to all just exceptions." Mr. Sheo Narain, on behalf of Malik Jinda, takes the objection that, especially in view of the nature of the additional grounds, none of which were taken in the lower Appellate Court, put in here, as they were, at the eleventh hour, on 11th February 1914, more than two years after presentation of the appeal, they should be summarily disallowed without discussion. In this view we fully concur; and the result is that defendant-vendee's appeal in Malik Jinda's case wholly fails.

As regards his appeal in Ghulam Muhammad's case we have heard lengthy arguments from Mr. Kureshi on the matter of Ghulam Muhammad's right of pre-emption. The crux of the matter is whether Ghulam Muhammad, a *Tarkhan* of *Mauza* Harnauli, can be said to belong to the same tribe as the vendors, who are *Lohars* of the same village. There is no definition available of the word "tribe". The question of the meaning of the word was discussed in *Ali Muhammad* v. *Shaman* (2), and we are content to take as just the propositions there directly and implicitly laid down, that the word should be construed broadly and that each case should be decided on its merits. In our opinion the question is here a pure question of fact, and the Courts below have, after examining all available evidence, concurrently found that the *Lohars* and *Tarkhans of this village Harnauli* form one tribe.

After giving the best possible attention to Mr. Kureshi's lengthy arguments on the point, we find that he has shown us no sufficient ground for holding those concurrent findings incorrect; and we, therefore, accept those findings. We do not think it right to discuss those arguments in detail.

(1) 18 Ind. Cas. 70; 28 P. W. R. 1913; 61 P. L. R. 1913; 31 P. R. 1913.
(2) 112 P. R. 1908.

The net result is that both appeals by defendant-vendee (Nos. 111 and 112) are dismissed with costs, and No. 180, appeal by Malik Jinda, *in re* Gheba's 20 *kanals* is accepted. As Ghulam Muhammad has not appealed in that connection, the decrees of the first Court, though substantially restored, are subject to a small obvious adjustment, and the decrees now given will stand thus:—

Malik Jinda to get 1,296 *kanals* out of the 2,541 in suit for Rs. 765, and Ghulam Muhammad the rest, *i. e.*, 1,245 *kanals*, for Rs. 735. The whole Rs. 1,500 is said to be in Court; but in case each pre-emptor has not paid in *his own* share of the money as stated above, we allow one month from this date for completion. If either pre-emptor fails to make up the sum due from him within one month, the other takes over the whole bargain, on condition of making up, within a further period of one month, any sum still deficient. If both pre-emptors fail in this, the suit will stand dismissed with costs.

Our authority for making this adjustment is Order XLI, rule 33, Civil Procedure Code.

As to costs, as already stated, Appeals Nos. 111 and 112 are dismissed with costs, while No. 180 is accepted with costs throughout, *i. e.*, defendant-vendee will pay Malik Jinda's costs in full in all the Courts. The taxing of costs for that appeal in this Court will form the subject of a special order in Chambers when the decrees have been drafted.

Appeals Nos. 111 *and* 112 *dismissed, No.* 180 *accepted.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 213 OF 1913.

May 19, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

PIR KHAN—PLAINTIFF—APPELLANT

versus

FAYAZ HUSAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Muhammadan Law—Sale by Shia—Suit by Sunni—Shia law of pre-emption, whether applicable.

PIR KHAN *v.* FAYAZ HUSAIN.

Where a Musalman of the Shia sect sells his property to a Hindu and a Sunni claims a right of pre-emption based on Muhammadan Law according to the Shia law of pre-emption, the Sunni has no right to pre-empt.

Abbas Ali v. *Maya Ram*, 12 A. 229; A. W. N. (1890) 93, *Qurban Husain* v. *Chote*, 22 A. 102; A. W. N. (1899) 198, referred to.

First appeal from a decree of the Subordinate Judge of Saharanpur, dated the 11th March 1913.

The Hon'ble Dr. *Sunder Lal* and the Hon'ble Mr. *Moti Lal Nehru*, for the Appellant.

Dr. *S. C. Banerji* and Mr. *L. M. Banerji*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption of a *zemindari* share and a house. The plaintiff-appellant is a co-sharer in the *mahal*. He is also a Mussalman of the Sunni sect. The vendor is also a Mussalman but of the Shia sect. The vendees are Hindus and strangers to the village. The plaintiff bases his right on a custom prevailing in the village among the members of the co-parcenary body. In the alternative he claims a right based on Muhammadan Law and alleges that he performed the two necessary preliminary demands. The Court below has dismissed the suit. It held that the plaintiff had failed to prove satisfactorily the existence of the alleged custom. In regard to the alternative claim, it held that the plaintiff was not entitled to claim the application of the Sunni rule of pre-emption to this case, the vendor being a Shia, and under the Shia rule of pre-emption, no right of pre-emption could be claimed in the circumstances of the present case as there were admittedly many more than two co-sharers. It must be pointed out that the share sold is *Khata Khewat* No. 19 in which the plaintiff has no share, but it is part of a *patti* in which he has a share. To this *patti* is attached certain *shamilat* land in which all the co-sharers of the *patti* have a share, and there is also some *shamilat deh* in which all the co-sharers of the *mahal* have shares. The house in suit stands on the *shamilat deh* and belonged to the vendor only. The plaintiff claims his right because he has a share in the *patti* and village. On appeal it is urged :—

(1) That the evidence produced is amply sufficient to prove the custom.

(2) That if this is not correct, then the lower Court was wrong in applying the Shia rule of pre-emption as the Muhammadan law of pre-emption prevailing in these Provinces must be taken to be the Sunni Law, irrespective of the creed of the parties, and, therefore, the lower Court ought to have decided the third and fourth issues which it has not touched.

In regard to the first point, the plaintiff produced an extract from the village *Wajib-ul-arz* of 1867, also copy of a judgment in a pre-emption suit of 1897, a copy of the *dasture dehi* prepared at the last Settlement which is now current and four witnesses.

Taking first the extract from the *Wajib-ul-arz* of 1867 we see that it runs as follows:—

"Paragraph 6 regarding the transfer of a *hakiyat* by sale or mortgage.

"Every co-sharer has power to transfer his '*hakiyat*' (his property) entered in the *khataoni*. If any co-sharer wishes to transfer his *hakiyat* by sale he shall first transfer it to an *ek-jaddi* own brother, and in case of his refusal a co-sharer in the village is entitled to make a purchase. If a dispute arises regarding the price of the property to be transferred it shall be decided either by the Court or by arbitration and if any brother or co-sharer does not take in lieu of the price fixed by arbitrators, the co-sharer may transfer it to a stranger if he likes; and he may mortgage it to whomsoever he likes. If a son is alive a gift in favour of a daughter's son or sister's son shall not be valid in the case of Hindus; but it shall be valid in the case of Mussalmans, while in the case of Englishmen the provisions of the statutory enactments shall be complied with.

"In this village *Mahajans*, *Brahmans*, *Kalals*, *Rajputs* and *Saiyeds* are co-sharers. On the death of a proprietor without male issue, his widow provided she does not re-marry shall be the owner with a power to sell or mortgage, but she shall not transfer the property of the deceased to her father, brother or relations. She can make a transfer to the heirs of her deceased husband. In case the widow adopts a son from amongst the issue of her father or deceased husband, then the property shall devolve on such adopted son if she adopts one from among the relations of the husband but it shall not devolve on

the issue of her father or on a *ghair-kuf*. In the case of two widows with different number of children the estate shall be divided with reference to the number of brothers and not *per stirpes*. In case there is no male issue the *ek-jaddi* relations shall be the owners."

We agree with the Court below that it is difficult, if not impossible, to accept this extract as recording pre-existing customs as to the transfer and devolution of property. The proprietary body consisted of Hindus of several castes and of Mussalmans whose customs and laws are naturally divergent. The clause even deals with the rights of Englishmen as to the power to make gifts. As their Lordships of the Privy Council have remarked there is no class of evidence which varies so much in value as this class, *i. e.*, *Wajib-ul-arziz*; and in the present case the clause contains, to use the language of Lord Collins in *Thakur Anant Singh* v. *Thakur Durga Singh* (1), entries recorded to connote the views of individuals as to the practice they would wish to see prevailing rather than the ascertained facts of a well-established custom.

A *Wajib-ul-arz* contains not only entries relating to custom but also entries relating to agreements arrived at by the co-sharers at the time of Settlement. The present record nowhere in clear terms sets forth that there is any 'custom' of pre-emption and the extract in the same clause contains matter which clearly could not be customs applying to all the co-sharers who were of various castes and religions. The evidentiary value of this document in the present case is practically *nil*.

Nor does the *dastur dehi* of the current Settlement assist us. It contains no mention of the rule of pre-emption. It mentions certain matters and then a general clause referring the reader for other customs to the old *Wajib-ul-arz* of 1867. The next piece of documentary evidence is the plaint and judgment in Suit No. 37 of 1897. This is no evidence at all of the existence of the custom. There is no mention of a custom in the plaint, no issue and no decision as to custom in the judgment. The right was claimed "Uunder the terms of the *Wajib-ul-arz* of the said village which is uncontested and still in force and binding in law on the vendor." Though the suit was brought, not while the Settlement of 1867 was in force, but during the currency of the present Settlement, the defendant vendee therein (who was the present plaintiff, then a stranger to the village) appears not to have contested this plea, but urged that the plaintiff therein had refused to purchase the property when offered to him. As evidence, therefore, of the existence of a custom these documents are of no value.

We next come to the four witnesses who testify to the existence of the custom. The first of these is the plaintiff Pir Khan himself. He bases his allegation that a custom of pre-emption exists on the entry in the *Wajib-ul-arz* and the fact that when he purchased a share in 1897, a co-sharer sued him and obtained a decree. This is the decree and suit which has been already discussed. He states that when he subsequently purchased another share, another co-sharer brought pressure to bear on his claiming a right of pre-emption. They came to terms under which he retained a portion of the property and subsequently the same co-sharer transferred the rest of the property and some more in addition. He admits two instances in which strangers acquired shares without any interference. In a third case he admits that a stranger acquired a share by status, that it was by auction sale. In one case he admits that though a suit was instituted to enforce the right of pre-emption, it was dismissed for default. He has no knowledge personally as to the state of affairs prior to 1897. Maru, the next witness, is very vague as to the incidents of the alleged custom and he has admitted four other instances in which strangers have purchased shares without any interference. Mahmudul Hasan, the third witness, is a man who was a co-sharer 15 years ago. His evidence is on all fours with that of the plaintiff and similar to it. He and the latter have in other suits given evidence for each other. Bundi, the fourth witness, alleges that the custom exists and states that he once brought a suit for pre-emption and won it. He had to admit that his mother brought it when he was a child. He admits that Fayaz Hussain sold property to Chunnilal Singh. He pretends that he does not know whe-

(1) 6 Ind. Cas. 787; 14 C W. N. 770; 7 A. L. J. 704; 12 C. L. J. 36; 12 Bom. L. R. 504; 8 M. L. T. 79; (1910) M. W. N. 324; 13 O. C. 163; 20 M. L. J. 604; 32 A. 363 37 I. A. 191.

ther his mother originally came into the co-parcenary body as a stranger purchasing from a co-sharer, Hussain Bakhsh. Although the other witnesses have admitted at least six instances, mostly in recent years, of strangers purchasing shares without interference from co-sharers, he states that there have been no such cases. He is clearly a partial and far from truthful witness. He does not know whether in his mother's case the right was based on custom or not.

It will be seen that while six cases of sales to strangers have been admitted, only four cases have been put forward in which the right of pre-emption has been claimed. In one of these, the plaintiff in the suit neither alleged nor claimed on the basis of custom. In the second the suit was dimissed for default. In the third the vendee and pre-emptor came to terms under which the former was allowed to retain part of the property and to take the balance a year after. In the fourth the claim was based on the entry in the *Wajib-ul-arz*. In these circumstances, looking to the ambiguity of the Settlement entries and the fact that in no more than 40 per cent. of the sales to strangers have claims for pre-emption been put forward and that not all of these were pressed or ended successfully, it is impossible to hold that the plaintiff has put before the Court sufficient evidence to establish the custom which he alleges.

We next come to the question of the plaintiff's right under Muhammadan Law. It is urged that the Muhammadan Law of pre-emption which the Courts in these Provinces can apply is the Sunni Law alone, and the reason given is that that was the law which was enforced before the British rule commenced. This is not an argument of much force, if of any at all. Reliance is placed on the decision of the Calcutta High Court reported as *Jog Deb Singh* v. *Mahomed Afzal* (2). We cannot follow this ruling in view of the decision of our own High Court. In the case of *Abbas Ali* v. *Maya Ram* (3), where the vendor and pre-emptor were both Shias and the vendee a Hindu, the Shia rule of pre-emption was enforced. In the case of *Kurban Hussain* v. *Chote Lal* (4), where a Shia sought to pre-empt in the case of a sale by a Sunni to a Sunni, the Court held that the suit must fail as the plaintiff being a Shia had, under the Shia Law, no right of pre-emption though under the Sunni Law such a right was given in the circumstances of that case. As was pointed out in that case, the Courts must apply the rule of justice, equity and good conscience. In the present case if the vendee and pre-emptor were to change places, the Shia could not pre-empt by reason of his own law, *i. e.*, his own law would be applied to him. In justice when he sells, his own law should be applied. There is no warrant for saying that the Shia Law of pre-emption is a dead letter in these Provinces. It has always been applied to Shias and we can see no justice in refusing to apply it. In the case of a sale by a Sunni to a Hindu, the Sunni Law is applied where a Sunni seeks to pre-empt, vide *Gobind Dayal* v. *Inayatullah* (5).

In our opinion the decision of the Court below is quite correct on both points. In this view the appeal fails and is dismissed with costs including fees on the higher scale.

Appeal dismissed.

(2) 32 C. 982; 9 C. W. N. 826.
(3) 12 A. 229; A. W. N. (1890) 93.
(4) 22 A. 102; A. W N. (1899) 198.
(5) 7 A. 775; A. W. N. (1885) 228.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 276 OF 1913.

January 7, 1914.

Present:—Mr. Justice Rattigan and Mr. Justice Beadon.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

versus

HAKIM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Land Acquisition Act (I of 1894), ss. 18, 19—Petition to Collector to review award—Petition rejected as time-barred, but sent to Divisional Judge to be put up with cases before him dealt with as order of reference—Appeal—Objection taken to jurisdiction of Divisional Judge at a late stage—Objection allowed to be taken—Divisional Judge incompetent to deal with application—Extension of time—Minority.

The award of the Collector was made on the 7th June 1912 and on the 11th July 1912, a somewhat vague petition on unstamped paper was presented to the Collector by all the respondents. This petition was returned on the ground that it was unstamped and did not specify the field areas to which it related.

SECRETARY OF STATE *v.* HAKIM.

On the 23rd July 1912, *H*, one of the respondents, presented a written objection to the award, but in it he merely asked the Collector to review his award and grant him further compensation. The Collector rejected the application as time-barred. On the 14th August 1912, *G*, another respondent, applied to the Collector practically for a review of his award. This application was also rejected as time-barred. The remaining respondents, *M* and *A*, said to be minors whose mother had been acting as their guardian, made no application after the unstamped petition of the 11th July.

The Collector, after rejecting the various petitions made to him, directed that the applications should be forwarded to the Court of the Divisional Judge "to be put up with the cases before him". This was regarded as an order of reference by the Collector, and the Divisional Judge dealt with it as such. On appeal from the order of the Divisional Judge, the Chief Court remanded the case, and subsequent to the date of return to the order of remand, the Government Advocate filed certain additional grounds of appeal taking exception to the jurisdiction of the Divisional Judge to adjudicate upon the claims of the respondents. Admittedly the objections had not been taken in the Court of the Divisional Judge when he was originally adjudicating upon the respondents' case:

Held, that the objection could be taken even at that stage of the case;

that under section 18 of the Land Acquisition Act, no extension of time is allowable on the ground of minority;

that the Divisional Judge had no jurisdiction to deal with the case of the respondents:—

(1) because there was no application by any of the respondents asking the Collector to take action under section 18 of the Act;

(2) because even the petitions made by the respondents were time-barred;

(3) because the Collector rejected the petitions and did not refer them under section 19 to the Divisional Judge, and

(4) because so far as *M* and *A* were concerned, there was no application at all before the Collector.

In re Land Acquisition Act; In the matter of Government and Nanu Kothare, 30 B. 275 at p. 285; 7 Bom. L. R. 697, referred to.

First appeal from the decree of the Divisional Judge, Hoshiarpur Division, dated the 12th November 1912, enhancing the compensation by Rs. 7,111-15-3 for the land acquired by Government for the High School, Hoshiarpur.

The *Government Advocate*, for the Appellant.

Sheikh *Umar Bakhsh*, for the Respondents.

JUDGMENT.—A return has now been made to this Court's order of remand, dated 12th May 1913, but the learned Government Advocate has filed certain additional grounds of appeal taking exception to the jurisdiction of the Divisional Judge to adjudicate upon the claims of the present respondents. These grounds were filed subsequently to the date of the said return, and it is admitted that they were not urged in the Court of the Divisional Judge when the latter was originally adjudicating upon the respondents' case. They were also not urged before this Court at the last hearing, but Mr. Petman contends that they go to the root of the case and as they show that the learned Judge had no jurisdiction to entertain and determine the claims put forward by the respondents, they can be raised even at the eleventh hour.

The authority cited by him [*In re Land Acquisition Act; In the matter of Government and Nanu Kothare* (1)] certainly supports his contention and the reasoning of the learned Judge (Chandavarkar, J.) who decided that case appears to us to be conclusive. The question, then, is whether in the present case the Divisional Judge had jurisdiction to deal with the case of the present respondents, Hakim, Gainda, Miran Bakhsh and Allah Ditta.

It appears that the award of the Collector was made on the 7th June 1912, and that on the 11th July 1912 a somewhat vague petition, on unstamped paper, was presented to the Collector by all the respondents. This petition was returned to the petitioners on the ground that it could not be entertained as it was unstamped and did not specify the field areas to which it related. On the 23rd July 1912 Hakim, acting for himself, presented a written objection to the award, but in it he merely asked the Collector to review his award and grant him further compensation. The Collector rejected this application as time-barred and in his order, dated 26th July 1912, observed that Hakim was present at the time when the award was announced.

On the 3rd August 1912 Hakim filed another petition before the Collector, but this was also rejected on the same grounds.

On the 14th August 1912 Gainda, on his own behalf, applied to the Collector practically for a review of his award, and urged that his petition was in time as he had no notice of the award until the 25th June, when notice of it was served upon him. This application was also rejected as time-barred,

(1) 30 B. 275 at p. 285; 7 Bom. L. R. 697.

and rightly so, for even upon the petitioner's own admission he had notice of the award on the 25th June and consequently more than six weeks had elapsed when he presented his petition on the 14th August. The respondents, Miran Bakhsh and Allah Ditta, (so far as we can gather from the record before us) made no application to the Collector after the rejection of the unstamped petition of the 11th July. They are said to be minors, but their mother had been acting as their guardian, and under section 18 of the Act no extension of time is allowable on the ground of minority.

Most unfortunately for all parties concerned, the Collector, after rejecting the various petitions made to him, appears to have directed that the applications should be forwarded to the Court of the Divisional Judge, "to be put up with the cases before him."

The Divisional Judge's office apparently regarded this order of the Collector as a reference under sections 18 and 19 of the Act, with the result that this case was placed before the learned Judge as an order of reference duly made by the Collector. Obviously this was an error, and as matters stood, the Divisional Judge had no jurisdiction to deal with the case of the respondents.

In the first place, there was no application by any of the respondents asking the Collector to take action under section 18 of the Act. The petitions of Hakim and Gainda (other objections apart) merely prayed the Collector to revise his award and to grant them further compensation.

In the next place, these petitions were time-barred and neither the Collector nor the Divisional Judge was competent to entertain them.

Thirdly, the Collector rejected the petitions and did not refer them under section 19 to the Divisional Judge.

And, lastly, so far as respondents, Miran Bakhsh and Allah Ditta, are concerned, there was no application at all before the Collector. Their petition of the 11th July had been rejected and thereafter they preferred no further application to the Collector.

In these circumstances we must hold, upon the authority cited, that the Divisional Judge had no jurisdiction to deal with the respondents' objections to the Collector's award, and we have no doubt that he would himself have declined to entertain these objections had he not been misled by the curious procedure adopted by the Collector.

We are ourselves at a loss to understand why that Officer, after very rightly rejecting the petitions presented to him, thought fit to forward the same to the Divisional Judge, with orders, in vernacular, which suggested that the petitions were referred in due course of law for the learned Judge's determination. The procedure prescribed by sections 18 and 19 of the Land Acquisition Act, 1894, is laid down in very clear terms and must be strictly observed. We cannot too strongly deprecate a departure from that procedure, and we believe that cases such as the one with which we are now dealing are extremely rare. As a result, however, of the irregularities committed by the Collector and by the Divisional Judge who was apparently himself misled thereby, the present respondents have been put to considerable expense, which might well have been avoided if the Collector had adhered rigidly to the provisions of the Act.

We must accept this appeal, but we think that in the circumstances the parties should be left to bear their own costs, and we direct accordingly.

Appeal accepted.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1000 OF 1912.

July 29, 1914.

Present:—Mr. Justice Oldfield.

ADAYAPADI RAMANNA UDPA AND OTHERS—APPELLANTS—PETITIONERS

versus

KRISHNA UDPA AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 9 (1)—Application by minor for restoration of suit—Guardian's laches—Duty of Court to inquire.

Where a minor's suit has been dismissed, the Court, while entertaining an application under Order IX, rule 9, of the Civil Procedure Code, ought to inquire whether the minor's guardian has been guilty of gross neglect of his interests. Minority itself is not "sufficient cause" for restoration.

MAHA PRASAD SINGH *v.* RAMANI MOHAN SINGH.

Kesho Pershad v. *Hirday Narain*, 6 C. L. R. 69; *Somayya* v. *Subbamma*, 26 M. 599; *Gopala Row* v. *Maria Susaya Pillai*, 30 M. 274; 17 M. L. J. 225, followed.

Venkatarama Aiyar v. *Nataraja Aiyar*, 18 Ind. Cas. 360; 24 M. L. J. 235; 13 M. L. T. 140; (1913) M. W. N. 165, distinguished.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of South Canara, in Civil Miscellaneous Appeal No. 6 of 1911, preferred against that of the Court of the District Munsif of Mangalore, in Interlocutory Application No. 48 of 1911.

Mr. *B. Sitarama Row*, for the Appellants.

Mr. *K. Y. Adiga*, for the Respondents.

JUDGMENT.—It is contended that the District Judge's decision should be set aside in revision, because he has dealt with this case without reference to the position of petitioners as minors litigating by their guardian.

The question is whether the point was entitled to consideration by the lower Courts in dealing with the question before them, one raised under Order IX, rule 9 (1), or whether they were limited to the inquiry whether "sufficient cause" for the absence of the minors' guardian was established. It is conceded that minority is not in itself covered by the description "sufficient cause."

Reliance has been placed for petitioners on *Kesho Pershad* v. *Hirday Narain* (1), a case directly in point. Other decisions against the restriction of the justification for restoration of a case for "sufficient cause" are *Somayya* v. *Subbamma* (2) and *Gopala Row* v. *Maria Susaya Pillai* (3). The former of these cases refers explicitly to the case of a minor whose suit has been dismissed through a guardian's laches. I must follow them in preference to *Venkatarama Aiyar* v. *Nataraja Aiyar* (4) and the cases cited therein on the other side. I, therefore, set aside the decision of the lower Court and direct it to restore the appeal and to hear it again in the light of the foregoing and with reference to the question whether the minors' guardian has been guilty of gross neglect of their interests. The point, on which petitioners now succeed, was not taken in the lower Courts. There will, therefore, be no order as to costs to date.

Decision set aside.

(1) 6 C. L. R. 69.
(2) 26 M. 599.
(3) 30 M. 274; 17 M. L. J. 225.
(4) 18 Ind. Cas. 360; 24 M. L. J. 235 at p. 239; 13 M. L. T. 140; (1913) M. W. N. 165.

PRIVY COUNCIL.

APPEALS FROM THE CALCUTTA HIGH COURT.

May 19, 1904.

Present:—Lord Shaw, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

MAHA PRASAD SINGH AND OTHERS—APPELLANTS

versus

RAMANI MOHAN SINGH AND OTHERS—RESPONDENT

AND

SURENDRA MOHAN SINGH AND OTHERS—APPELLANTS

versus

MAHA PRASAD SINGH AND OTHERS—RESPONDENTS.

AND

RAMANI MOHAN SINGH AND OTHERS—APPELLANTS

versus

MAHA PRASAD SINGH AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 19—Jurisdiction—Consent or contract, whether can give jurisdiction to Court—Pleadings—Plea of jurisdiction raised neither before High Court nor before Privy Council on appeal but pressed in argument before Privy Council—Facts not disputed—Plea allowed—Suit relating to lands situated in Sonthal Parganas instituted in Bhagalpur—Settlement of lands not completed and concluded before suit—Sonthal Parganas Settlement Regulation (III of 1872), ss. 5, 6—Exclusive jurisdiction of Settlement Officers or Officers appointed by Lieutenant-Governor of Bengal—Sonthal Parganas Act (XXXVII of 1855), s. 2—Sonthal Parganas Justice Regulation (Act V of 1893), Part 2—Bengal Civil Courts Act (VI of 1871)—Bengal, North-Western Provinces and Assam Civil Courts Act (XII of 1887)—Compound interest—Interest exceeding principal—Interpretation of Statute—Proviso, how to be interpreted.

Lands, two-thirds of which were situated in the District of Sonthal Parganas and one-third in the District of Bhagalpur, were mortgaged by mortgagors residing in the former District, by a bond executed at Bhagalpur containing a stipulation that the mortgagees might enforce it in the Bhagalpur Court. Before the date on which the mortgagees sued on their mortgage in the Court of the Subordinate Judge at Bhagalpur, some portions of the lands situated in the Sonthal Parganas had been settled and notification had been duly made under section 5 of the Sonthal

Parganas Settlement Regulation, III of 1872 that such Settlement had been completed, but other portions of the lands were not so settled prior to that date. The defendants pleaded, *inter alia*, that the Court in which the suit was instituted had no jurisdiction to entertain it under the Sonthal Parganas Regulations, and that the plaintiffs were precluded from claiming compound interest or interest exceeding the amount of the principal advanced, under section 6 of Regulation III of 1872. On both these questions the Subordinate Judge found against the defendants. On appeal to the High Court as well as to the Privy Council the question of jurisdiction was not raised, but it necessarily presented itself in the argument before the latter tribunal:

Held, that (1) their Lordships could not decline to entertain the question of jurisdiction, although it was not specifically raised in the appeal, because it depended on no disputed facts and necessarily presented itself in the argument;

(2) as the land situated in the Sonthal Parganas had not been settled and the Settlement declared by a notification to have been completed and concluded, the suit came within the provisions of section 5 of the Sonthal Parganas Settlement Regulation III of 1872, and must have been brought before Settlement Officers or Courts of Officers appointed by the Lieutenant-Governor of Bengal under section 2 of the Sonthal Parganas Act (XXXVII of 1855) & the Sonthal Parganas Justice Regulation Act V of 1893), and therefore, the suit could not lie in a Court established under the Bengal Civil Courts Act (VI of 1871) or under the Act which has taken its place, namely, the Bengal, United Provinces and Assam Civil Courts Act (XII of 1887);

(3) as the Court of the Subordinate Judge at Bhagalpur had no jurisdiction to entertain the suit, the parties could not give it the necessary jurisdiction by consent, that is to say, by the stipulation in bond that the mortgagees could enforce it in the Court of Bhagalpur;

(4) the provision of section 6 of the Sonthal Parganas Regulation III of 1872 is not one of procedure but of substance, and so far as the Courts having jurisdiction within the Sonthal Parganas are concerned, it places all contractual stipulations as to compound interest in a position of non-enforceability and limits statutably the total interest which can be decreed on any loan or debt;

(5) the phrase "all Courts having jurisdiction in the Sonthal Parganas" in section 6 of the Sonthal Parganas Regulation did not mean Courts locally situated in the Sonthal Parganas and dealing with matters purely local, but meant all Courts having jurisdiction in the Sonthal Parganas and acting under and by virtue of such jurisdiction;

(6) apart from the question of jurisdiction any Court dealing with the subject-matter of the suit would be bound to give full force and effect to the provisions of section 6 of the Sonthal Parganas Regulation III of 1872, and to refuse to decree compound interest or total interest exceeding the principal of the original debt or loan; and

(7) unlike an exception, a proviso to a clause should be taken in connection with the general language of the previous portion of the clause.

Three consolidated appeals: The first from a judgment and decree, dated 3rd April 1907, of the High Court of Judicature at Fort William in Bengal, on appeal from a judgment and decree of the Subordinate Judge at Bhagalpur, dated 12th February 1906; second from a judgment and decree of the said High Court, dated 5th December 1907*, on appeal from a judgment and order of the said Subordinate Judge, dated 19th August 1907, and the third from a judgment and decree of the said High Court, dated 18th December 1908, on appeal from a judgment and decree of the said Subordinate Judge, dated 6th August 1908.

FACTS.—For the purpose of this report it is not necessary to refer to the facts in the last two appeals which were brought by the mortgagees. The facts of the first appeal brought by the mortgagors were as follows :—

On the 21st December 1896, a mortgage for Rs. 3,50,000 with interest at the rate of Rs. 7-8 per cent. per annum with annual rests was executed by the then adult members of a joint Hindu family governed by the Mitakshara School of Hindu Law, consisting of the appellants in the above-mentioned first appeal, in favour of Rai Suraj Narain Singh Bahadur, since deceased, father of the respondents in that appeal. The mortgage was the last of various transactions of the same character, ranging over a period of about fourteen years, made between the members of the said joint family and the said mortgagee.

The properties mortgaged consisted of interests in lands, the greater part of which was situated in the District of the Sonthal Parganas and the remainder in that of Bhagalpur. The mortgage which was executed at Bhagalpur specifically stated and provided that the principal, interest and compound interest due on account of the loan should be re-paid at Bhagalpur, that the loan had been taken at Bhagalpur, and that the said mortgagee would be at liberty to institute a suit in the Court of the District Judge of Bhagalpur for the realization of the amount due upon the mortgage by the sale of the mortgaged properties.

*This judgment is reported in 4 Ind. Cas. 56.—*E*

MAHA PRASAD SINGH v. RAMANI MOHAN SINGH.

On the 20th June 1904 the present suit was instituted by the respondents as the heirs and legal representatives of the mortgagee in the Court of the Subordinate Judge of Bhagalpur, for the recovery of the amount due on the mortgage in respect of principal, interest, compound interest and costs by sale of the said mortgaged properties, the mortgagors, who were resident in the Sonthal Parganas, and others who were interested in the lands mortgaged being made parties. On the pleadings the Subordinate Judge fixed ten issues of which only the following are now material:

(1) Whether this Court has jurisdiction to try the suit? (6) Are the plaintiffs precluded from claiming compound interest or interest exceeding the amount of principal advanced, under Regulation III of 1872?

The Subordinate Judge decided both those issues in favour of the mortgagees-plaintiffs and decreed the suit. His judgment on those points was as follows :—

1st Issue.—"It is admitted that a portion of the mortgaged properties is situated within the local jurisdiction of this Court (see the affidavit of the witness Maharaj Dubey of the defendants in the High Court dated the 8th August 1904 and the evidence of the defendants' witness No. 1, Keshi Lal, and paragraph 16 of the bond in suit) and, therefore, under section 19 of the Civil Procedure Code this Court has jurisdiction to try this suit. Moreover, the defendants in paragraph 16 of the bond in suit stipulated that this Court would have jurisdiction to try the suit. The Honourable High Court practically decided in the motion that was made by the defendants for a transfer of this suit to the Sonthal Parganas that this Court has jurisdiction to try this suit (See the report in 1 Calcutta Law Journal, page 6 *note*). I, therefore, find this issue in favour of the plaintiffs."

6th Issue.—"It has been contended on behalf of the defendants that notwithstanding any stipulation contained in bond 1, consent of parties cannot give jurisdiction to a Court: if this Court has jurisdiction to try this suit, that jurisdiction has been conferred by section 19 of the Civil Procedure Code, as a small portion of the property hypothecated by the bond 1 is situated within the jurisdiction of this Court, which jurisdiction is neither local nor pecuniary; hence it has been contended that this Court has concurrent jurisdiction to try the suit with a Court at Sonthal Parganas, and, therefore, this Court must be considered as a Court "having jurisdiction in the Sonthal Parganas" within the meaning of section 6 of Regulation III of 1872 (B. C.) and as a consequence, this Court cannot give compound interest or interest exceeding the principal amount mentioned in the bond. But no authority has been cited for this proposition. Sections 19 and 223, Civil Procedure Code, give jurisdiction to this Court, but these two sections do not give this Court any "jurisdiction in the Sonthal Parganas" but only to the particular case. It was held in *Sew Prosad Poddar* v. *Corporation of Calcutta* (1) that the law of the place where the contract was made would govern the rights of the parties, *Sujan Singh* v. *Ganga Ram* (2) and *Palaniappa Chetti* v. *Periakaruppan Chetti* (3) also lay down the same principle. The very fact of the stipulation in paragraph 19 of bond 1, that the suit upon the bond would be instituted in Bhagalpur and the defendands would have no right to object to it, indicates the intention of the parties that they would not be governed by the Sonthal Parganas Law, and it was one of the conditions upon which the money was advanced, and it is admitted that the bond 1 was executed at Bhagalpur. Hence I am of opinion, that plaintiffs are entitled to get the interest claimed and should not be governed by Regulation III of 1872 (B. C.) which extends to the whole of the Sonthal Parganas (see section 2) and that section also says this Regulation shall be read with Act XXXVII of 1855. This explains the words "All Courts having jurisdiction in the Sonthal Parganas" in section 6 and it does not mean any Court in the Regulation District having under section 19, Civil Procedure Code, concurrent jurisdic-

(1) 9 C. W. N. 18.
(2) 8 C. 337 (P. C.); 7 P. R. 1882; 4 Sar. P. C. J. 307; 9 I. A. 58; 6 Ind. Jur. 150
(3) 17 M. 262.

tion to try the suit and to sell properties situated in the Sonthal Parganas. In construing a Statute the words used should be taken in their accepted sense. I, therefore, find this issue also against the defendants".

On appeal the question of jurisdiction was not raised in the High Court which affirmed the decision of the Court below on the 6th issue for the following reasons :—

"Mr. Eardley Norton argues that, when, in section 6 of the Regulation III of 1872 it is laid down that all Courts having jurisdiction in the Sonthal Parganas shall observe the following rules, and therein certain restrictions are provided against usury, which the Subordinate Judge in this suit has not given effect to. The Subordinate Judge himself says that, in his opinion, the provisions of section 6 of Regulation III of 1872 do not apply to Courts exercising jurisdiction within the Sonthal Parganas under section 19, Civil Procedure Code. He thinks that these words relate only to the Courts of the Sonthal Parganas exercising jurisdiction within their territorial limits; and it would appear to us that the Subordinate Judge's view upon this matter is correct. We are relieved of the necessity of discussing this question at any great length because it was decided by this Court in Regular Appeal No. 467 of 1902 in a judgment, dated the 16th December 1903, to which one of the members of this Bench was a party. In that judgment occurs the following passage: "The appellant's fifth plea is founded on the terms of section 6 of the Settlement Regulation III of 1872, according to which no Court having jurisdiction in the Sonthal Parganas can decree compound interest arising from any intermediate adjustment of account or a larger amount of interest than the original debt." But the words "Court having jurisdiction in the Sonthal Parganas" occuring in the section must, in our opinion, refer to a Court in the Sonthal Parganas and constituted under the Regulation. They cannot include a Court, such as that of the Subordinate Judge of Bhagalpur when dealing with a suit, the cause of action in which has arisen within his jurisdiction, and not in the Sonthal Parganas, and which has only jurisdiction in the Sonthal Parganas in the sense that it has power to order the sale of some of the mortgaged property which is situated in that district.

"Two cases have been cited by the learned Pleader for the appellants, namely, *Dungaram Marwari* v. *Rajkishore Deo* (4) and *Shama Charan Misser* v. *Chuni Lal Marwari* (5). They do not appear to be in point, or to throw any light upon the question now under discussion. There is certainly nothing in them which in any way conflicts with the view expressed above.

"Mr. Eardley Norton, for the appellant, has cited another case, namely, that of *Maseyk* v. *Steel & Co.* (6). But it does not appear to us that this case in any way supports his contention. We accordingly see no reason to dissent from the view taken by this Court in the judgment above cited. Moreover, our attention has been called to the fact that in the mortgage-bond on which the plaintiff now sues the defendants expressly declare that the loan had been taken in Bhagalpur for the realization of the amount due. It appears that all the loans taken by the defendants from the plaintiff were taken at Bhagalpur; and there was further stipulation that interest should be paid at Bhagalpur. We, therefore, think that the suit was properly instituted at Bhagalpur and that, for the reasons above given, the Court at Bhagalpur was not restricted in awarding interest by the provision of section 6 of Regulation III of 1872."

Mr. *Lowndes*, for the Mortgagors:—By a notification, dated the 19th August 1867, in the *Calcutta Gazette* the Code of Civil Procedure, 1859 (Act XIV of 1859), was made applicable to the Sonthal Parganas under power given in section 385 of the Code in that behalf. But section 5 of Regulation III of 1872 takes all suits relating to lands, etc., out of the jurisdiction of the ordinary Courts in the Sonthal Parganas. Such suits must be brought before the Settlement Officers or the Officers appointed under section 2 of Act XXXVII of 1855. It follows, therefore, that the Court of Bhagalpur could have no jurisdiction to entertain such suits. The repealing Codes, Act X of 1877 and Act XIV of 1882, do not

(4) 18 C. 133.
(5) 26 C. 238.
(6) 14 C. 661.

apply to the Sonthal Parganas: see sections 1 and 3 of both Codes, which do not give the Government power to extend them to the Scheduled Districts, which include the Sonthal Parganas; see Act XIV of 1874. Regulation V of 1893 makes the Code of Civil Procedure applicable to suits of Rs. 1,000 and over, see sections 9 and 10. But these sections do not apply to suits mentioned in section 5 of Regulation III of 1872. Unless it is shown that the lands mortgaged are settled and that the Settlement has been declared by a notification in the *Calcutta Gazette* to have been completed and concluded, the suit could only lie under section 5 of Regulation III of 1872 before the Settlement Officer or Officers appointed under section 2 of Act XXXVII of 1855. The decision in *Sorbojit Roy* v. *Gonesh Prosad Misser* (7) does not consider the effect of section 5 of Regulation III of 1872 on the notification of August 19, 1867, and relates to the right of appeal. That case is, therefore, not an authority on the question whether this suit lies in the Bhagalpur Court. Reference was also made to *Ram Ratan* v. *Lalta Prasad* (8). For enactments in force in the Sonthal Parganas see the Bengal Code, 3rd Edition, page 242 *et seq.* No notification in the *Calcutta Gazette* as required by section 5 of Regulation III of 1872 has appeared in respect of all the mortgaged lands and consequently the Court in Bhagalpur had no jurisdiction to entertain the suit, which ought to be dismissed. Reference was also made to Act XXXVII of 1855, preamble, and sections 1, 2 and 3; Regulation III of 1872, sections 3, 9 and 26; Regulation V of 1893, sections 7 and 8; Regulation III of 1899 and *Dungaram Marwari* v. *Rajkishore Deo* (4).

Section 6 of Regulation III of 1872 relating to usury is not merely a matter of procedure. It involves a question of principle and is, therefore, binding on the Bhagalpur Court, which ought not to have granted compound interest as in this case it is a Court having jurisdiction in the Sonthal Parganas: see *Maseyk* v. *Steel & Co.*, (6).

Sir *Robert Finlay*, *K. C.*, Messrs. *De Gruyther*, *K. C.*, and *Dunne*, for the Mortgagees:—Before 1855 the Sonthal Parganas were subject to the ordinary law and procedure. But Act XXXVII of 1855 put limitations on suits in which the value did not exceed Rs. 1,000 and set up special Courts for such suits. Regulation III of 1872 leaves in general terms the application of the ordinary law and procedure to all suits over Rs. 1,000: see the preamble and sections 1, 2 and 3. Section 5 applies only when the Settlement is pending, and the special jurisdiction thereby created relates to questions of title to land and not to suits to enforce a mortgage. The sole object was to give the Settlement Officers supreme power to decide who shall be entitled as owner of land in the Record of Rights. The Settlement was completed and section 5 of Regulation III of 1872 has no application: see *Imperial Gazetteer of India*, Volume XXII, title Sonthal Parganas. The Code of Civil Procedure applies to suits involving Rs. 1,000 and over brought in the Courts of the District Judge and Subordinate Judge: see Regulation V of 1893, sections 9 and 10. Reference was also made to Act XIV of 1874, sections 1 and 5; Regulation V of 1893, the preamble and sections in Chapters 1 and 3; Regulation III of 1872, sections 2, 14, 17, 18 *et seq.* and 26; Act XXXVII of 1855, section 2; Act VII of 1871, section 12 and Act XII of 1887.

The lands mortgaged are situated in two Districts, the Sonthal Parganas and Bhagalpur, and the suit could be brought in either of them: Code of Civil Procedure, 1882, section 19. Moreover, the Courts in the two Districts are subject to the same High Court and section 23 of the Code would apply. If the suit could not be brought in the Court at Bhagalpur, it could not be brought in any Court in the Sonthal Parganas, and the question would arise whether there is any Court in India where it could be brought. It is submitted that the Court at Bhagalpur had jurisdiction to entertain the suit: *Sorbojit Roy* v. *Gonesh Prosad Misser* (7). The case in *Ram Ratan* v. *Lalta Prasad* (8) was distinguished. Reference was also made to Act XIV of 1882, sections 16 and 17. The case of *Ram Chandra Marwari* v. *Rani Keshobati Kumari* (9) shows that a case like the present one is ordinarily brought in the ordinary Civil Court where ordinary law is applied.

(7) 10 C. 761.
(8) 17 A. 483; A. W. N. (1895) 110.

(9) 2 Ind. Cas. 935; 10 C. L. J. 1 (P. C.); 6 A. L. J. 617; 6 M. L. T. 1; 11 Bom. L. R. 765; 13 C. W. N. 1102; 36 C. 840; 19 M. L. J. 419; 36 I. A. 85.

The mortgage-bond clearly shows the intention of the parties that they would be governed by the law and procedure in force in Bhagalpur. The mortgagors cannot now say that the Bhagalpur Court has no jurisdiction. The point raised should be decided according to the intention of the contracting parties: *Hamlyn* v. *Talisker Distillery* (10).

The point of jurisdiction is a new point and requires inquiries to be made as to whether Settlement of all the lands in suit has been completed and notifications appeared in the *Calcutta Gazette*. It is, therefore, submitted that the mortgagors should not be allowed to raise it at this stage: *Owners of Ship Tasmania* v. *Smith* (11); *Owners S. S. Pleiades* v. *Owners of S. S. Jane* (12) and Safford and Wheeler's Privy Council Practice, page 852.

The claim is for money lent and that if the mortgagors do not pay, to sell the security. As regards the first claim the Bhagalpur Court has jurisdiction as the money was to be re-paid at Bhagalpur, and the cause of action arose there as the mortgagor broke the contract there: *Vaughan* v. *Weldon* (13) and Code of Civil Procedure 1882, sections 16, 17 and 18. That Court has also jurisdiction in respect of the lands in the Sonthal Parganas under section 19 of the Code.

Section 6 of Regulation III of 1872 merely relates to procedure and does not apply to Courts situate outside the Sonthal Parganas. The intention of the Legislature is to confine the section to Courts exercising jurisdiction in the Sonthal Parganas. The words "having jurisdiction" refer to local Courts in Sonthal Parganas. The Court at Bhagalpur in passing the decree does not exercise jurisdiction in the Sonthal Parganas. The decision in *Maseyk* v. *Steel & Co.* (6) is wrong.

[MR. AMEER ALI referred to *Gopi Mohan Roy* v. *Doybaki Nundun Sen* (14).]

Mr. Lowndes, referred to *Shurroop Chunder Gooho* v. *Ameerunnissa Khatoon* (15).

The Court at Bhagalpur only passes the decree, which is sent on to a Court in Sonthal Parganas. The section in question is confined to a Court in the Sonthal Parganas making a decree and has nothing to do with the execution of a decree made by another Court. It is, therefore, submitted that the decree passed by the Bhagalpur Court is right and that it could be executed by a Court in the Sonthal Parganas.

Regulation III of 1872 is not an Act of the Legislature. It is issued by the Lieutenant-Governor in his executive capacity and can have no operation outside the Sonthal Parganas. The Lieutenant-Governor has no power to control the provisions of section 19 of the Code of Civil Procedure, 1882. If the Regulation is intended to have any force outside the Sonthal Parganas it is *ultra vires*.

Mr. *Lowndes*, in reply :—If the Civil Procedure Code, 1882, does not apply, section 19 thereof cannot give jurisdiction to the Bhagalpur Court. On the other hand if that Code does apply, section 5 of Regulation III of 1872 excludes its application to suits mentioned in that section, which is not confined to suits in Settlement and includes a suit like the present one. The result is that the Code does not apply in this case.

Regulation III of 1872 was passed under powers conferred by section 1 of 33 and 34 Vict., Ch. 3, and, therefore it has the same validity as any Act passed by the Legislature.

JUDGMENT.

LORD MOULTON.—In this case their Lordships have to deal with three consolidated appeals from decrees of the High Court of Judicature at Fort William in Bengal, arising out of a mortgage suit filed in the Court of the Subordinate Judge at Bhagalpur in Bengal. The first and principal appeal is from the decree of the Subordinate Judge enforcing the mortgage, which was affirmed on appeal by the High Court. Subsequently to making that decree the Subordinate Judge made two

(10) (1894) A. C. 202; 6 R. 188; 71 L. T. 1; 58 J. P. 540.
(11) (1890) 15 A. C. 223 at p. 225; 63 L. T. 1; 6 Asp M. C. 517.
(12) (1891) A. C. 259 at p. 263; 60 L. J. P. C. 59; 65 L. T. 169, 7 Asp. M. C. 41.
(13) (1874) 10 C. P. 47; 44 L. J. C. P. 64; 31 L. T. 683; 23 W. R. 138
(14) 19 C. 13.
(15) 8 C. 703.

orders varying the same, both of which were on appeal set aside by the High Court.* From these two orders of the High Court appeals have been brought by the respondents to the main appeal, and they constitute the second and third of the consolidated appeals.

The mortgage-bond, to enforce which the action was originally brought, was a bond for Rs. 3,50,000, dated the 21st December 1896, in favour of Babu Suraj Narayan Singh, the father of the principal respondent, and secured on lands situated in the Sonthal Parganas and elsewhere. The mortgagors were members of a joint Hindu family. Inasmuch as no question arises in this appeal as to the parties to the present action being the proper parties, it will be convenient to call the appellants in the principal appeal the mortgagors and the respondents the mortgagees.

The bond sued on was the last of a series of bonds for increasing amounts. The total of the principal amounts advanced was, according to the statements in the plaint, Rs. 2,85,903-1-9. But the total claim of the mortgagees at the date of suit was Rs. 5,36,038-11-10, the balance being made up of interest which was charged according to the provisions of the different bonds, the rate under the bond in suit being Rs. 7½ per cent. per annum with annual rests. By far the greater portion of the mortgaged properties was situated in the District of the Sonthal Parganas, and the mortgagors resided in that district. The remainder of the mortgaged property was situated within the local jurisdiction of the Bhagalpur Court.

The bond in suit was executed at Bhagalpur and contained a stipulation that the mortgagees might enforce it in the Bhagalpur Court.

The suit was commenced on June 20th, 1904. The plaint shows that it was an ordinary suit to enforce a mortgage. Written statements of defence were put in by various defendants and various issues were raised and decided by the Subordinate Judge at the trial. Most of these relate to matters no longer in dispute. The only issues that remain for their Lordships' decision in this appeal turn on the fact that the mortgagors reside and the chief part of the property is situate in the Sonthal Parganas, so that it is not necessary further to refer to the other issues.

The judgment of the Subordinate Judge, which is dated February 12th, 1906, was in favour of the mortgagees on all issues. On the appeal to the High Court the argument seems to have been confined to the sixth issue, which was in the following terms :—

"Are the plaintiffs precluded from claiming compound interest or interest exceeding the amount of the principal advanced under Regulation III of 1872?"

The High Court found in favour of the mortgagees on this issue, and from that decision the present appeal is brought. But in the hearing before the Subordinate Judge an issue was raised as to the jurisdiction of the Court of Bhagalpur to entertain the suit, and this point has again been raised in the argument before their Lordships. Seeing that it is a question of jurisdiction, and depends on no disputed facts, their Lordships are of opinion that they cannot decline to entertain it, although it is not specifically raised on the appeal, more especially as it necessarily presented itself in the argument.

The position of the Sonthal Parganas is very peculiar. They are under separate and special legislation, which differs widely from the legislation applicable to the rest of Bengal. The Lieutenant-Governor of Bengal has the power to vary that legislation from time to time by notifications published in the *Calcutta Gazette*, under and according to provisions appearing in the Regulations relating to the district as will presently be more particularly referred to. At the hearing of the appeal it was found that the documents in the records did not adequately inform their Lordships of the relevant notifications which had thus appeared in the *Calcutta Gazette*, and, accordingly, it was arranged that the parties should supplement the record by putting in copies of such notification as they thought material. These were furnished to their Lordships in December last, and they affect to an important degree the matters in issue, and more particularly those that turn upon the Settlement of the lands to which the mortgage-bond relates.

*The judgment of the High Court setting aside one of these orders is reported in 4 Ind. Cas. 56.—*Ed.*

In order to make clear the legal questions that arise in this appeal, it is necessary to explain the nature and sequence of the legislation relating to the Sonthal Parganas.

The special legislation for the Sonthal Parganas commences by an Act of the Governor-General of India in Council, No. XXXVII of 1855, which was passed on December 22nd, 1855. Its full title is:—

"An Act to remove from operation of the General Laws and Regulations certain districts inhabited by the Sonthals and others and to place the same under the superintendence of an Officer to be specially appointed for that purpose."

The preamble of the Act recites that the General Regulations and Acts of Government then in force in the Presidency of Bengal were not adapted to the uncivilised race of people called Sonthals, and it was, therefore, deemed expedient to remove from the operation of such laws certain districts. It then proceeded to enact by clause 1 as follows:—

"The districts described in the Schedule to this Act are hereby removed from the operation of the General Regulations of the Bengal Code and of the Laws passed by the Governor-General of India in Council, except so far as is hereinafter provided, and no law which shall hereafter be passed by the Governor-General of India in Council shall be deemed to extend to any part of the said districts unless the same shall be specially named therein."

This is subject to a proviso which is not material to this case.

The Act then proceeds to carry out its main object by the following enactment:—

"The said district shall be placed under the superintendence and jurisdiction of an Officer or Officers to be appointed in that behalf by the Lieutenant-Governor of Bengal.....The administration of civil and criminal justice.....are hereby vested in the Officer or Officers so appointed."

This language is perfectly general in its character, and under it the whole administration of civil justice became vested in the Officer or Officers so appointed. But there follows a proviso to which frequent reference was made in the argument. It reads as follows:—

"Provided that all civil suits in which the matter in dispute shall exceed the value of Rs. 1,000 shall be tried and determined according to the General Laws and Regulations in the same manner as if this Act had not been passed."

The interpretation of this provision is a matter of great difficulty. Two rival interpretations naturally suggest themselves. The one is that the Officers exercising the jurisdiction shall do so in accordance with the General Laws and Regulations, so that the rights of the parties are unaffected by the provision, although they are to be pronounced upon by a different judicial tribunal. The other is that not only the laws that govern rights, but also the procedure to enforce those rights is to remain unchanged. Now it must be observed that this is a proviso and not an exception, and accordingly, taken in connection with the general language of the previous portion of the clause, the former of these two interpretations is the one that commends itself to their Lordships, so that it must be construed as providing that the special Officer or Officers shall try such suits, but that in trying and determining them they shall observe the General Laws and Regulations obtaining in Bengal, which but for the Act would have applied equally in the Sonthal Parganas. It would seem, however, that the other view has been taken in India [see the judgment in *Sorbajit Roy* v. *Gonesh Prosad Misser* (7)]. Subsequent legislation has, however, rendered it unnecessary, so far as the decision in this case is concerned, to decide what would be the state of things if this Regulation were still in force unmodified by any other statutory enactments.

The territorial definition of the Sonthal Parganas was originally to be found in the Schedule to this Act; but, by Act X of 1857, a new schedule was substituted therefor. The judgment of the High Court finds that two-thirds of the mortgaged properties are situated within the district described in that schedule, and it would seem that this estimate may be assumed to be approximately correct for the purposes of this appeal.

The next Act in chronological order to which it is necessary to refer is the Code of Civil Procedure of 1859. The Sonthal

Parganas are not specially named in that Act and, therefore, it did not *prima facie* apply to them ; but, nevertheless, we must have regard to the language of section 385 of that Act, which reads as follows :—

" This Act shall not take effect in any part of the territories not subject to the General Regulations of Bengal, Madras and Bombay, until the same shall be extended thereto by the Governor-General of India in Council or by the Local Government to which such territory is subordinate and notified in the Gazette."

Although the words " Sonthal Parganas " do not appear in this section the district falls under the description there appearing.

Accordingly, we find that by a notification on August 19th, 1867, the Code of Civil Procedure of 1859 as amended by the Code of Civil Procedure, 1861, was applied to the Sonthal Parganas subject to certain provisions, restrictions and exceptions which are not relevant to the matters of this suit.

It is not necessary to decide what was the precise effect of this notification. It can hardly have been intended that it should apply to the Courts held by the Officers appointed by the Lieutenant-Governor of Bengal in those suits in which they were not required to try and determine the case according to the General Laws and Regulations prevailing in Bengal. But with regard to civil suits in which the matter in dispute exceeded the value of Rs. 1,000, it would seem to have settled the doubt as to whether they were cognizable by ordinary Civil Courts duly established with jurisdiction within the Sonthal Parganas, because it will be found that the fact that such jurisdiction exists in such Courts is recognised in subsequent legislation.

In the year 1872 a new Regulation was passed for the Sonthal Parganas. It is entitled the Sonthal Parganas Settlement Regulation, and by clause 2 it is directed to be read with Act XXXVII of 1855 and Act X of 1857 before referred to. Clause 3 reads as follows:—

"Subject to the provisions of this Regulation, the Regulations and Acts mentioned in the Schedule annexed to this Regulation or such portions of them as are unrepealed shall be deemed to be in force in the Sonthal Parganas. No other Regulations or Acts shall be deemed to be in force in the Sonthal Parganas, except so far as regards the trial and determination of the civil suits mentioned in section 2, Act XXXVII of 1855, in which the matter in dispute exceeds the value of Rs. 1,000, when such suits are tried in the Courts established under Act VI of 1871."

It further provides that the Lieutenant-Governor of Bengal may by notification in the *Calcutta Gazette* add to or take away from the list in the Schedule.

To arrive at the true meaning and effect of these provisions it is necessary to bear in mind that at the date of this Regulation the Code of Civil Procedure, 1859, as amended by the Code of Civil Procedure, 1861, applied to the Sonthal Parganas by virtue of the notification of August 19th, 1867. But the Schedule to the Regulation does not contain the Civil Procedure Codes of 1859 and 1861, nor have they ever been added to the above list by any notification of the Lieutenant-Governor of Bengal as above described. It follows that these Civil Procedure Codes were thereafter applicable in the Sonthal Parganas only so far as concerns the trial and determination of civil suits in which the matter in dispute exceeded the value of Rs. 1,000 when such suits were tried in the Courts established under Act VI of 1871. So far as such suits were concerned there is nothing in this clause of the Sonthal Parganas Settlement Regulation to alter the effect of the notification of August 19th, 1867, which applied to them the Civil Procedure Code of 1859 as amended in 1861.

Act VI of 1871 is known as the Bengal Civil Courts Act, 1871. It is not in the scheduled list. But it was passed at a date when the Code of Civil Procedure, 1859, as amended by the Code of Civil Procedure, 1861, was in force in the Sonthal Parganas, and it would seem as though the wide provisions of the clauses in those Codes giving jurisdiction to Civil Courts must be taken to have given to the Government power to appoint Judges under it within the Sonthal Parganas, inasmuch as section 4 of the Sonthal Parganas Regulation, 1872, provides as follows:—

"The Lieutenant-Governor of Bengal may, by notification in the *Calcutta Gazette*, invest any competent Officer in the Sonthal Parganas with the powers of any Civil Court established under Act VI of 1871, and may exclude the whole or any part of the said Parganas from the jurisdiction of any of the Courts established under the said Act now having jurisdiction therein."

But while it is evident that the Government by this section left it to the Lieutenant-Governor of Bengal to decide in future whether Courts established under the Bengal Civil Courts Act, 1871, should retain jurisdiction within the Sonthal Parganas, it had already made up its mind that such should not be the case with suits relating to lands pending the completion of the Settlement which they proposed forthwith to make of all the lands situated in the Sonthal Parganas. This is made clear by section 5, which reads as follows:—

"Till such time as a Settlement of the whole or any part of the Sonthal Parganas shall be made under the rules hereinafter provided, and the said Settlement shall be declared by a notification in the *Calcutta Gazette* to have been completed and concluded, no suit shall lie in any Court established under the said Act VI of 1871 in regard to any land, or any interest in or arising out of any land, or for the rent or profits of any land, or regarding any village headship or other office connected with the land, except as hereinafter provided; but such suits shall be heard and determined by the Officers appointed by the Lieutenant-Governor of Bengal under section 2 of the said Act XXXVII of 1855, or by the Settlement Officers hereinafter mentioned, according as the said Lieutenant-Governor shall from time to time direct."

Then follows a proviso by which the Officer empowered to try a suit may transfer it to a Court established under the said Act, and thereby give to the Court jurisdiction to try it. No question, however, under this proviso arises in the present case.

The critical question in this suit is as to whether clause 5 excludes from the jurisdiction of Courts established under the Bengal Civil Courts Act, 1871, suits relating to land where the value of the matter in dispute is more than Rs. 1,000. Their Lordships are of opinion that to this question only one answer can be given The language of the section is so wide and so peremptory that it gives to the Officers therein mentioned sole and exclusive jurisdiction in all suits in regard to any land, or any interest in or arising out of any land, or for the rent or profits of any land. To make the meaning clearer and to render the language more emphatic, it is expressed both in the positive and in the negative form. On the one hand it provides that "no suit shall lie in any Court established under the said Act VI of 1871 in regard to any land, etc.;" and on the other hand it provides that such "suits shall be heard and determined by the Officers, etc." It is impossible not to give to such language the full effect of creating an exclusive jurisdiction. It follows, therefore, that no action relating to land in the Sonthal Parganas can be brought otherwise than before such Officers so long as section 5 is in force with respect to the district in which that land is situated. There is no difficulty in comprehending the motives for such legislation. The section shows that a Settlement of the lands was in contemplation, and evidently the aim of the provision was to prevent any class of jurisdiction between different Courts in matters relating to land until such time as the Government proclaimed the Settlement to be completed—a very intelligible policy when it is considered that on the results of such suits between individuals might depend the entries which must be made in the Settlement Records.

The object of the Regulation being thus to throw the whole of the jurisdiction in suits relating to land into special Courts established in and for the Sonthal Parganas, and provision being made for extending that exclusive jurisdiction to all suits, one has to consider the meaning and effect of section 6, which is the section upon which the rights of the parties in the present suit depend. That section, so far as is material, reads as follows :—

"All Courts having jurisdiction in the Sonthal Parganas shall observe the following rules relating to usury, namely:—

"(*a*) . . . . no compound interest arising from any intermediate adjustment of interest shall be decreed ;

"(*b*) the total interest decreed on any loan or debt shall never exceed one-fourth of the principal sum, if the period be not more than one year, and shall not in any other case exceed the principal of the original debt or loan."

The respondents sought to establish that the phrase "all Courts having jurisdiction in the Sonthal Parganas" meant Courts locally situated in the Sonthal Parganas, and dealing with matters purely local. Their Lordships cannot accept this interpretation. The words are definite and precise, and must be applied in their natural signification. It was urged that, taken literally, they would apply to everything done by a Court having jurisdiction in the Sonthal Parganas, whether the matter related to those districts or not, inasmuch as the language used makes the application of the enactment depend on the Court and not on the matter in dispute. But this is to ignore the fact that the Regulation is only applicable to the Sonthal Parganas, and that, therefore, it would not apply to Courts having jurisdiction wider than these local limits when such Courts were dealing with matters relating solely to other parts of India. The enactment, therefore, applies to Courts having jurisdiction in the Sonthal Parganas, and acting under and by virtue of such jurisdiction.

The importance of the section is very great. It is a protective section clearly dictated by the fundamental consideration to which reference has already been made, and which led to the Sonthal Parganas being put under separate and special legislation, namely, that—

"The General Regulations and Acts of Government now in force in the Presidency of Bengal are not adapted to the uncivilised race of people called Sonthals, and it is, therefore, expedient to remove from the operations of such laws"

the districts known as the Sonthal Parganas.

The provision, therefore, is not one of procedure but of substance, and so far as the Courts having jurisdiction within the Sonthal Parganas are concerned it places all contractual stipulations as to compound interest in a position of non-enforceability, and limits statutably the total interest which can be decreed on any loan or debt. The application of these provisions to the facts of the present case will be considered later.

The next Act in chronological sequence to which reference was made in the argument is Act XIV of 1874, known as the Scheduled Districts Act, 1874. This is an Act for the purpose of removing doubts as to what Acts or Regulations are in force in parts of British India which have never been brought within or have from time to time been removed from the operation of the General Acts and Regulations and the jurisdiction of the ordinary Courts of Judicature. These parts of British India are termed in the Act "Scheduled Districts." They are all set out in the first Schedule to the Act, and amongst them are to be found the Sonthal Parganas. The scheme of the Act is peculiar. It is expressly made to apply to all parts of British India other than the Scheduled Districts. But it is provided that it shall come into force in any Scheduled District upon the issue of a notification under section 3 of the Act with regard to such district. In such case the Local Government may, with the previous sanction of the Governor-General in Council by notification in the *Gazette of India* and also in the local *Gazette* declare (among other things) what enactments are actually in force in any of the Scheduled Districts, and every such notification shall be binding on all Courts of Law. During the argument Counsel for the parties were not in agreement as to whether any notification under this Act had been issued applying to the Sonthal Parganas ; but, from the subsequent information supplied to their Lordships, it would appear that no such notification has been issued, and, therefore, that the provisions of the Scheduled Districts Act, 1874, have never been applied to them. It is, therefore, unnecessary to discuss further the provisions of this enactment.

The next Act which requires to be noticed is the Civil Procedure Code, 1877. It repeals Act VIII of 1859 and Act XXIII of 1861, which constituted the then exist-

ing Code of Civil Procedure. Section 1 reads as follows :—

" This Act may be cited as 'The Code of Civil Procedure' and it shall come into force on the first day of October 1877.

"This section and section 3 extend to the whole of British India. The other sections extend to the whole of British India except the Scheduled Districts as defined in Act XIV of 1874."

The relevant part of section 3 reads as follows :—

"The enactments specified in the first Schedule hereto annexed are hereby repealed to the extent mentioned in the third column of the same Schedule.

"But when in any Act, Regulation or notification passed or issued prior to the day on which this Code comes into force reference is made to Act VIII of 1859, Act XXIII of 1861, or 'The Code of Civil Procedure' or to any other Act hereby repealed, such reference shall so far as may be practicable be read as applying to this Code or the corresponding part thereof."

The effect of these sections is to make the notification of 1867 relative to the application of the then existing Codes of Civil Procedure to the Sonthal Parganas read as though it applied to the Civil Procedure Act, 1877. But it will be remembered that such application had been restricted by the Sonthal Parganas Regulation of 1872 to suits brought for amounts above Rs. 1,000 in Courts established under Act VI of 1871. The combined effect of these provisions must be to make the Civil Procedure Act of 1877 apply in the Sonthal Parganas only to suits so brought.

The next Act is the Civil Procedure Code of 1882. In everything that is material to the present appeal this is identical with the Civil Procedure Code, 1877. It took the place of that Act in the Sonthal Parganas to the extent that such Act was in force therein, that is to say, for suits brought for amounts above Rs. 1,000 in Courts established under Act VI of 1871.

We now come to Regulation V of 1893, the short title of which is the Sonthal Parganas Justice Regulation, 1893. It made important changes in the administration of civil justice in the Sonthal Parganas. By section 5 it added to the two classes of special Courts theretofore existing in the Sonthal Parganas, named the Courts of Settlement Officers and the Courts of Officers appointed by the Lieutenant-Governor of Bengal, under section 2 of the Regulation of 1855, a third class, namely Courts established under Act XII of 1887, known as the Bengal, United Provinces and Assam Civil Courts Act, 1887, which is an Act which has taken the place of Act VI of 1871 (which has been repealed), and all references to the last-mentioned Act must now be read as referring to it.

These definite provisions entirely remove the difficulties as to the jurisdiction within the Sonthal Parganas of Courts appointed under the Bengal, United Provinces and Assam Civil Courts Act, 1887, or its predecessor, the Bengal Civil Courts Act. 1871. It remains to see what suits are put within the cognizance of these Courts. By section 9 the jurisdiction of a Judge of one of these Courts extends to—

" Suits of which the value exceeds Rs. 1,000 and which are not excluded from his cognizance by the Sonthal Parganas Settlement Regulation, or by any other law for the time being in force."

Their Lordships are clearly of opinion that these words of exclusion refer to section 5 of the Regulation of 1872, which excluded from the cognizance of any such Court suits relating to land, the Settlement of which had not been finished and duly notified, and placed them exclusively in the hands of Settlement Officers or Officers appointed by the Lieutenant-Governor of Bengal under section 2 of the Regulation of 1855. This exclusive jurisdiction is, therefore, maintained, and suits in regard to land, which is not in districts that have been notified as being completely settled, are not within the cognizance of the ordinary Courts, no matter what may be the value of the matter in dispute. It is not necessary for the purpose of this appeal to examine further into the jurisdiction of Courts established under these provisions, because the Court of Bhagalpur, in which the present action was brought, is not one of such Courts.

The result of this examination of the Acts and Regulations applicable to the Sonthal Parganas is that at the date when

this suit was commenced no suit could lie in any Court established under Act VI of 1871, or under the Act which has taken its place, namely, the Bengal, United Provinces and Assam Civil Courts Act, 1887, in regard to any land or any interest in or arising out of any land, or for the rent or profits of any land, but such suit must have been brought before Settlement Officers, or Courts of Officers appointed by the Lieutenant-Governor of Bengal under section 2 of the Sonthal Parganas Act, 1855, and the Sonthal Parganas Justice Regulation Act, 1893, Part 2, so long as the land had not been settled and the Settlement declared by a notification in the *Calcutta Gazette* to have been completed and concluded. And, further, that whatever be the Court that has jurisdiction to decide cases within the Sonthal Parganas, and is exercising that jurisdiction, it must observe the two rules relating to usury above referred to.

It is necessary, therefore, to ascertain what was the exact position (so far as Settlement is concerned) of the land included in the mortgage-bond at the date of the commencement of the action in which the present appeal is brought, namely, June 20th, 1904. The information supplied to their Lordships by the parties, as to the notifications appearing in the *Calcutta Gazette*, shows conclusively that, although portions of the lands mortgaged had been settled, and notification had been duly made that such Settlement had been completed, at dates prior to the institution of the suit, other portions were not so settled. It is clear, therefore, that the suit came within the provisions of section 5 of the Sonthal Parganas Settlement Regulation, 1872, relating to the exclusive jurisdiction of Officers appointed by the Lieutenant-Governor of Bengal, or by Settlement Officers, inasmuch as it related to land which had not been settled, or the Settlement of which had not been declared by a notification in the *Calcutta Gazette* to have been completed and concluded. The Court of Bhagalpur had, therefore, no jurisdiction to entertain the suit, and this appeal must be allowed.

Reliance was placed by Counsel for the respondents on the stipulation in the bond that the mortgagees might enforce it in the Court of Bhagalpur. Their Lordships are of opinion that this has no effect. That Court had no jurisdiction to entertain the suit which, beyond question, was a suit in regard to land in the Sonthal Parganas, and that being so the parties could not give it the necessary jurisdiction by consent. To do so would be to nullify the express prohibition of section 5 of the Sonthal Parganas Regulattion, 1872, which was binding on any Court having jurisdiction in the Sonthal Parganas in the exercise of such jurisdiction.

Their Lordships are also of opinion that, apart from the question of jurisdiction, any Court dealing with the subject-matter of the suit would be bound to give full force and effect to the provisions of section 6 of the Sonthal Parganas Settlement Regulation, 1872, relating to usury, and, therefore, to have refused to decree any compound interest arising from any intermediate adjustment of interest, or an amount of total interest exceeding the principal of the original debt or loan.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed, and the action dismissed with costs in both Courts. The respondents must pay the costs of this appeal. The two subsidiary appeals fall with the dismissal of the action, and the costs connected with them will form part of the costs of the whole proceedings, which the respondents must bear.

Appeal allowed.

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

Solicitors for the Respondents: Messrs. *Morgan, Price & Co.*

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 202 OF 1911.

January 26, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Chevis.

DEV RAJ AND ANOTHER DEFENDANTS—APPELLANTS

versus

SHIV RAM—PLAINTIFF—AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts.

DEV RAJ v. SHIV RAM.

120, 125, 126—*Suit for declaration that alienation will not affect plaintiff's rights—Property alienated house and not land—Suit not by first reversioner —Inapplicability of Articles* 125, 126—*Civil Procedure Code (Act V of* 1908), *Order VII, r.* 6—*Suit not on face of plaint time-barred.*

Article 125 of the Indian Limitation Act (IX of 1908) covers only suits for land and comes in only when the suit is by the first reversioner.

The words 'set aside' in Article 126 of the Limitation Act (IX of 1908) do not include a suit for a declaration that the alienation objected to should not affect plaintiff's rights after the death of the alienor. To ask for a thing to be 'set aside' implies a prayer for immediate relief.

Jagadamba Chaodhrani v. *Dakhina Mohun Roy Chaodhri*, 13 C. 308 (P. C.) 13 I. A. 84, distinguished.

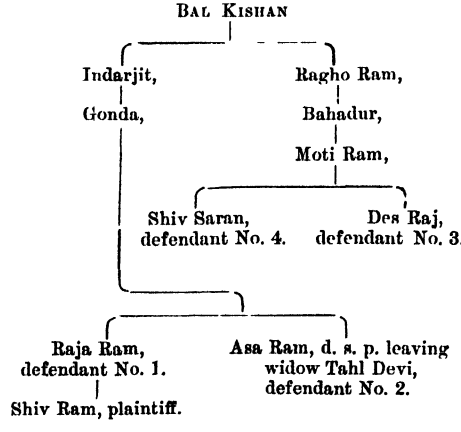
Where a suit is not on the face of the plaint time-barred, Order VII, rule 6, of the Civil Procedure Code has no application.

Second appeal from the decree of the Divisional Judge of the Jullundur Division, dated the 22nd December 1910, reversing that of the Subordinate Judge, first Class, Jullundur, dated 11th June 1910, dismissing the claim.

Rai Bahadur Pandit *Sheo Narain*, for the Appellants.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Respondents.

ORDER.—The pedigree of this family, in so far as we require it for this case, is as follows:—



On 4th April 1898 a mortgage-deed was executed whereby the house in suit was mortgaged by defendants Nos. 1 and 2 to defendants Nos. 3 and 4 for Rs. 1,400 paid in cash at time of registration. Plaintiff sued for a declaration that this mortgage, being without consideration and "necessity", should not affect his reversionary rights. The suit was instituted on 25th February 1910, *i.e.*, some 9 years 11 months after the date of the mortgage; but in his plaint Shiv Ram puts the date of accrual of cause of action at about a month before institution of suit, it being alleged that then the defendants finally refused to recognise plaintiff's claim.

Defendants Nos. 3 and 4 pleaded limitation. They also urged that defendant No. 1's consent to defendant No. 2's alienation of her share barred plaintiff's claim as to that share; that the house was not ancestral, *qua* plaintiff; that plaintiff could not object to alienations made by his own father; that plaintiff acquiesced in the alienation; and that in any case the alienation was for consideration and "necessity."

The first Court drew issues, and proceeded to dispose in favour of plaintiff of the issue as to limitation by applying Article 125 of the Schedule to defendant No. 2's alienation and Article 126 to that by defendant No. 1. It then found that, the father (defendant No. 1) being manager of the joint family, plaintiff had no power to sue and have the alienation set aside as having been made for unlawful proposes, apparently assuming without discussion that the loan was for family purposes.

This was sufficient for disposal of the case; but the Court went on to hold that the house was not proved ancestral *qua* plaintiff, that defenant No. 1's consent validates defendant No. 2's alienation as against plaintiff, that the alienation was for consideration and "necessity," and not for immoral purposes, and that the plaintiff had acquiesced in the mortgage.

Shiv Ram appealed to the Divisional Court, which noted that the respondents had not again raised the question of limitation which had been correctly decided below. It then went on to find that the house was ancestral, and that plaintiff and defendant No. 1 are joint, and quoted *Bahadar Singh* v. *Desraj* (1) as authority for holding that, though consideration passed and though it is not

(1) 53 P. R. 1901 (F. B.); 62 P. L. R. 1901.

shewn that the money was borrowed for immoral purposes, yet as "necessity" is not shewn, plaintiff must have his decree, which, however, will not prevent the mortgagee-defendants from prosecuting any remedies they may have against defendant No. 1 and the property. That Court also held that defendant No. 1's consent to defendant No. 2's alienation could not affect plaintiff's right to object, and that it was not proved that plaintiff had ever acquiesced in the alienations.

The mortgagee-defendants have now filed this further appeal and we have heard arguments and have arrived at certain conclusions, which we may summarise thus:—

(*i*) The contention now urged for the first time that defendant No. 2 has daughters and their sons alive, who, as heirs, would under Hindu Law be preferred to plaintiff, is taken too late and cannot be heard now; ground of appeal I (*d*).

(*ii*) Grounds II (*d*) and (*f*) have not been argued before us and must be taken as given up.

(*iii*) Respondents' Counsel's argument that defendant No. 2 having under Hindu Law no share in the family property, the alienation should be looked upon as entirely defendant No. 1's alienation, is overruled.

The lower Appellate Court has found that Raja Ram, defendant No. 1, and Asa Ram were not joint; and the presumption (not rebutted) from the acts of the parties and the pleadings is against the idea of their jointness. We find that it is not proved that defendant No. 2's late husband was one of a joint Hindu family with defendant No. 1, and thus the contention fails.

(*iv*) Leaving out of account for the moment a new point of view, to be noticed later, suggested by plaintiff's Counsel, we find that this suit would be barred by time.

The Articles of the Limitation Schedule that come in for discussion are Nos. 125, 126 and 120. The first two allow twelve years from the occurrence of certain events and the third six years only; and we are of opinion that the third alone applied to the facts of the present case.

Article 125 runs thus:—

Suit during the life of a Hindu or Muhammadan female by a Hindu or Muhammadan who, if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void except for her life or until her re-marriage.	Twelve years.	The date of the alienation.

It does not apply because it covers only suits for *land*, and further it comes in only when the suit is by the first reversioner. Here the suit is not for land, and defendant No. 1 is the first reversioner, not the plaintiff. We may note that Counsel on both sides are agreed that Article 125 cannot be invoked in this case.

Article 126 runs thus :—

By a Hindu governed by the law of the *Mitakshara* to set aside his father's alienation of ancestral property.	Twelve years.	When the alienee takes possession of the property

Mr. Shafi contends that this Article does cover defendant No. 1's alienation because the suit is by a Hindu governed by the *Mitakshara* Law and is directed against his father's alienation of property. He argues that the words "set aside" include a suit for a declaration that the alienation objected to should not affect plaintiff's rights after the death of the alienor, and in support of the contention he quotes the Privy Council ruling in *Jagadamba Chaodhrani* v. *Dakhina Mohan Roy Chaodhri* (2). That ruling is concerned with a suit against an adoption.

In the limitation law then in force Article 129 corresponds to Article 118 of the present law, and the phrase in the older law was "to set aside" an adoption. At pages 319, 320 of the report their Lordships said in effect that the phrase was not precise or exact and they gave reasons for holding that it should be taken as including a suit to have an adoption declared invalid

(2) 13 C. 308; 13 I. A. 84 (P. C.)

DEV RAJ *v.* SHIV RAM.

No doubt, in consequence of that ruling, the Legislature in the later law amended the phraseology and for "to set aside an adoption" substituted "to obtain a declaration that an alleged adoption is invalid, or never, in fact, took place." But it left unaltered the phrase "set aside" in Articles 13, 14, 15, 44, 91 and 126; and as regards Article 126, we cannot but take it that this was done advisedly.

The Legislature, as it were, conceded that in Article 129 (now 118) the wording required amendment, but at the same time decided that in Article 126 and the five other Articles named above the phrase "set aside" in its strict meaning should stand; and it seems to us clear that to ask for a thing to be "set aside" implies a prayer for immediate relief, and not for a mere declaration that on the happening of a future contingency, of which the plaintiff may not be alive to take advantage, certain results will follow.

As neither Article 125 nor Article 126 applies, we have to fall back on Article 120, and clearly if plaintiff has to rely on this alone, his suit is too late. But plaintiff urges further that he came of age at the age of 18, less than three years before suit, and thus should have the benefit of section 6 with section 8 of the Limitation Act.

Mr. Sheo Narain replies that plaintiff did not plead this in his plaint and contends that under Order VII, rule 6, Civil Procedure Code, the point cannot be taken now. We agree, however, with Mr. Shafi that that rule has no application, inasmuch as the suit was not on the face of the plaint time-barred, and, therefore, it was not necessary to state in detail the grounds on which it was contended that the suit was within time. It is also noticeable that the first Court took it as needing no discussion that the suit was within time, and in the lower Appellate Court the then respondents did not raise the question of limitation at all. Indeed it is here for the first time that this rather difficult and intricate question of limitation has been fully sifted, and we think it is only fair to allow plaintiff to plead his age and sections 6/8 aforesaid, which he would probably have done long ago, had he really been seriously attacked in either of the lower Courts on the subject of time bar.

If plaintiff succeeds in showing that his suit is within time, the defendants' appeal will have to be heard further on the merits, Mr. Sheo Narain still having a right of reply on grounds I (*a*), (*b*), (*c*) and II (*a*), (*b*), (*c*) and (*e*).

It will be seen that in a note appended to his grounds of appeal Mr. Sheo Narain justified his clients appealing here though plaintiff had valued his suit at Rs. 600 only, on the ground that the real value of the suit was Rs. 1,400, the mortgage-money. The matter has to be decided on the wording of section 40 (1) (*a*) (*ii*), Punjab Courts Act, as it stood before its recent amendment by Punjab Act I of 1912. We have heard lengthy and learned arguments, but we do not think it necessary to explain at length why we consider that the *suit* does not carry a value of over Rs. 1,000. We are of opinion that plaintiff had the option of valuing as he pleased the reversionary and uncertain rights which he wished to safeguard; but this does not conclude the matter, for, in our opinion, the decree appealed against does directly involve a "question respecting" the house in suit, and that house, mortgaged for Rs. 1,400 cash, can safely be valued at over Rs. 1,000. This brings in a further appeal under the said section and settles the matter in favour of defendants-appellants.

For these reasons we remand this case to the first Court through the lower Appellate Court for an inquiry into the date of birth of the plaintiff, who must show that he was under 21 when he instituted his suit. That Court should take all evidence on this point which the parties may think fit to produce and should forward the result with its opinion through the lower Appellate Court which should also record its opinion. Return in three months. One month for objections.

Case remanded.

SRINATH ROY *v.* DINABANDHU SEN.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

July 16, 1914.

Present:—Lord Moulton, Lord Sumner, Lord Parmoor, Sir John Edge and Mr. Ameer Ali.

Raja SRINATH ROY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DINABANDHU SEN AND OTHERS—DEFENDANTS—RESPONDENTS.

Julkar *rights—Tidal and navigable rivers—Fishery rights, Government's right to grant—Change of river course—Right of owner or grantee to follow the river—Bengal Law—Government grant—Evidence—Privy Council Practice—Established rules not to be superseded unless unjust—Foreign rules, considerations to be borne in mind in applying—English tenures and Bengal* zemindari *rights, whether identical—Analogy of English Law, whether should be resorted to when Indian Law is clear*—Julkar *right classified in English Law as a* profit a prendre, *effect of.*

The right of the Government of India to grant a several fishery in a tidal navigable river exists apart from the ownership of the bed of the river, and the right of fishery follows the river whatever course it may take. In other words, the grantee of *julkar* rights in the old channel can continue to enjoy them in the new one, whether the change in the river's course is a sudden or a gradual one. Therefore, in Bengal the Government's grantee can follow the shifting river for the enjoyment of his exclusive fishery so long as the waters form part of the river system within the upstream and downstream limits of his grant, whether the Government owns the soil subjacent to such waters as being the long-established bed, or whether the soil is still in a riparian proprietor as being the site of the river's recent encroachment.

Case-law on the subject reviewed.

The mere fact that the *julkar* right is classified in the language of the English Law of real property as a *profit a prendre in alieno solo* does not prevent its proprietor from being entitled to follow the river in its natural change.

The evidence of a Government grants of an exclusive fishery in navigable waters ought to be conclusive and clear

In the case of *julkar* grant made by Government prior to the Decennial Settlement, as *pattahs* or other muniments evidencing the grants are rarely forthcoming, resort must be had to secondary evidence of them, or to the inference of a legal origin to be drawn from long user.

In proposing to apply the juristic rules of a distant time or country to the conditions of a particular place at the present day, regard must be had to the physical, social and historical conditions to which that rule is to be adapted.

The analogy of an English rule can hardly be prayed in aid when Indian Legislature has an established and different rule on the same subject.

English tenures and Bengal *zemindari* rights do not full correspond to one another.

The Judicial Committee would be slow to disturb decisions by which rules, governing extensive and important rights, have been established, and unless they could be shown to be manifestly unjust or flagrantly inexpedient, their Lordships would not supersede them.

Appeal from a judgment and decree of the Calcutta High Court, dated March 11th, 1908, reversing those of the Additional Subordinate Judge of Faridpur, dated June 30th, 1905.

FACTS will appear from their Lordships' judgment.

Messrs. *De Gruyther, K. C.*, and *Dunne*, for the Appellants, contended that the appellants had established their title to the *julkar* in the Padma river and the limits and area of the said *julkar* rights. The *ekjai hastbud* of 1790, *hakikat chowhaddibandi* of 1795, *dowl kabuliats* of 1793 and 1799, *issumnavisi mauzahwari* of 1821 and a *robakari* of 1861 left no doubt that they were granted *julkar* rights in the Padma. The proceedings in litigation in 1797, although between the appellants and another party, fixed the limit of the *julkar* in question as did the maps and other transactions extending over a long period. The stream in dispute was a branch of the Padma falling within the limits of the *julkar*. It admittedly flowed for a considerable distance through and over the lands belonging to the appellants.

[LORD MOULTON:—You are following the river when it flows.]

If a river changed its bed the owner of *julkar* rights had the right to enjoy them in the new channel. It made no difference whether the new bed of the river was on the land belonging to another person. The owner of the fishery had a right to follow the current together with the open channel all closing or closed channels abandoned by the river right up to the time when the channel became finally closed at both ends. So long as the river retained its navigable character it was subject to the rights of the public and the fishery remained in the person who was grantee from the Government. The *julkar* rights in the river extended over a piece of water formed originally by the river, but so far dried up as to be disconnected from it, except in the rains during and after floods. The *julkar* rights were settled with the appellants' predecessors many years ago. By virtue of the Settlement conferred on them they were entitled to exercise the right of

fishery in the river wherever it flowed within the limits prescribed in the Settlement itself.

Reference was made to *Forbes* v. *Meer Mahomed Hossein* (1); *Ishur Chand Ram* v. *Ram Chand Mokherji* (2); *G bind Chunder Shaha* v. *Khaja Abdool Gunnie* (3); *Krishnendro Roy Chowdhry* v. *Maharanee Surno Moyee* (4); *Tarini Churn Sinha* v. *Watson & Co.*, (5); *Jogendra Narayan Roy* v. *Crawford* (6); *Bhaba Prasad* v. *Jagadindra Nath Rai* (7).

Mr. *Lowndes*, for the Respondents, contended that there had been no grant of fishery from the Government, either by prescription or by adverse possession. Supposing there was a grant, it could not go beyond *zemindari*. Supposing also that there was full grant and not confined to the *zemindari*, it would not cover subsequent streams on another person's land. This vas a point of law. The origin of the right was that the Crown owned the beds.

[LORD MOULTON:—The Crown is ultimate owner of all land.]

If exclusive right of fishery in tidal rivers was claimed, it must be proved by direct grant or by prescription. The first case decided in India said that there was no law upon fishery in India and, therefore, they must go to the Code of Justinian.

[LORD MOULTON:—Right of the public in tidal rivers overrides everything.]

The proprietary right subsisted in the land forming the bed of a changing river.

[LORD MOULTON:—Your arguments are based upon the theory of ownership in land in tidal rivers in England.]

The *Carlisle Corporation* v. *Graham* (8) laid down that a several fishery could not be acquired even in a tidal river if the soil belonged not to the Crown but to a subject.

[LORD MOULTON:—Very much in your favour, but not in favour of your case.]

Right of fishery goes with the land.

[LORD MOULTON:—*Zemindar* grants fishery to *A*, land on one side belongs to him and on the other to *C*. The river begins changing the bed, away goes fishery.]

In India if there was no definite law, as in this case, equity and justice would govern.

(1) 12 B. L. R. 210 at p. 216 (P. C.); 20 W. R. 44.
(2) 1 S. D. A. R. 221; (1807) 1 Morley's Digest 561.
(3) 6 W. R. 41.
(4) 21 W. R. 27.
(5) 17 C. 963.
(6) 32 C. 1141; 2 C. L. J. 569.
(7) 33 C. 15; 9 C. W. N. 934.
(8) (1869) 4 Ex. 361 at p. 370; 38 L. J Ex. 226; 21 L. T. 133; 18 W. R. 318.

[LORD SUMNER:—If it is only judge-made history of law, you cannot apply it to another case.]

[LORD MOULTON:—Fishery belongs to one and soil to another. Fishery is quite independant of the soil.]

The land belonging to one was under water; he had possession on it and other things as well as fisheries.

[LORD SUMNER:—I may say,—My land is overflowed: I can build on it if I like.]

[LORD MOULTON.—The Magna Charta said you cannot make private rights in tidal and threw fishery open to the public.]

In so far as alluvion and diluvion were concerned English Law was to be applied as it stood in case of non-tidal rivers. In *Babon Mayacha* v. *Nagu Shravucha* (9) fishery was entirely governed by the English Law.

[LORD MOULTON:—Supposing at seaside land is submerged, do you think people could not follow their fish there?]

This case stood by itself.

[LORD MOULTON:—He proves boundary upstream and downstream. Then there can be no doubt].

Gardner v. *Hodgson's Kingston Brewery Co. Ld.*, (10) as to the Common Law was another argument in his favour.

[LORD MOULTON.—Enjoyment for a long time is not peculiar to the English Law.]

It had been asserted against the public and it was an exclusive right. *Julkar* was exclusive right against the public. It would be very unjust to deprive one of the use of his land without even giving him the right to fish in the water submerging it.

Reference was made to *Gopeenath Roy* v. *Ramachunder Turkhunker* (11); *Luckhee Dasee* v. *Khatima Beebee* (12); *Nabikishen Roy* v. *Nehchoolanund Gosain* (13); *Gureeb Hossain* v. *Lamb* (14); *Nobin Chunder Roy* v. *Radha Pearee Debia* (15): *Carlisle Corporation* v. *Graham* (8); *Foster* v. *Wright* (16); Halsbury's Laws of England, Volume XIV, *tit.* Fishery.

Mr. *DeGruyther*, in reply.

(9) 2 B. 19 at pp. 32, 33.
(10) (1903) A. C. 229; 72 L. J. Ch. 558; 52 W. R. 17; 88 L. T. 698; 19 T. L. R. 458.
(11) (1808) 2 Sevester's Rep. 467*n.*; 1 Mac. Select. Rep. 228.
(12) (1863) 2 S. D. A. R. 51.
(13) (1856) 2 Sevester's Rep. 465 *note*.
(14) (1859) 20 S. D. A. R. 1357.
(15) 6 W. R. 17.
(16) ((878) 4 C. P. D. 438; 49 L. J. C. P. 97; 44 J. P. 7.

SRINATH ROY *v.* DINABANDHU SEN.

JUDGMENT.

LORD SUMNER.—In this action the plaintiffs claimed, as proprietors of a several fishery in certain tidal navigable waters in Eastern Bengal, a decree for possession of an exclusive fishery in a portion of a river channel, of which the principal defendants own both the bed and the banks. They succeeded before the Additional Subordinate Judge of Faridpur and failed on appeal to the High Court at Calcutta. Hence this appeal to their Lordships' Board.

There is a section of the river system of the Lower Ganges, between Dacca on the left bank and Faridpur on the right, where the great stream divides and for many miles runs in two channels roughly parallel with one another. The general course is to the south-east. The northern of the two channels is much the larger, but the southern, the smaller of the two, is itself wide. Both channels are tidal and navigable.

The streams in the Gangetic delta are capricious and powerful. In the course of ages the land itself has been deposited by the river, which always carries a prodigious quantity of mud in suspension. The river comes down in flood with resistless force, and throughout its various branches is constantly eroding its banks and building them up again. It crawls or races through a shifting network of streams. Sometimes its course changes by imperceptible degrees; sometimes a broad channel will shift or a new one open in a single night. Slowly or fast it raises islands of a substantial height standing above high water level and many square miles in extent. Lands so thrown up are called *churs*, and it is by *chur*-lands formed at some unknown though probably not remote date that the northern and southern channels in question are at present divided.

In the year 1897 a channel was broken through the defendants' *chur*-land in question. Though relatively small, even this stream was of considerable size; it is navigable for small craft, and is certainly within the ebb and flow of the tide. This new branch probably followed a line of depressions already existing, one end of which was actually an arm running up from the northern river.

The plaintiffs claim the exclusive fishery in this new navigable channel as falling within the upstream and downstream limits of their several fishery, and allege that the defendants are tespassers when they fish in it. The defendants justify their claim to fish in a portion of this channel as part of the rights of owners of the subjacent soil and of persons claiming under them.

That the plaintiffs are entitled to some fishery right in the river waters generally, not far distant from the site in question, never was much disputed, and was admitted by the respondents before their Lordships' Board, but they dispute its origin and its extent. They say that this branch is of origin so recent that no title by prescription or adverse possession arises as against themselves; that they are not affected by evidence of prescription against third parties; that even a several fishery, duly created in the main stream by the Government of India in right of the Crown, would not extend to this new branch, still less would rights acquired in the main stream by prescription against other riparian proprietors be exercisable in it; that the evidence neither establishes such bounds for the alleged exclusive fishery upstream and downstream as would bring this branch between them, nor shows that in fact any *julkar* right was ever created by Government at all. In substance the trial Judge found for an actual Government creation of the plaintiffs' right, as well as for the boundaries claimed by them. The High Court concluded against the plaintiffs on the question of the extent of their *julkar* rights without determining their origin.

The evidence of the origin of the plaintiffs' rights is documentary, and does not depend on the credibility of witnesses. Chur Makundia is the name of the plaintiffs' *pergunnah*. They produced among many other documents (*i*) an *ekjai hastbud* in respect of it for the year 1790, which showed that it then included a *mahal julkar*; (*ii*) a *hakikat chowhaddibandi* of the lands and *jamas* of that *pergunnah* for the year 1795, which showed that the name of the *julkar mahal* was River Belabanta and Bil Baor with specified

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boundaries, of which the Kole Churi of Alipur alone can now be traced by name, (*iii*) *dowl kabuliyats* of 1793 and 1799, specifying the amount of the *dowl-jumma* of the *julkar*, and (*iv*) an *issumnavisi mouzahwari* of 1821 mentioning the *julkar* in the river Balabanta as a *mouza* of *pergunnah* Chur Makundia. They put in (*v*) a *robakari* of the Court of the Collector of Faridpur, dated 11th January 1861, by which the Government recognised that this *julkar* had been included as a *mahal* in the *zemindari pergunnah* Chur Makundia (formerly Touzi No. 110 in the Dacca Collectorate, and now No. 4,000 in that of Faridpur), since before the Decennial Settlement. It named the upstream and downstream limits, and stated that the Balabanta river, in which it was enjoyed, was the same as that known in 1861 as the Padma, that is the larger and more northerly of the two branches of the Ganges above described. The more southerly has been known for some fifty years as the Bhubaneshwar.

Some evidence, not very distinct, was given at the trial, apparently for the purpose of showing that no grant from the Government was any longer to be found among the papers belonging to the plaintiffs' *zemindari*, but no point seems to have been made then or since that the proper searches had not been made. Although, on the other hand, when Government has created a separate estate of *julkar* at the period in question, it is usual to find some entry of it in the Decennial Settlement papers, no evidence was forthcoming to show that *julkar* grants made prior to the Decennial Settlement or that Settlements with *zemindars* made at the time of it must necessarily have taken the form of *pattahs* or some other muniments which should now be in the *zemindar's* possession, or be recorded in the Government archives still in existence. In practice such original grants are but rarely forthcoming now, and resort must be had to secondary evidence of them or to the inference of a legal origin to be drawn from long user [Garth, C. J., in *Hori Das Mal* v. *Mahomed Jaki* (17)]. The trial Judge was satisfied that the plaintiffs had proved a Government grant or Settlement about the end of the eighteenth century. He was overruled by the High Court, not on the ground that no such grant was proved, but that it was not shown to have been a grant of a several fishery of wide extent. The High Court thought that in reality it was only appurtenant to the plaintiffs' actual *pergunnah* and was limited by its riverine bounds.

Their Lordships accept the rule laid down in the case of *Hori Das Mal* v. *Mahomed Jaki* (17) [following the English rule in *Fitzwalter's* case (18)] that the evidence of a Government grant of an exclusive fishery in navigable waters ought to be conclusive and clear, but they are of opinion that, in so far as such evidence can now be expected to be forthcoming as to particular grants more than a century old, the evidence in the present case was sufficient to show that the competent authority—the Government of India in right of the Crown—did actually grant to the plaintiffs' predecessors-in-title, or settle with them so as in effect to grant, a *julkar* right of several fishery in certain of the waters of the portion of the Ganges system in question.

The next point is one of metes and bounds. This depended partly on the above-named documents, partly on the records of certain litigation with the neighbouring *zamindars* of *Pergunnah* Bikrampur and persons holding under them in 1816 and 1843, put in as part of the history of the fishery and of the claims made to it, partly on the testimony of living *patnidars*, *ijaradars*, fishermen, and so on, and the local investigations of an *Amin* deputed by order of the Court. The *Amin's* reports and maps were accepted in both Courts, and by both parties on the present appeal. The plaintiffs' case depended on fixing by means of the above materials, supplemented by a series of maps from 1760 onwards, four points roughly forming a parallelogram, within which their alleged *julkar* rights lay, the western or upstream boundary and the eastern or downstream boundary in each

(17) 11 C. 434 (F. B.).

(18) (1686) 3 Keble 242; 1 Mod. 105; 84 E. R. 699.

case extending from points north of the northern or larger channel, the Padma, to points south of the southern or smaller channel, the Bhubaneshwar, and the *locus in quo* of the dispute falling between them. The defendants contended, that in so far as any certain points were proved at all, the materials relied upon only showed that the fishery did not extend into any part of the Padma, but was limited by the right or southern bank of the main stream and thus excluded it. They pointed out that the Faridpur Collectorate was bounded by the right bank of the Padma, the whole breadth of the main stream being in the Collectorate of Dacca, and they argued that the *robakari* of 1861, which was the strength of the plaintiffs' case, proved at most a recognition of a fishery right, which stopped short of those waters in which it was now essential to the plaintiffs to make good their claim.

A sufficient answer is made by the plaintiffs. They obtain early evidence of the actual position of the points forming their boundaries north of the main stream from proceedings in suits decided in their favour between themselves or their predecessors-in-title and the owners of the Bikrampur *zemindari*, who claimed some *jalkar* rights in the main Padma also, and by means of such proceedings in 1797, 1816 and 1843, by means of other similar proceedings in litigation with some of the present defendants in 1894, 1896 and 1897, and also by a long succession of *ijara kabuliyats* and *pattahs*, which they put in evidence, they prove *de facto* possession, as under their *jalkar* rights, of the whole fishery in both streams between their upper and their lower limits. It is an intricate task to trace the various spots mentioned from map to map, because of the periodic diluviation of trees and houses, though these are the least transient of the landmarks available. Matters are also complicated by variations in the names of the rivers, Bhubaneshwar, Krishnapur, Narina, Padma, and Balabanta or Balbanta. The result, however, is sufficiently clear. Further, the decision recorded in the *robakari* of 1861 was appealed to the Commissioner of the Division at Dacca, who at that date exercised appellate jurisdiction in such matters over the Collectorate of Faridpur, and he affirmed the decision below. As this decision proceeded on the footing that the *jalkar* claimed extended over the waters of the Padma, and was a valid *jalkar* included in the Permanent Settlement, it may reasonably be inferred that the Commissioner of Dacca took note that the parties entitled to the *jalkar* claimed rights within his Collectorate, and finding nothing in the Dacca records to the contrary, affirmed the decision below for Dacca as well as for Faridpur.

The trial Judge, following a long and considerable body of decisions in Bengal, held that, if the plaintiffs' rights in this stream or streams out of which the new branch opened were once established, they would extend to the waters of the new branch as soon as it was formed, a principle which is conveniently called "the right to follow the river." It does not appear that this current of authority was challenged or doubted either before the trial Judge or the High Court; certainly its authority was binding upon both. The defendants' case simply was that in fact neither the plaintiffs nor their predecessors-in-title could be shown ever to have enjoyed or to have been entitled to any *jalkar* right except that lying within the boundaries of their *zemindari* and appertaining thereto. The High Court appears to have arrived at a conclusion in favour of the defendants' argument mainly in consequence of the view taken of the true meaning of the judgment of 1816, and of the significance of the *thakbast* map of 1862, and a marginal note upon it. It is not necessary to examine the language of the judgment of 1816 in detail, but their Lordships are unable to hold that it excluded the main or northern stream from the plaintiffs' fishery, either expressly or by implication. The language is obscure, but, as their Lordships read it, the plaintiffs' construction of it was right. The *thak* map was pressed beyond its legitimate effect. It was concerned only with that portion of the fishery which fell

within *Pergunnah* Bikrampur, and was inconclusive.

The question of the effect of deltaic changes in a river's course upon the exclusive right of fishing in it appears in the Indian decisions as long ago as the beginning of the last century. It was laid down in 1807 that if a river changes its bed the owner of *julkar* rights in the old channel continues to enjoy them in the new one [*Ishur Chand Ram* v. *Ramchund Mokhurji* (2)]. The converse case occurred in the following year. A landowner sued the owner of *julkar* rights in a tidal river for taking possession of a *jheel* formed on his land by the overflow of the river. The channel of the river had not altered, the *jheel* formed no part of it, and was only connected with it at the river's highest stage. Accordingly, it was held that the owner of the fishery, having no right over the plaintiffs' land, had no right to the fishery in waters thus formed upon his lands. [*Gopeenath Roy* v. *Ramchunder Turklunkar* (11)]. This assumed some right of following the river and placed a particular limit upon it. It will be observed so far that whatever may have been the basis for the right of *julkar* in the river, the right of fishing in the *jheels* was treated as belonging to the owner of the subjacent soil, a right which was shortly after, in 1813, held to be severable from the ownership of the soil, so that the bare grant by the landowner of the right of fishing in the *jheel* did not in itself convey any property in the soil [*Lukhee Dasee* v. *Khatinah Beebee* (12)]. Why the owner of *julkar* right in the river has or may have an enjoyment of that right co-extensive with the waters of the river which permanently form part of it, though they have changed their course, is not stated. Not improbably it rested on local custom, for the Bengal Alluvion and Diluvion Regulation (XI of 1825) is careful in a cognate matter to keep local custom alive. At any rate the principle was well established as early as 1808 that a right of fishery follows the river whatever course it may take, for the ground on which in *Gopeenath's* case (11) the High Court allowed the appeal from the Court below, which had acted on this principle, is simply that in point of fact the *jheel* in question, though formed by the river's overflow, was no longer so connected with it as to form part of the river. This was long considered to have been the effect of these decisions. Mr. Sevester's note upon them in Vol. II, page 467, of his reports is, "A general right of fishery in river, when not otherwise defined, is restricted to the channel of the river and water considered to form part of it, not extending to adjacent lakes or other pieces of water occasionally supplied by overflowings of the river but not actually connected with the channel of it." The rule was so applied in 1856 [*Nubkishen Roy* v. *Uchchootanund Gosain* (13)] and in 1863 [*Ramanath Thakoor* v. *Eshanchunder Bonnerjee* (19)]. In the former it was held that the right of *julkar* in the river was confined to the river and streams flowing into or from it, exclusive of *jheels* not connected with the channel but extending to watercourses which though not immediately within the great channel of the river adjoin or flow into it or are supplied therefrom; "their right consists of the flowing stream and the adjuncts flowing from or into it." In the latter the limitation of the river's adjuncts flowing from or into it was held not to extend to adjacent sheets of water with which the river communicates only when in flood. "We think," says the Court, "the grant of *julkar* must be construed as *prima facie* confined to the rivers and sheets of water communicating therewith to which the plaintiff might get access without trespassing on the land." It is true that these two decisions do not specifically deal with the case of the changed channel of a deltaic stream, but they do clearly lay down rules for defining the area of the waters in which the *julkar* right is to be enjoyed, which carry it beyond the limits of actual navigability though confining it to waters which are adjuncts of the navigable stream. They make the right depend on the identity of the river in which it is enjoyed and do not confine it to such waters of that river as are superimposed

(19) (1863) 2 Sevestor 463.

on the very land once owned by the grantor of the right. The current of decision was not unruffled by doubts. The Court observes in 1859 in *Gureeb Hossein Chowdhree* v. *Lamb* (14): "The part of the country through which the Megna flows is intersected with innumerable creeks into which the tide from the main river flows. The right of fishing in these tidal creeks belongs of right to the owner of the property into which they flow," but this case is explained by the fact that the part of the river in question was almost if not quite an arm of the sea. An opinion was indicated in 1864, though not absolutely necessary to the decision, in *Moharanee Sibessury Dabee* v. *Lukhy Dabee* (20) that the extension of rights of fishery, in consequence of an expansion of the river in which they were enjoyed, ought to depend, as questions of alluvion would, upon the rapidity of the expansion. If sudden, it would work no change in the ownership of the submerged soil, and so cause no extension of the *julkar* right; it would do both if it took place by gradual and imperceptible advances. The Court here inclined to connect the right of fishing indissolubly with the right to the soil subjacent to the waters in which the fishery right was enjoyed. In 1866 came two somewhat contradictory decisions. The Court in *Nobin Chunder Roy Chowdhry* v. *Radha Pearee Debia* (15) scouted as "preposterous" a claim to follow the diverted waters in which the plaintiff had the fishery, but this was without discussion of the authorities, and the claim was alleged, not against the owner of the soil over which the diverted waters flowed, but against the owner of the fishery in the waters of another river into which the plaintiff's river had burst and discharged itself. In the second case, *Gobind Chunder Shaha* v. *Khaja Abdool Gunnie* (3), the plaintiff and defendant, joint owners of land and of a fishery, had made a partition of the land but not of the fishery, and the plaintiff sought to oust the defendant from fishing over the land which now belonged exclusively to him, but had been overflowed by a change in the course of the waters. Sir Barnes Peacock in dismissing the suit observes: "Still, the fishery existed in that part of the river out of which the fish was taken, although, by a change in the course of the river, it ran over that portion of thelland which was allotted to the plaintiff under the *butwara*." Again, in 1873 [*Krishnendro Roy Chowdhry* v. *Maharanee Surno Moyee* (4)] the Court somewhat reluctantly followed the rule, which it deemed to be settled, that the owner of the fishery where the river's channel has changed has "a right to follow the current," that he "may not only follow the river to any channel which it may from time to time cut for itself, but may continue to enjoy together with the open channel all closing or closed channels abandoned by the river right up to the time when the channel became finally closed at both ends." Upon the facts of that case it is the latter part of this proposition that is directly involved in the decision. The whole question was learnedly reviewed by Mr. Lal Mohun Doss in 1891 in his Tagore Lectures on the Law of Riparian Rights, who, (pages 372, *et seq.*) while admitting a settled current of authority in India to the contrary, urges the very arguments and conclusions of the now respondents and relies on the same authorities. Nevertheless, after this discussion had brought the question again before the Courts and the profession, the High Court in a critical decision affirmed the long-standing rule. This was in 1890 in the case of *Tarini Churn Sinha* v. *Watson & Co.* (5). The questions were directly raised: "Can a right of *julkar* in a public navigable river exist apart from the right to the bed of the river, or must it necessarily follow that right?" "Do the defendants lose their vested right by a change in the river's course, though the river still is navigable and subject to public right?" This case raised the very question which has been in debate before their Lordships, for the change in the river's course was a sudden one taking place in the course of a single year and not by imperceptible or slow encroachment. The answer given by the Court was in favour of the owner of the right of fishing in the river. It purported to follow a converse decision

(20) 1 W. R. 88.

in *Grey* v. *Anund Mohun Moitro* (21) and decided that "so long as the river retains its navigable character, it is subject to the rights of the public, and the fishery remains in the person who held it under a grant from the Government." In *Gray's* case (21) a change of channel had left an old bed either dry or containing only pools disconnected with the river, and it was held that what the river had abandoned, albeit part dry land and part *jheels*, became private property. Thenceforth it belonged to the riparian owners who could claim settlement of it from Government, and the reason given is that "the right of the defendant" (the owner of the fishery), "being granted out of and part of the Government's right to the river, no longer exists when the Government's right is itself gone." Thus it will be observed that in *Tarini's* case (5) the Court conceived itself to be reducing the subject to symmetry by deciding that while on the one hand the owner of the fishery rights in the river lost them where there was permanent recession of the river, he increased them where there was permanent advance of the river. In the latter case the Court disregarded the conception of Government right to the river as being an incident of Government right to the subjacent soil, and treated the Government right and the right of its grantee in respect of the fishery as subsisting in the river wherever that river might flow, and not as subsisting in flowing water only where and so long as it flowed over soil vested in the Government. This view has since been treated as established. That the *julkar* right in the river extends over a piece of water formed originally by the river, but so far dried up as to be disconnected from it, except in the rains, during and just after floods, was decided in 1905 in *Jogendra Narayan Roy* v. *Crawford* (6). The ground of the decision is that such water is still part of the river system, and when that is so in fact the right of fishing persists in respect of it. This is the case of retrocession. So too in the case of *Bhaba Prasad* v. *Jagadindra Nath Rai* (7) in the same year the principle is thus expressed, "the *julkar* rights were settled with the plaintiffs' predecessor many years ago. The plaintiffs, by virtue of the Settlement conferred upon them, are entitled to exercise the right of fishery in the said river Brahamputra wherever it flows within the limits prescribed in the Settlement itself." Both these cases purport to follow *Tarini's* case (5), which was a case of an advance of the river into a newly-formed channel, and the rest of a long line of settled authorities. It must now be taken as decided in Bengal that the Government's grantee can follow the shifting river for the enjoyment of his exclusive fishery so long as the waters form part of the river system within the upstream and downstream limits of his grant, whether the Government owns the soil subjacent to such waters as being the long-established bed, or whether the soil is still in a riparian proprietor as being the site of the river's recent encroachment. Their Lordships were strongly and ably pressed to disregard, or at least to qualify, these decisions. The points made were (*a*) that in principle the right to grant a several fishery in tidal navigable waters is so essentially connected with the right to the soil and the bed of the channel, that no fishery right can exist where the grantor of the several fishery never has owned the subjacent soil; (*b*) that in any case the acquisition of fresh waters can go no further and can proceed no otherwise than the acquisition of fresh soil by alluvion, and, therefore, that an expansion of waters within which a *julkar* right exists can only carry with it an extension of the *julkar* right if it has taken place by imperceptible encroachments upon the land, and not by sudden irruption; and (*c*) that it would be grossly unjust to hold that the natural misfortune which swamps a landowner's soil by a river's encroachment should be accompanied by a legal ouster from such enjoyment as the natural disaster has left him. In extension of the last point it was argued that the disputed site in fact covered the sites of former enclosed *jheels* which belonged to and had been enjoyed by the defendants, and that no trespass could be committed as against the plaintiffs in any view by fishing where the defendants had

(21) (1864) W. R. 108.

formerly been accustomed and entitled to fish in waters overlying their own land. This question of fact, which seems not to have been passed upon by the Courts below, was not sufficiently made out, but even if it were, it appears to be covered by the general argument.

For these contentions reliance was placed on the *Carlisle Corporation* v. *Graham* (8) when Kelly, C.B., says: "We are called upon to decide the question which now arises for the first time,—Is the several fishery of a subject in a tidal river, the waters of which permanently recede from a portion of its course and flow into and through another course, where the soil and the land on both sides of the new channel thus formed belong to another subject transferred from the old to the new channel, and so a several fishery created in and throughout such new channel, or in some, and if any, in what part of it?.....In the case of *Murphy* v. *Ryan* (22) O'Hagan, J., in delivering the judgment of the Court, says: 'But whilst the right of fishing in fresh water rivers in which the soil belongs to the riparian owner is thus exclusive, the right of fishing in the sea, its arms and estuaries, and in its tidal waters, wherever it ebbs and flows, is held by the Common Law to be *publici juris* and so to belong to all the subjects of the Crown; the soil of the sea, and its arms and estuaries and tidal waters being vested in the Sovereign as a trustee for the public. The exclusive right of fishing in the one case, and the public right of fishing in the other, depend upon the existence of a proprietorship in the soil of the private river by the private owner, and by the Sovereign in a public river respectively.' And this is the true principle of the law touching a several fishery in a tidal river. If, therefore, the right of the Crown to grant a several fishery in a tidal river to a subject is derived from the ownership of the soil, which is in the Crown by the Common Law, a several fishery cannot be acquired even in a tidal river if the soil belong not to the Crown but to a subject. And all the authorities, ancient and modern, are uniform to the effect that if, by the irruption of the waters of a tidal river, a new channel is formed in the land of a subject, although the rights of the Crown and of the public may come into existence and be exercised in what has thus become a portion of a tidal river or of an arm of the sea, the right to the soil remains in the owner, so that if at any time thereafter the waters shall recede and the river again change its course, leaving the new channel dry, the soil becomes again the exclusive property of the owner, free from all rights whatsoever in the Crown or in the public."

With this case has to be considered also *Foster* v. *Wright* (16). There the proprietor of a right of fishing in the Lune, at that part neither tidal nor navigable, was held entitled to "follow his river" when the river had so far shifted its course as to flow over another's land, and the person, to whom the land which came to form its new bed had previously belonged, was held to be a trespasser when he fished in its new channel. The change of bed had been gradual, perceptible and measurable over considerable periods of time, but from week to week imperceptible. It was held that the imperceptible changes had had the effect of producing an accretion to the land of the owner of the fishery, and that "the river had never lost its identity nor its bed, its legal owner," (page 446); "he has day by day and week by week become the owner of that which has gradually and imperceptibly become its present bed, and the title so gradually and imperceptibly acquired cannot be defeated by proof that a portion of the bed now capable of identification was formerly land belonging to the defendant or his predecessors-in-title." The *Carlisle Corporation* v. *Graham* (8) was distinguished on the ground that in that case the river bed was a new bed, not formed by the gradual shifting of the old one but totally new, the old bed remaining recognisable in its old site but deserted. The Eden became a river with two beds: the Lune was at all times a river with only one though an ambulatory one. As Counsel in *Foster* v. *Wright* (16) boldly argued for the right to "follow the river" in its Indian sense saying (page 440), "even a sudden and violent

(22) 2 Ir. Rep. C. L. 143 at p. 149; 16 W. R. 678.

change in its course would not have taken away" the plaintiff's right, and as the adoption of that *a fortiori* view would have made all consideration of gradual accretion immaterial, the decision must be regarded as one which negatives the contention of the respondents in the present case. As with the river Lune so the part of the river Eden which was in question in *Carlisle Corporation* v. *Graham*(8) is one which does not appear to be subject to frequent change. How the law might be if conditions similar to those of Bengal could occur in England is another matter. The above cases would have been more directly in point had the river in question been one which often and swiftly changes its course, as for instance the tidal Severn, of which Hale writes (Hargrave's Law Tracts, page 16), "that river, which is a wild unruly river, and many times shifts its channel, especially in that flat between Shinberge and Aure, is the common boundary between the manors on either side, *viz.*, the *filum aquae* or middle of the stream, and this is the custom of the manors contiguous to that river from Gloucester down to Aure." There is in this part of the Severn an ancient several fishery, enjoyed by the Lords of Berkeley under Charters of Henry I., Richard I., and John, which must be much more analogous to the *julkar* in the present case than cases in the rivers Eden or Lune. A somewhat similar instance in Scotland is mentioned by Lord Abinger in *In re Hull and Selby Railway Company* (23); but the question of the right to follow the river does not appear to have arisen for decision in these cases.

It was admitted that the Common Law of England as such does not apply in the *Mofussil* of Bengal, but the argument was that principles established under and for English conditions afford a sound guide to the rules which should be enforced in India. Their Lordships have given these arguments careful consideration, though they would in any case be slow to disturb decisions by which rules have been established for Bengal governing extensive and important rights such as rights of *julkar*, and unless they could be shown to be manifestly unjust or flagrantly inexpedient, their Lordships would not supersede them. The Indian Courts have in many respects followed the English Law of waters. Sometimes their rules are the same; sometimes only similar. *Julkar* may exist not only as a right attaching to riparian ownership but also "as an incorporeal hereditament, a right to be exercised in the tenement of another" [*Forbes* v. *Meer Mahomed Hossein* (1)] as a *profit a prendre in alieno solo* [*Lukhee Dasee* v. *Khati Nah Beebee* (12)]. In navigable waters such rights are granted by the Government of India, or, what is equivalent to a grant, settled with the grantee under the Revenue Settlement by the Government, and are thus derived from the Crown, *Prosunno Coomar Sircar* v. *Ram Coomar Parooey* (24). The freehold of the bed of navigable waters was deemed to be in the East India Company as representing the Crown and now is vested in the Government of India in right of the Crown [*John Doe Dem Seebkristo* v. *East India Company* (25); *Nogender Chunder Ghose* v. *Mahomed Esoff* (26)]. Where the bed thus forms part of the public domain, the public at large is *prima facie* entitled to fish. Thus the English analogy has been closely followed. Again, the sudden invasion of a private owner's land by the waters of a navigable river does not divest the property in the soil. If the change in the course of the navigable river results in the water in the new course being in fact navigable [that is, capable of being traversed by a boat at all seasons, *Chunder Juleah* v. *Ram Churn Mookerjee* (27); *Mohinee Mohun Doss* v. *Khaja Assanoollah* (28)] the flooded landowner must submit to have his land traversed by the vessels of the public in the course of navigation and cannot in right of his ownership erect works on his flooded soil to the obstruction of the navigation. None the less he remains the owner, and should the waters permanently retire, his full rights as owner revive unless lapse of time or circumstances, or both, suffice to prove an abandonment of his rights of ownership for his part.

(23) (1839) 5 M. & W. 327; 8 L. J. Ex. 260; 52 R. R. 733.

(24) 4 C. 53; 3 Ind. Jur. 214.

(25) 6 M. I. A. 267; 10 M. P. C. C. 140; 1 Sar. P. C. J. 540; 14 E. R. 445; 19 Eng. Rep. 100; 110 R. R. 21.

(26) 10 B. L. R. 406, 18 W. R. 113.

(27) 15 W. R. 212

(28) 17 W. R. 73.

Still, there is one step which the Indian law has never taken, far as it has gone in the adoption of English rules. Often as the opportunity for so doing has arisen, it has never been held that the capacity of the Government of India to grant to or settle with a private owner the exclusive right of fishing in tidal navigable waters is so indissolubly bound up with its ownership of the soil subjacent to those waters that, no matter how those waters may subsequently change their course, while still remaining part of the same river system within the upstream and downstream limits of the grant, the enjoyment of the right so granted cannot extend beyond the limits of the Government's ownership of the soil lying perpendicularly underneath them, as it may vest from time to time. It is one thing to presume the soil of the bed of a tidal navigable river to be vested in the Crown and to hold that the Government of India in right of the Crown can grant the fishery in the superincumbent waters in severalty, and quite another to hold that the several fishery when once thus created is for ever enjoyable only in waters that continue to flow precisely over ground which was in the Crown at the date of the grant. "Whether the actual proprietary right in the soil of British India," says Garth, C. J., in the case of *Hori Das Mal* v. *Mahomed Jaki* (17) already cited, "is vested in the Crown or not (a point upon which there seems some diversity of opinion), I take it to be clear that the Crown has the power of making settlements or grants for purposes of revenue of all unsettled and unappropriated lands. And I can see no good reason why they should not have the same power of making settlements of *julkar* rights and of lands covered by water as of lands not covered by water. In either case the settlement is made for the purposes of revenue, and for the benefit of the public." Again, the rights of the Crown are thus stated in *Collector of Maldah* v. *Syed Suduroodeen* (29) :— "The claim to resume land is one based on the right of the Government to a portion of the produce of every *bigha* of the soil as revenue; whereas the claim to possession of the *julkars* of rivers not forming portions of settled estates is founded upon a supposed right in Government as trustee of the waterways of the country, to possess and to assign the exclusive possession of them to any individual it chooses on the payment of revenue for them in the shape of a fishery rent." [*Hurreehur Mookerjea* v. *Chundeechurn Dutt* (30); *Bagram* v. *Collector of Bhulooa* (31). See, too, *Radha Mohun Mundul* v. *Neel Madhub Mundul* (32) and *Satcowri Ghosh Mondal* v. *Secretary of State for India* (33) where the cases are collected and discussed.]

In truth the rule which in the United Kingdom thus connects the subject's right to an exclusive fishery in tidal navigable waters with the limits of the Crown's ownership of the subjacent soil is itself the result of conditions partly historical and partly geographical which have no counterpart in Lower Bengal. In Bracton's time this rule would seem to have been unknown; at any rate he ignores it, and treats the right of fishing in rivers, as did the Roman Law, as a right *publici juris*. Whether in his time this was at Common Law orthodox or heterodox, or whether he supplemented the defects of our insular system by a reversion to that of Rome, need not now be considered. What is clear is that during the many years between his time and Hale's the generality of the right of river fishing, if it ever had been the doctrine of the Common Law, was such no longer. According to Hale (*De jure maris*, page 1, Chapter 4; Hargrave's Law Tracts, page 11), "the right of fishing in the sea and the creeks and arms thereof is originally lodged in the Crown as the right of depasturing is originally lodged in the owner of the wastes whereof he his lord, or as the right of fishing belongs to him that is the owner of a private or inland river. . . The King is the owner of this great waste, and as a consequent of his propriety hath the primary right of fishing in the sea or creeks or arms thereof." Be it observed that this doctrine may be called essentially insular, and that the proofs of it which Hale adduces

(29) 1 W. R. 116.

(30) 17 S. D. A. R. 641.
(31) W. R. (1864) 243; 2 Sevester 373.
(32) 24 W. R. 200.
(33) 22 C. 252.

are purely English, namely, Close Rolls, Parliament Rolls, and Rolls of the King's Bench mainly in Plantagenet times, and that he places on Bracton's Roman doctrine an interpretation, confining it to rivers which are arms of the sea, which is itself a dissent from that doctrine. The question how far a rule established in this country can be usefully applied in another, whose circumstances, historical, geographical, and social, are widely different, is well illustrated by the case of navigability, as understood in the law of the different States of the United States of America. Navigability affects both rights in the waters of a river, whether of passing or re-passing or of fishing, and the rights of riparian owners, whether as entitled to make structures on their soil which affect the river's flow, or as suffering in respect of their soil *quasi*-servitudes of towing, anchoring, or landing in favour of the common people. The Courts of the different States, minded alike to follow the Common Law where they could, found themselves in the latter part of the eighteenth and the early part of the nineteenth centuries constrained by physical and geographical conditions to treat it differently. In Massachusetts, Connecticut, New Hampshire, and Vermont, where the rivers approximated in size and type to the rivers of this country, the English common law rule was followed, that tidality decided the point at which the ownership of the bed and the right to fish should be public on the one side and private on the other. Other States, though possibly for other reasons since they possessed rivers very different in character from those of England, namely, Virginia, Ohio, Illinois, and Indiana followed the same rule. But in Pennsylvania, North Carolina, Iowa, Missouri, Tennessee, and Alabama, this rule was disregarded, and the test adopted was that of navigability in fact, the Courts thus approximating to the practice of Western Europe (*see* Kent's Commentaries, III, 525). The reasoning has been put pointedly in Pennsylvania. Chief Justice Tilghman says in 1810, in *Carson* v. *Blazer* (34), "The Common Law principle concerning rivers" (*viz.*, that rivers, where the tide does not ebb and flow, belong to the owners of adjoining lands on either side), "even if extended to America, would not apply to such a river as the Susquehanna, which is a mile wide and runs several hundred miles through a rich country, and which is navigable and is actually navigated by large boats. If such a river had existed in England no such law would ever have been applied to it." *See*, too, *Shrunk* v. *Schuylkill Navigation Co.* (35). Thirty years later in *Zimmerman* v. *Union Canal Co.* (36) President Porter observes, "the rules of the Common Law of England in regard to the rivers and the rights of riparian owners do not extend to this commonwealth, for the plain reason that rules applicable to such streams as they have in England above the flow of the tide, scarcely one of which approximates to the size of the Swatara, would be inapplicable to such streams as the Susquehanna, the Allegheny, the Monongahela," and sundry other "rivers of Damascus." A similar deviation, equally grounded in good sense, from the strict pattern of the English Law of waters lies at the bottom of the current of Indian cases previously referred to, and forms its justification.

In proposing to apply the juristic rules of a distant time or country to the conditions of a particular place at the present day, regard must be had to the physical, social, and historical conditions to which that rule is to be adapted. In England the rights of the Crown and other rights derived from them have long been established by authority, even though this historical origin is imperfectly known or conjectural. The result may be that the law is quite certain and yet is based on considerations of history and precedent which are quite the reverse. In Bengal a special history, and a special theory of rights, tenures and obligations condition the rules applicable to such an incorporeal hereditament as that now in question. In England we go back before Magna Charta for the commencement of several fisheries in tidal navigable waters, and know little of their actual origin. In Bengal it is sufficient to say that at the time of the Decennial or the Permanent Settlement, or since, such rights,

(34) (1810) 2 Binney 477; 4 Am. Dec. 463.

(35) (1826) 14 Sergeant and Rawle 71 at p. 78.
(36) 1 Watts and Sergeant 351.

though possibly descending from remote antiquity, were settled with the Government of India, whose special position, originating on 12th August 1765, when the East India Company became Receiver-general in perpetuity of the revenues of Bengal, Orissa, and Behar, is historically well known. English tenures and Bengal *zamindari* rights, unduly assimilated at one time, have never fully corresponded to one another. Above all the difference, indeed the contrast, of physical conditions is capital. In England the bed of a stream is for the most part unchanging during generations, and alters, if it alters at all, gradually and by slow processes. In the deltaic area of Lower Bengal change is almost normal in the river systems, and changes occur rarely by slow degrees, and often with an almost cataclysmal suddenness. If English cases were applied to Bengal, so that the area of enjoyment of a several fishery in tidal navigable waters should be limited to the area within which the Crown, the assumed grantor of the fishery, had owned the subjacent soil at the time of its grant, who could say from time to time what the bounds of that enjoyment are, and where the ownership of the soil is to be delimited? The course of the waters has been in flux for ages : at what date is this ownership to be taken ? As Lord Abinger says of the rule of gradual accretion of soil in *In re Hull and Selby Railway Co.* (23) the theoretic basis of which has been variously stated from the time of Blackstone to the present day (see the different theories collected by Farwell, L.J., in *Mercer* v. *Denne* (37), " the principle is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property." Take which date you will, the ever-shifting river does not run now where it ran then, and if the ownership of the soil remains as it was, it is sheer guesswork to say in which part of the present waters the grantee of *jalkar* rights shall enjoy his several fishery under his grantor's title, and in which parts he must abstain, since the waters flow over the soil of private owners. Any given section of the river system is in all probability a shifting and irregular patchwork of water flowing over soil which belonged to the Sovereign: at the selected date and of water flowing over soil then belonging to other owners and since encroached upon, with the background of a probability that before the date in question and yet within historic times, no water may have run there at all. By what analogy can rules applicable to the Eden and the Lune be profitably applied to such physical conditions ?

It was urged that the established rule with regard to alluvion should be applied to rights of *jalkar* ; that since the right to accretions and the liability to derelictions of soil attached only to gradual accretions or to erosions taking place by imperceptible degrees, so too the right of the owner of the fishery to "follow the river" ought to be limited to cases where the river's encroachments were gradual, and ought not to be extended to an irruption as sudden, and accomplished as rapidly, as was the formation of the channel in question in the defendants' lands. It is to be observed that here too Indian Law, doubtless guided by local physical conditions, has adopted a rule varying somewhat from the rule established in this country. Where under English conditions the rule applies to "imperceptible" alterations, Regulation XI of 1825, Articles 1 and 4, speak of "gradual accession." The analogy of the English rule can hardly be prayed in aid when Indian legislation has thus an established and different rule on the same subject. Further, as the Indian rule is established now beyond question, it may perhaps be said without offence of the Indian as of the English rule, that it represents rather a compromise of convenience than an ideal of justice, for that which is a man's own does not become another's any more agreeably to ideal justice by being filched from him gradually instead of being swallowed whole. In any case the analogy is not in *pari materia*. Property in the soil is one thing; enjoyment of a profit *a prendre* in flowing water may in some respects be another. True, the profit *a prendre* is to be enjoyed *in alieno solo* ; such is its nature. True too that at the time of the grant

(37) (1905) 2 Ch. 538 at p. 568; 21 T. L. R. 760; 70 J. P. 64; 54 W. R. 303; 3 L. G. R. 1293; 74 L. J. Ch. 723; 93 L. T. 412.

the grantor has no power to create this incorporeal hereditament where his ownership of the soil does not extend; but when the power to grant arises from sovereignty, and has never been decided to be limited to the bounds of the grantor's proprietorship as it may continue to exist from time to time the mere fact that the *julkar* right is classified in the language of the English Law of real property as a *profit a prendre in alieno solo* does not prevent its proprietor from being entitled to follow the river in its natural change. The fish follow the river and the fisherman follows the fish; this may be right or wrong, but the question is not settled by asking under what circumstances of natural physical change the proprietor of an acre of dry land, which has vanished from sight, can claim to have still vested in him an equal area of river bed on the same site, or another acre of dry land transferred by the river and attached by accretions to another proprietor's land.

Lastly, it is said to be unjust that a landowner should not only lose the use of his land when the river overflows it, but also the right to fish over his own acres and in his own waters, in order that another may unmeritoriously fish in his place. There is some begging of the question here; the waters are not his waters, nor is the change confined to the flooding of his fields. It is the river that has made his land its own; the waters are the tidal navigable waters of the great stream. In physical fact the landowner enjoys his land by the precarious grace of the river, whose identity is so persistent, and whose character is so predominating, as almost to amount to personality; and is it fundamentally unjust that in law too he should lose what he has lost in fact, and be precluded from taking in substitution for his lost land an incorporeal right which has been granted not to him but to another? The Sovereign power lawfully invests its grantee with *julkar* rights in part of the river: is it unjust that when that river shifts its course changing in locality but not in function, the owner of those rights should still enjoy them in that self-same river, instead of being despoiled of them by the course of nature, which he could neither foresee nor control? There must be some rule and there must be some hardship. To say the least there is no such proof that one rule is better than the other as would even approach the conclusion that the rule established should now be set aside.

Their Lordships are of opinion that no reason sufficiently cogent has been found to warrant them in disregarding the settled Indian authorities, and being further of opinion that the plaintiffs established their claim at the trial, they will humbly advise His Majesty that the appeal should be allowed with costs here and below, and that the judgment appealed from should be set aside and the judgment of the trial Judge restored.

Appeal allowed.

Solicitors for the Appellants: Messrs. *Watkins and Hunter.*

Solicitors for the Respondents: Messrs. *Theodore Bell & Co.*

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 269 OF 1911.

June 8, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Rattigan.

Diwan SHIB NATH—DEFENDANT—APPELLANT

versus

THE ALLIANCE BANK OF SIMLA, LTD., LAHORE—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 9, O. II, rr. 1 and 2—Joinder of causes of action—Joinder of parties—Necessary party not added—Party impleaded by Appellate Court—Higher Court will not interfere on score of limitation—Punjab Courts Act (XVIII of 1884), s. 75 (2)—Function—District Judge transferring case to Additional District Judge—Assignment—Jurisdiction—Hindu Law—Father's debt time-barred, son's duty to discharge—Will not acted upon—Family arrangement—Son's right to object to father's alienation—Unfriendliness on part of father does not destroy son's right as co-parcener—Evidence Act (I of 1872), s. 115—Estoppel—Mortgagor condoning defects in mortgage, effect of—Letter, when it will not require registration—Hindu Law—Trust-deed—Trustee alien in race and religion—When valid—Revocable trust—Valid, how far.

SHIB NATH *v.* ALLIANCE BANK OF SIMLA LTD., LAHORE.

Sub-section (2) of section 75 of the Punjab Courts Act, 1884, cannot be properly construed so as to prevent a District Judge from transferring to a subordinate Court a suit pending before himself. The sub-section is intended merely to invest a District Judge with power of control over the distribution of business, and by no means implies that an Additional District Judge has no judicial powers until the District Judge confers them on him. An Additional District Judge obtains his powers when he is appointed and gazetted, and even if to give him jurisdiction there must be an assignment of function by the District Judge, the transfer of, and direction to try, a particular case to the former by the latter is such an assignment.

Order II, rule 1, Civil Procedure Code, 1908, has reference mainly, if not exclusively, to correct joinder of causes of action, adequate inclusion of reliefs claimed and so forth, rather than to joinder of parties, and even violation of such a rule as Order II, rule 2, does not involve dismissal of suit, but merely that omitted claims shall not be sued for separately.

Where the first Court finds that a particular person is not a necessary party and then proceeds with the suit, the Appellate Court cannot, in view of Order I, rule 9, allow the suit to be defeated, even if it holds that the said person should have been impleaded. If the first Court, however, finds that the said person is a necessary party and directs that he be made one, and the plaintiff refuses thereafter to implead him, that Court would be bound to dismiss the suit.

It is settled law that when an Appellate Court does implead a person interested in the result of an appeal, a higher Court will not upset the order on the score of limitation.

Where a Hindu father was, during all the years when his debts were accumulating, living an immoral life, wasting his estate in debauchery and extravagance, it would not be reasonable to call upon his son, while challenging the validity of the debts, to prove that this and that item of debt was incurred for use on this or that piece of immorality or extravagance.

To a Hindu the payment of his father's debt, though time-barred, is a pious duty and such a debt is a just antecedent debt, however old it may be.

Where after the death of a Hindu testator, in mutation proceedings between his heirs, no mention was made of the Will, nor was it invoked when the suit between them was compromised, and the settlement of shares was not in strict accordance with the personal law of the parties:

Held, under the circumstances of the case, that the settlement was in the nature of a family arrangement, the essence of which was that, notwithstanding the Will, the property was still family property and was inherited from the testator.

Under Hindu Law a son has from birth an indefeasible right as a co-parcener in the family estate and mere unfriendliness on the part of his father cannot destroy that right. He can object to the alienations, made by his father, of the family property.

Where a mortgagor fully condones all defaults and defects in connection with and in the mortgage, he or his representative will not be allowed to assail the mortgage on the ground of those defaults and defects.

Where a person made another think that he recognized and accepted a particular transaction of his father, and in this way induced that other to pay out large sums of money, to undertake heavy liabilities and so forth, himself gaining the benefit of a steady, if not very handsome, maintenance allowance, he would be estopped from going back upon his repeated recognition and acceptance of the aforesaid transaction.

A letter by which the writer intimates that he intends to raise no objection to a certain transaction entered into by the trustees of his father in respect of immoveable property worth more than a hundred rupees, without mentioning that the writer has rights which he is giving up for a consideration or otherwise or that any other person is asserting new rights which he, for consideration or otherwise, thereby expressly recognizes, or that he is conferring any rights or privileges, does not require registration.

A trust-deed of a Hindu whereby the trustees are to take over all the estates, collect rents and outstandings, pay debts, bring and defend suits, raise loans etc., and at the same time pay certain maintenance allowances to the author of the trust and his son, who with all the other members of the family could live where and how they pleased without any interference on the part of the trustees, is not unlawful simply because the trustees are of alien race and religion.

A trust revocable by its creator is a valid trust, in so far that the acts of the trustee will be binding on the creator of the trust up to revocation.

First appeal from the decree of the Additional District Judge, Gujranwala, dated the 13th January 1911, decreeing plaintiff's claim.

Mr. *Beechey* and Lala *Balwant Rai*, for the Appellant.

Messrs. *Pestonji Dadabhai* and *H. A. Herbert*, for the Bank.

Mr. *Nanak Chand*, for Diwan Amar Nath, Respondent.

ORDER.—In this case the Alliance Bank of Simla, plaintiff, sued 36 defendants for Rs. 2,58,151-10-6 on a mortgage and obtained a decree for that sum with future interest against certain defendants. Against this decree two appeals have been instituted, No. 269 of 1911 by defendant Diwan Shib Nath and No. 495 of 1911 by plaintiff for execution of the decree against certain properties excluded from the decree in the possession of certain defendants. These appeals are to be heard on 18th May on the merits subject to decision on a preliminary point raised in Appeal No. 269 aforesaid in paragraph 43 of the memorandum of appeal

which runs thus:—"The Court below had no jurisdiction to hear and decide this case which was not legally before it." The point is explained as follows on the record and by Mr. Beechey on behalf of his client Dewan Shib Nath aforesaid.

The suit was instituted on 7th February 1905 in the Court of the District Judge, Gujranwala. At that time Lala Karam Chand was District Judge, and he issued notices to defendants for 10th March 1905 and on 15th April 1905 drew up preliminary issues. Upon them he demanded an amended plaint and this was presented on 5th June 1905. Unavoidable delays took place, and on 3rd February 1906 all the written pleas having been put in, Lala Karam Chand fixed 13th March for replication and a week later he drew up issues, twenty three in number, based on plaint, pleas and replication. He was then absent for a short time, his *locum tenens* Bhai Gulab Singh merely postponing the case. On 20th July 1905 the case again came before Lala Karam Chand who heard it on various dates up to 19th December 1906 after which Misra Jowala Sahai became District Judge and carried on the proceedings taking a lot of evidence and passing various orders upto 31st July 1908. Then Mr. Strickland was District Judge and had the case before him once (25th August 1908), postponing it at once to October 19th, 1908, after which Misra Jowala Sahai again became District Judge and carried on the case to 27th August 1909. Then until 22nd December 1909 Abdul Hamid as District Judge had charge of the case and after him M. Niaz Din until 4th May 1910, though he recorded no evidence. On 23rd June 1910 Mr. S. S. Harris, as District Judge, took up the case and kept it till 21st July 1910, after which he ceased to be District Judge, Abdul Hamid again assuming that office. By 25th October 1910 Mr. Harris had again become District Judge. He applied to Government that Misra Jowala Sahai should be put on special duty to dispose of the case and so on 19th November 1910 a Notification appeared in the *Punjab Gazette* appointing Misra Jowala Sahai, Additional District Judge, Gujranwala. On the same day Mr. Harris passed the following order:—

"As Misra Jowala Sahai has arrived and assumed charge, I transfer this case to his Court for disposal."

The case was then argued before that Officer and disposed of by him on 13th January 1911.

Mr. Beechey's contention is based on section 75, Punjab Courts Act. Misra Jowala Sahai's appointment as Additional District Judge was made under sub-section (1) of that section; and Mr. Beechey contends that in view of sub-section (2) it was necessary for Mr. Harris, before transferring this case to him, to "assign" definite "functions" to him, so as to clothe him with power to hear such a case as this. The point is a highly technical one, and in support of it Mr. Beechey can only refer us to *Bidya Moyee Debya Chowdhurani* v. *Surja Kanta Acharji* (1), a case in which an opinion favourable to Mr. Beechey's contention was expressed but the point was not definitely decided. We do not think that section 75 (2), Courts Act, can be properly construed so as to prevent a District Judge from transferring to a subordinate Court a suit pending before himself. That Misra Jowala Sahai's Court was subordinate to Mr. Harris's is clear from section 24 (3), Civil Procedure Code, and section 24 (1) (*a*) allows full power of transfer by a Court of a suit pending before it to a subordinate Court competent to try it. It is true that in the Calcutta ruling the opinion is expressed that, until a District Judge has formally assigned to his Additional District Judge the function of trying a certain class of cases, the latter Court is not "competent" to try a case of that class; but with all due deference we are not disposed to acquiesce in that opinion. We think sub-section (2) aforesaid was intended merely to invest the District Judge with power of control over the distribution of business, and by no means implies that the Additional District Judge has no judicial powers until the District Judge confers them on him—the Additional District Judge obtains his powers when he is appointed and gazetted, and we fail to see where the want of jurisdiction comes in. Further, even if to give the Additional District Judge jurisdiction there must be an assignment of "function" by the District Judge, was not the transfer and direction to try this case such an assignment?

For these reasons we overrule the objection.

(1) 32 C. 875; 9 C. W. N. 705.

Mr. *Beechey* and *Lala Balwant Rai*, for the Appellant.

Messrs. *Pestonji Dadabhai* and *Herbert*, for Respondent No. 1.

Mr. *Ganpat Rai*, for Respondent No. 2.

Mr. *Nanak Chand* and Lala *Charan Das*, for Respondent No. 3.

JUDGMENT.—This is a somewhat complicated case with a voluminous record, instituted in February 1905 and decided by the District Judge, Gujranwala, on 13th January 1911. The pleadings are lengthy and the issues as drawn numerous, but they have been set out in such detail in the judgment of the lower Court that it would be mere waste of time and paper to repeat them here. That Court, in going through all the issues *seriatim*, set down the following findings:

I. Bhai Kahan Singh, defendant No. 1, was properly impleaded, though no relief can be sought against him.

II. Defendant No. 4 was not member of joint undivided Hindu family. The successive Wills of Diwan Jowala Sahai and of his widow Mai Gujri, dealing with property acquired by the former, preclude the idea of its being "ancestral" in the hands of Diwan Lachman Das.

III. Diwan Lachman Das did execute the mortgage in suit and he had full power to do so.

IV. Defendant No. 4 acquiesced in that mortgage after fully understanding it. He gave free consent to its being enforced and to all the connected transactions between the trustees, the Bank and defendant No. 1.

V. Diwan Lachman Das had power to create a trust and did create a trust, Messrs. Parker and Herbert remaining trustees until early in 1904, when in consequence of defendant No. 4's denunciation of the trust, they applied to District Judge, Lahore, for determination of trust and for release from liability under it, with the result that defendants Nos. 2 and 3 were appointed trustees.

VI. The execution of the deed of assignment of the mortgage to the Bank was advantageous to defendant No. 4 and was ratified by him both at the time and by subsequent conduct. He has not proved that his consent was procured through undue influence.

VII. Defendant No. 4 in his suit against defendant No. 1 regarding the mortgage never alleged want of *consideration*, but only absence of "necessity." The amount of money secured by this mortgage being 2 lakhs, it is proved that it all passed. The whole sum to be raised was 3 lakhs, *i.e.*, 2 lakhs by this deed on property in British India and one lakh by another deed, still to be executed on property in Kashmir State. The items making up the 2 lakhs are all genuine, *viz.* Rs. 67,700 due to defendant No. 1 himself; Rs. 1,02,762-13 due to Lala Tirath Ram and others on jewels pledged with them; Rs. 29,537-3 due to various other creditors. Hence it is proved that full consideration passed.

VIII. No doubt Diwan Lachman Das led an immoral life and spent large sums on immoral pleasures; but it is not proved that any of the specific debts covered by the mortgage was taken for or spent in the pursuit of such pleasure. Hence defendant No. 4 cannot contest this claim on the rules of Hindu Law, which prohibit the alienation of family property for immoral purposes. To a large extent the indebtedness was due to expensive litigation.

IX. Plaintiff and defendant No. 1 did not know the sums borrowed from the latter and from other creditors had been taken for use in immoral pursuits.

X. Plaintiff is entitled to the full interest stipulated for in the mortgage, *viz.*, 15 per cent. per annum.

XI. No doubt the original intention was that 3 lakhs in all should pass, and that defendant No. 1 should pay off Cooper's half lakh and Diwan Amar Nath defendant's Rs. 30,000 as well as the items mentioned above; but the mortgage for 2 lakhs was a self-contained transaction fully understood, entered into and ratified, and for one reason or another the one lakh mortgage never came off. Lachman Das expressly agreed to the appropriation of items to the 2 lakhs mortgage. Diwan Amar Nath's claim could not be paid off at that time, as the two years' term of his mortgage was still unexpired; and Rs. 12,000 of Cooper's claim was paid out of the item Rs. 29,537. Hence the mortgage was complete.

XII. Defendant No 1 never waived any of his rights under the mortgage.

XIII. The assignment to plaintiff was made in good faith and is not tainted with

fraud. Planitiff under it can claim all defendant No. 1's rights and not only what he paid for those rights.

XIV. The plaintiff Bank rightly took the Rs. 60,000 recovered on Lachman Das's life-policy and credited it against the advances made to the trustees prior to the assignment.

XV and XVI. Defendant No. 5 has $\frac{1}{3}$rd share in properties 3, 4, 6 and 7, Schedule I (B), and the mortgage does not bind that share.

XVII. The mortgage cannot affect defendant No. 5's shares in properties 12 and 21, Schedule I (A).

XVIII and XIX. Nor his share in property 13 (*Jagir*).

XX to XXII. Lachman Das under the mortgage-deed had full power to *sell* any part of the mortgaged property, but was to pay over three-fourths of the price received to defendant No. 1 against the mortgage debt. Hence all the alienations by way of *sale* made by Lachman Das after the mortgage are valid sales and are unaffected by the mortgage.

XXIV to XXVII. Lachman Das himself sold the jewels to Diwan Amar Nath, defendant No. 5. These jewels are not "ancestral" property, and Lachman Das had free power over them. Hence defendant No. 4 can raise no objection on this account.

XXIII. Plaintiff is entitled to a decree for Rs. 2,58,151-10-6, the amount due on the footing of the mortgage, and defendants Nos. 2, 3 and 4 shall pay plaintiff's full costs and also interset on the decretal amount at 7 per cent. per annum to date of decree and thence to date of payment. The sum decreed shall be recovered primarily from the mortgaged property, omitting the properties alluded to in findings XX to XXII above and in paragraph 10 of the amended plaint, and next from the general estate of Lachman Das reaching their hands. Defendants Nos. 10 to 10 B, 11 to 13, 14, 18, 19 to 19 F, 20 and 25 to 27 shall be liable only to the extent of the mortgaged property in their hands and shall not be liabe for costs.

Against the decree drawn up on these lines both the plaintiff Bank and defendant No. 4 have appealed, the latter asking for dismissal of the plaintiff's suit and the former complaining of the exclusion of defendants Nos. 7 to 9, 28, 30, 31 and 37 to 39 from liability under the decree—findings XX to XXII above. The present judgment is concerned only with defendant No. 4's appeal. In ground 43 of that appeal Mr. Beechey contended that the Court below had no jurisdiction to hear the suit, a contention which we have disposed of against him in our order of 24th April 1914 which should be read as part of this judgment.

It should be noted here too that, apart from his findings on the regular issues, the District Judge decided an important preliminary point raised before his predecessor but not included in the issues and not previously decided, *viz.*, whether Dhanpat Rai, son of defendant No. 4, was a necessary party to the suit as being a member of the same joint Hindu family. The finding was that he was not a necessary party. This objection as to non-joinder was taken more than once in the Court below and seems to have been taken at the earliest opportunity —*e.g.*, see page 7, paper-book, Part II, line 24—but was stoutly resisted by the plaintiff—see page 11, line 4. The point is strongly urged before us and is to be found embodied in paragraph 41 of the memorandum of appeal. The question involved is two-fold. Is Dhanpat Rai a person who should have been made a defendant? If so, what is the effect of not impleading him? The first branch of the question depends for its answer on the examination of some of the most important and most difficult questions in the case—*e.g.*, the authenticity, validity and practical effectiveness of the Will of the late Diwan Jowala Sahai, whether the family remained a joint undivided family or not, whether the trust had ceased to exist at date of institution of suit, and so forth—and we think it best to deal only with the second branch here. No decision, we could come to on the points to be decided in the first branch, would be binding on Dhanpat Rai, and we, therefore, see no advantage in dealing with that branch at all at this stage of the case, for we are of opinion that, for the purposes of this case, a decision on the second branch will suffice. If the plaintiff Bank hereafter finds itself opposed by Dhanpat Rai, it has only itself to

blame, for it might have avoided such a possibility by impleading him here.

The matters stand to be decided on the Civil Procedure Code, Order I, rule 9, and Order II, rule 1. The latter Order is concerned with "frame of suit" and from the several rules in it one gathers that rule 1 has reference mainly, if not exclusively, to correct joinder of causes of action, adequate inclusion of reliefs claimed and so forth, rather than to joinder of parties; and even violation of such a rule as Order II, rule 2, after all does not involve dismissal of suit but merely this that omitted claims shall not be sued for separately. Order I, rule 9, lays it down that no suit shall be defeated by reason of the misjoinder or non-joinder of parties and that the Court may in every suit deal with the matter in controversy so far as regards the rights and interest of the parties actually before it. The Court below ruled that Dhanpat Rai was not a necessary party and so proceeded with the case as it stood. The question was one of some complication and difficulty, and the Court came to a reasoned decision upon it; and we do not think we can, in view of Order I, rule 9, allow the suit to be defeated, should our opinion even be that Dhanpat Rai ought to have been made a defendant. We quite see that, if the Court below had found he was a necessary party and had directed that he be made one, and plaintiff had refused thereafter to implead him, that Court would have been bound to dismiss the suit or to reject the plaint; but from this it does not follow that we, sitting as a Court of Appeal, should dismiss the suit in the event of our taking a different view from that held by the lower Court as to the exact position of Dhanpat Rai. We, therefore, hold that in no case should the non-impleading of Dhanpat Rai be allowed to defeat this suit though no doubt Dhanpat Rai will not be affected by our findings on the various issues raised in the case; and we may, before finally leaving this matter, point out that the plaintiff Bank would appear to have had some justification for its action in defendant No. 4's own previous treatment of the claims of Dhanpat Rai, and also that the latter has never asked to be impleaded: *vide* defendant No. 4's suit of 3rd June 1901 against the mortgage to defendant No. 1 in which he impleaded his father and defendant No. 1 and not Dhanpat Rai, though in his plaint (paragraph 3) he described the family as a joint Hindu family; and defendant No. 4's suit brought in 1909 against the trustees in which he impleaded only defendants Nos. 2 and 3 and left out Dhanpat Rai; and thirdly, the application of 1904 by Messrs. Parker and Herbert, the original trustees, in the contest over which no objection was raised that Dhanpat Rai also had an interest.

It is convenient to take up next a preliminary objection by Mr. Nanak Chand, on behalf of defendant No. 5, to the effect that his client is not a necessary party to this appeal, that he was not impleaded until 4th May 1911, and that, therefore, if he is a necessary party he was impleaded too late; and that in either case his name should now be struck out and he be allowed costs. We overrule this objection. Mr. Nanak Chand quotes Order XLI, rule 20, *Umed Singh* v. *Dalip* (2), *Ram Ratan Chuckerbutty* v. *Jogesh Chandra Bhattacharya* (3) and *Subramaniam Chetty* v. *Veerabhadram Chetty* (4). Mr. Beechey on the other side contends that defendant No. 5 is interested, though perhaps no relief is asked for directly against him. We have always considered it settled law [*Cf. Sher Khan* v *Musammat Sis Bano* (5)] that, when an Appellate Court does implead a person interested in the result of an appeal, a higher Court will not upset the order on the score of limitation. The lower Appellate Court may perhaps decline to add a respondent after time for that or for any other reason; but if it chooses to act under Order XLI, rule 20, (old section 559, Civil Procedure Code), and if it appears that the person added is a person *interested*, then no plea of bar by reason of lapse of period of limitation can be heard. That defendant No. 5 is interested, we think, there can be no doubt. Defendant No. 1 (see paragraph 39 of his memorandum of appeal) takes up the matter of the sale of the jewels to defendant No. 5, and it is idle to pretend that defendant No. 5 is not interested there. It might be a serious matter for him if this Court were to hold that Lachman Das did not authorise the sale of those jewels and that

(2) A. W. N. (1893) 35.
(3) 12 C. W. N. 625.
(4) 31 M. 442; 4 M. L. T. 104; 18 M. L. J. 452.
(5) 24 Ind. Cas. 930; 225 P. L. R. 1914; 125 P. W. R. 1914.

they were still the property of Lachman Das's family.

We can now turn to the serious problems of this case. It will make for convenience, if we begin by stating in chronological order the important incidents in the history of the litigation and connected therewith.

23*rd November* 1878.—Diwan Jowala Sahai died, His Will, dated 19th *Baisakh Sambat* 1920=30th April 1863, in favour of his wife, *Mussammat* Gujri, is disputed both as to authenticity and validity.

5*th May* 1889.—Will by Mai Gujri in favour of Diwan Lachman Das. She died on 10th January 1892.

1890—1892—Litigation between Amar Nath and Anant Ram and Mai Gujri and Lachman Das ending in compromise of 4th February 1892 and decree of 6th December 1892, whereby property in suit was divided between the two branches of the family Lachman Das taking the lion's share.

19*th March* 1898.—Mortgage by Lachman Das for Rs. 30,000 to Diwan Amar Nath, defendant No. 5.

16*th March* 1899.—Bond executed by Lachman Das in favour of defendant No. 1 for Rs. 30,683-8.

31*st May* 1889—Mortgage for 2 lakhs by Lachman Das to defendant No. 1, the deed in suit.

1*st June* 1899.—Defendant No. 1, at request of Lachman Das, pays off Lala Tirath Ram, Khushali Mal and Ganesh Das, Rs. 1,02,762-13 by *hundis* etc., gets receipt and recovers from them pawned valuables.

14*th June* 1899.—Defendant No. 1 pays Cooper Rs. 12,000 on account of Lachman Das.

15*th October* 1899.—Lachman Das sells to defendant No. 5 for Rs. 69,500 the property aforetime in mortgage to the latter for Rs. 30,000.

18*th October* 1899.—Confirms above in a message to his agent.

18*th October* 1899.—Lachman Das writes to defendant No. 1 telling him that he (Lachman Das) has sold the valuables mentioned above to defendant No. 5 for one lakh, that defendant No. 1 should hand the things over to defendant No. 5 and take over the lakh, crediting Rs. 87,450 to the mortgage in suit and the rest towards another debt due by the writer to defendant No. 1,

3*rd June* 1901.—Defendant No. 4 sues defendant No. 1 and Lachman Das for declaration against the mortgage of 2 lakhs.

5*th August* 1902.—That plaint was rejected on preliminary point, and appeal filed in Chief Court.

21*st June* 1901.—Defendant No. 4 on behalf of self and as guardian of Dhanpat Rai executes and registers an agreement in favour of defendant No. 5, ratifying the sale of 15th October 1899 to defendant No. 5 and admitting that the debts due by the vendor were just and for "necessity."

10*th March* 1903.—Plaintiff Bank commences negotiations with "Sun Life Office" for insurance of one lakh on life of Lachman Das. After Lachman Das's death the Bank recovers the insurance money in 1904.

21*st March* 1903.—Lachman Das applies to District Court, Rawalpindi, to be adjudicated an insolvent and at foot of list of creditors adds a note that he does not admit liability for the mortgage of 2 lakhs aforesaid, it being "invalid" and "executed under undue pressure and without consideration."

21*st March* 1903.—Same day Lachman Das executes in favour of Messrs. Parker and Herbert an agreement, appointing them Managers of his estate.

20*th April* 1903.—Lachman Das executes trust-deed in favour of same gentlemen for same purposes, registered 13th May 1903: deed signed by Lachman Das and defendant No. 4 and registration witnessed by Dhanpat Rai.

10*th May* 1903.—The trustees engage *inter alia* to pay defendant No. 4 an allowance of Rs. 300 per mensem from the estate: this was paid and accepted without demur upto death of Lachman Das, end of 1903.

18*th May* 1903.—Defendant No. 4 writes to Mr. Parker incidentally recognising aforesaid agreement and trust: further letters to same purpose upto 22nd November 1903.

10*th July* 1903.—Defendant No. 4 writes a letter to the trustees approving of a proposed transfer of defendant No. 1's rights to the Bank and also of withdrawal of appeal filed by defendant No. 4 in Chief Court against order of 5th August 1902 aforesaid rejecting plaint,

Same day.—The trustees pay defendant No. 4 Rs. 1,500 as costs of that appeal case and take receipt. By 11th July 1903 the trustees had borrowed Rs. 72,000 from Bank and had paid off debts *pro tanto.*

11*th July* 1903.—Defendant No. 4, through Mr. Parker, withdraws said appeal.

11*th July* 1903.—Same day: defendant No. 1 executes deed of assignment of his mortgage to Bank for 1½ lakhs.

1*st January* 1904.—Lachman Das dies.

4*th January* 1904.—Mr. Beechey, Advocate, on behalf of defendant No. 4, writes to the trustees denouncing the trust.

9*th January* 1904.—The trustees execute mortgage-deed in favour of Bank.

12*th January* 1904.—Trustees apply to the District Judge to be relieved.

22*nd April* 1904.—District Judge appoints defendants Nos. 2 and 3 trustees.

7*th January* 1905.—Present suit filed.

20*th May* 1909.—Defendants Nos. 2 and 3 confess judgment in defendant No. 4's suit against them denouncing the trust and surrender the estate to him.

We may also note that the creditor Cooper, who had a mortgage claim of half a lakh against Dewan Lachman Das and, as stated above, received Rs. 12,000 from defendant No. 1 on 14th June 1899, subsequently executed his decree and sold up the mortgaged property.

The questions to be discussed in this case are very numerous and the best order in which to take them is a debatable point. On the findings at which we have arrived it will be seen that adjudication on some of these questions is not strictly called for as, for instance, where we find that obstacles in plaintiff's way have been removed by reason of acquiescence or ratification on the part of Lachman Das or defendant No. 4; but nevertheless we think it is on all grounds convenient, seeing that the case may yet go on to a higher tribunal, that we should discuss and express opinions upon all the main questions raised and we will begin with the mortgage of 31st May 1899, and all that has been said for and against it.

Mr. Beechey's arguments against it may be summarised thus:—

I. The mortgage was not executed by Lachman Das with free consent, defendant No. 1 having exercised undue influence,

II. It was wholly invalid because Lachman Das had left his family and so had lost all his rights.

III. The mortgage was incomplete for want of full consideration for the following reasons:—

(*a*) The contract was one for 3 lakhs to be furnished to defendant No. 1, whereas only one mortgage for 2 lakhs was entered into, the other projected mortgage for one lakh being left unexecuted through defendant No. 1's drawing back.

(*b*) It was an executed part of the contract that the properties mortgaged to defendant No. 5 for Rs. 30,000 and to Cooper for Rs. 50,000 should be saved, whereas in consequence of defendant No. 1's default and his manner of appropriation of items of debt against the 2 lakhs, both properties were lost, one by auction sale under decree and the other by private sale rendered necessary by Lachman Das's necessities.

(*c*) Defendant No. 1 had no right to set his own claim of Rs. 67,700 against the 2 lakhs but should have set Cooper's or defendant No. 5's claim or both against that sum.

(*d*) One item (Rs. 10,663) included in the said Rs. 67,700 should not be there, consisting as it does of an unproved and time-barred debt of Diwan Jowala Sahai.

IV. Diwan Lachman Das was, during all the years when his debts were accumulating, living an immoral life, wasting his fine estate in debauchery and extravagance and, though it is impossible specifically to connect any item of debt with any one definite act of immorality or extravagance, the inference is fair that the indebtedness was the result of such acts and that defendant No. 1 was well aware of this. A heavy onus rests on plaintiff and defendant No. 1 to prove that the debts were incurred for legitimate family purposes.

Diwan Jowala Sahai had two wives, one Mai Gujri, mother of Lachman Das, and the other mother of Kirpa Ram who left two sons, defendant No. 5 and Diwan Anant Ram—*vide* oral evidence of both parties *passim.*

Jowala Sahai had held high office in Kashmir and died a very rich man. Lachman Das after his father's death was in possession of a fine estate. We need not go into details, it is enough to say that his income has been variously estimated at Rs. 40,000 to a lakh or more a year; and it is fairly clear that he could draw freely on his mother, who had been left by his father in possession of a very large amount of moveable property. (On her death Lachman Das is said to have gone to her house at Eminabad and to have carried off 35 lakhs worth of valuable property). When expelled from Kashmir he seems to have plunged into a vortex of insensate debauchery and riotous living, and, though no doubt he spent much in litigation and had to pay up some Rs. 5,500 to defendant No. 5 as the result of litigation, he got a full *quid pro quo* for that sum in valuable estate; and we think it is impossible to avoid the conclusion that the debts incurred upto 31st May 1899 were on the whole incurred for immoral purposes and by way of wanton extravagance and waste. We do not think that in circumstances such as these it is reasonable to call upon defendant No. 4 to prove that this and that item of debt was incurred for use on this or that piece of immorality or extravagance, and thus we agree in the main that Mr. Beechey's argument (IV) above, taken by itself, is sound.

But we are unable to arrive at a clear finding that the question of the mortgage-deed was the result of undue influence exercised by defendant No. 1 or that Lachman Das had renounced his rights and so had no power to mortgage the estate—Arguments (I) and (II). The latter argument needs no serious refutation. Lachman Das's litigation with defendant No. 5 in 1890-1892 and his continuous dealings with the property shew clearly not only that he had no intention of renouncing any rights, but also that he was inclined to claim rights in it superior to those he would concede to the other branch, and that he considered himself justified in ignoring his son, defendant No. 4. As to argument (I) no doubt, the mortgagor was heavily in debt, and a person in such a position has to agree to terms an indebted person would refuse to recognise; but in the mortgage-deed we can find no such onerous conditions as to arouse suspicion. Indeed in some respects, *e. g.*, the arrangement for redemption of valuable jewels from the Tirath Ram firm, the contract was distinctly advantageous to the mortgagor; and the rate of interest (15 per cent per annum) was in all the circumstances moderate. We shall presently see that in the matter of appropriation of items of debt against these 2 lakhs, Lachman Das agreed to an arrangement which in view of the subsequent break down of the negotiations for the other mortgage for 1 lakh on the Kashmir property turned out unfortunate; but on 31st May 1899, and on the facts as they then stood, we cannot see any proof of undue influence as such.

There is much to be said for defendant No. 4 under argument (III). It seems to us fairly clear from defendant No. 1's own admission and from the probabilities of the case that the mortgagor was most anxious to save the properties mortgaged to Cooper and defendant No. 5 respectively; that he would not have agreed to the appropriations in this mortgage, leaving out the said properties and the mortgages on them, unless he had felt sure that at some early date defendant No. 1 would come forward with another lakh of rupees to be used to pay off Cooper and defendant No. 5 and to be secured by a mortgage on the Kashmir property and that it was defendant No. 1's fault that this second mortgage never came off. If Lachman Das had denounced the mortgage in suit when defendant No. 1 refused, or virtually refused, to carry out the second we think it likely enough that no Court of equity could, in the absence of proof of acquiescence, have resisted a contention by him, based on the reference in the deed to 3 lakhs being required and to the urgent need of rescuing the Cooper and defendant No. 5 properties, that the whole affair was really intended to be one contract, and that the backing out of defendant No. 1 from his engagement as to the second half of it rendered the first half of no effect. We may note here that District Judge is wrong when he says :—(page 287 line 40, Part II,—that Diwan Amar Nath's mortgage could not have been redeemed at once. Perusal of condition 4, Part I, page 26, makes this clear enough.

Thus, we agree with Mr. Beechey in his argument (III) (*a*) standing alone ; but we are unable to agree as to clauses (*b*) to (*d*) of the same argument. We have already—see our version above of finding VII of the learned District Judge—stated the manner in which defendant No. 1 made up the 2 lakhs due to him on this mortgage. In the deed itself there are indications that it was at time of drafting in contemplation that the 2 lakhs should be made up of the debts due to Tirath Ram, defendant No. 5, and Cooper ; but this intention is not directly stated, and at time of registration when according to rule the Registering Officer always questions the vendor or mortgagor about consideration, Lachman Das said plainly that he wished defendant No. 1 to have credit for his Rs. 67,700 and to pay Tirath Ram's claim and to use the rest of the 2 lakhs for payment of other debts. The rest was under Rs. 30,000 and thus the satisfying of the claims of Cooper and defendant No. 5 was impossible. Defendant No. 5's claim might, no doubt, have been paid off in bulk, leaving only a few hundreds due ; but on the whole considering the aforesaid declaration by the mortgagor at registration and his subsequent conduct to be noticed later, we think no objection can be properly based upon the aforesaid appropriation of items against the 2 lakhs.

As to clause (*d*) of the argument (III), Lachman Das was a man of affairs and we cannot imagine his assenting to the inclusion of a large sum which was not incurred by his father and which was fictitious. It is impossible to expect plaintiff to prove that Jowala Sahai, who died in 1878, owed that sum, and as to the contention based on time-bar, we need only point out that to a Hindu the payment of his father's debt, though time-barred, is a pious duty, and such a debt is a just antecedent debt however old it may be. Also see Indian Contract Act, section 25.

So far, then, we have arrived at the conclusions, that the mortgage-deed in suit is assailable on the ground that the whole contract for 3 lakhs was, in consequence of defendant No. 1's backing out, not carried out, and also on the ground that the debts included in the 2 lakhs were incurred for immoral purposes ; but these conclusions need qualifying by the importation of the following provisons.

Provided (*a*) that defendant No. 4 has any *locus standi* to object to the dealings of his father with the estate;

(*b*). That Lachman Das by his conduct did not condone the breach as to the projected one lakh mortgage and the unfortunate consequence of that breach ;

(*y*). A similar proviso as to defendant No. 4 and his conduct.

The first of these questions opens up the whole matter of the Wills of Diwan Jowala Sahai and his widow, Mai Gujri, and of their effect upon the nature of the property in suit; and for the sake of lucidity of discussion we set down here in their natural order the successive questions that arise :—

A. Is the alleged Will of Diwan Jowala Sahai genuine ?

B. He and his descendants being presumably members of a joint undivided Hindu family, could he make a valid Will leaving everything to one widow?

C. Was his Will, if it was his, ever given effect to ?

D. By the two Wills, if recognised, the mortgaged property now in question went from Jowala Sahai to Mai Gujri and from her to Lachman Das. On these premises was the said property "ancestral" in the hands of Lachman Das *qua* defendant No. 4 ?

E. Or was it, though not "ancestral", still *qua* defendant No. 4 *family* property in which defendant No. 4 was a co-parcener under Hindu Law ?

F. Were Lachman Das and defendant No. 4 members of a joint undivided Hindu family at time of mortgage ?

The learned District Judge has accepted the Will as genuine, as being over 30 years old and having been produced from proper custody. (Section 90, Indian Evidence Act). He has held also that Diwan Lachman Das's confession of judgment in the suit by Mai Gujri against him and his cousins in 1890 based on this Will binds defendant No. 4 ; that she became owner under the Will ; that under her Will, which is not now contested in itself as regards its authenticity, Diwan Lachman Das *acquired*

the property; and that defendant No. 4 and he did not constitute a joint Hindu family. Reliance was also placed on a statement made by defendant No. 4 in the present case on 29th April 1908, as showing that he admitted both the execution and the validity of Diwan Jowala Sahai's Will. A good deal of this must be accepted as unquestionably correct. The Will of Diwan Jowala Sahai was probably genuine enough, and as the property was apparently acquired by him we take it that he could do what he liked with it. But there are strong indications that, notwithstanding the litigation of 1890, which was undertaken by Mai Gujri only in order to give support to the Will executed in the previous year, the Will of Diwan Jowala Sahai was in reality a dead letter; for though the many landed properties held by Jowala Sahai at his death were mutated half and half to Lachman Das and his nephew, the Will was never mentioned and when Lachman Das and his nephews in 1890-1892 compromised their suit, again the Will was not invoked. Lachman Das no doubt got the lion's share on the compromise, but we think it is impossible to consider the facts of the compromise and to hold that the Wills were recognised. In reality we think the parties took the case as one of succession, Lachman Das being allowed a large share as the most important and powerful member of the family. No doubt Mai Gujri remained in possession of a very large amount of moveable property lying in the ancestral house at Eminabad where she was living; but the whole matter—the confession of judgment, the settlement of the shares of Lachman Das and his nephews and so forth—was in the nature of a family arrangement, the essence of which was that, notwithstanding the Will, the property was still family property and was *inherited* from Diwan Jowala Sahai. Mr. Pestonji contends that the suit was for 35 lakhs and yet the then plaintiffs(defendant No. 5 and Anant Ram) got comparatively little, showing that the Will stood and Lachman Das, as an act of grace, gave them a little; but we take a different view as just stated. And in arriving at the above decision we do not overlook Mr. Pestonji's further arguments that Mai Gujri did not abandon her rights under the Will of her husband having sued within twelve years of his death, an argument reinforced by reference to *Sain Ditta* v. *Ghulaman* (6), *Sansar Singh* v. *Tiloka* (7), *Jodha* v. *Dhani Ram* (8), and *Baz Khan* v. *Sultan Malik* (9); that *qua* the one-fifth extra share taken by Diwan Lachman Das in 1892 the property was no longer ancestral or joint family property; that a Hindu son may cease to be a member of a joint family without losing his rights as a separated son [*Balkrishna Trimbak Tendulkar* v. *Savitribai* (10)]; that some of the property came from Diwan Hari Chand, brother of Jowala Sahai, and no ancestor of defendant No. 4, and that that property at all events is not "ancestral." None of these arguments override our version of the real meaning of the family arrangement of 1892; and as regards Diwan Hari Chand, we need only remark that this point was never pressed in the lower Court and was never put in issue and we cannot allow it to be raised now.

Upon objection taken by defendant No. 4's Counsel we ruled (on 26th May 1914) that plaintiff's Counsel could not refer to the composition-deed of 1892 because of its non-inclusion in the printed paper-book, but there is sufficient oral evidence and the main facts are not denied. Further we have great difficulty in seeing why defendant No. 4 and his father were not a joint family at date of mortgage. They were, of course, on bad terms and Lachman Das seems to have ignored defendant No. 4 and to have kept him at a distance; but this sort of treatment cannot of itself disrupt a Hindu family. Defendant No. 4 was never separated off, was never given his share of the family estate. Under Hindu Law he had from birth an indefeasible right as a co-parcener in the family estate; and mere unfriendliness on the part of his father cannot destroy that right. Mr. Pestonji invokes Article 127, Limitation Act, Schedule I, but we cannot find any definite proof that more than 12 years

(6) 85 P. R. 1892 (F. B.).
(7) 51 P. R. 1898.
(8) 30 P. R. 1901
(9) 43 P. R. 1901.
(10) 3 B. 54.

before the present suit Lachman Das plainly told defendant No. 4 that he intended to exclude him from the estate, or indeed that defendant No. 4 has been ever excluded in the proper sense of the word. He has all along been maintained out of the family property. Lastly, the statement of 29th April 1908. by defendant No. 4 is too vague and contradictory to be of any value. Our conclusion, then, as regards proviso (*a*) is that defendant No. 4, as a member of a joint Hindu family, has *locus standi* to object to the alienations made by his father of this family property, which should probably be described as "ancestral" in the hands of his father.

Turning to proviso (*b*) the important points are Lachhman Das's letter of 1st June 1899 to defendant No. 1 asking him to pay off Tirath Ram and take the jewels; his letter of 18th October 1899, asking defendant No. 1 to hand over those jewels to defendant No. 5 and to credit, out of the one lakh purchase-money, Rs. 87,450 to this very mortgage; his resistance—see judgment of 5th August 1902—when defendant No. 4 attacked the mortgage; his conduct at certain mutation in October 1903—Part II, page 278 bottom; and his quiescence in the matter at time of assignment of mortgage to the plaintiff Bank. On the other side we have his denunciation of the mortgage on the 21st March 1903 in his insolvency petition. It is also as well to point out that on that same day he executed the management-deed in favour of Messrs. Parker and Herbert, in which they are authorised to contest claims generally; that on 20th April 1903, he executed the trust-deed in their favour, and that not long afterwards came the negotiations with the plaintiff Bank engineered by his trustees *for transfer of defendant No.* 1's *rights to it*. Reading between the lines it is easy enough to understand all this. On the day after the mortgage Lachhman Das, anxious to have the jewels redeemed and quite content, writes to defendant No. 1 no doubt expecting that the one lakh mortgage will presently come off. Then having three days before effected what looks like an advantageous sale* to defendant No. 5 for Rs. 69,500 of property mortgaged for Rs. 30,000—though, of course, originally he wanted that property redeemed—Lachman Das on 18th October 1899 seems still quite disposed to recognise the mortgage in suit, nearly half of which he then paid off; and up to August 1902, he appears to have been content to let the mortgage stand. Then for a brief period in March 1903—here see Parker's evidence, page 92, Part II, bottom—prompted perhaps by his new advisers, the managers, he contemplates contesting the mortgage; but soon comes to see that his most judicious course is to admit the mortgage and place his affairs in the hands of the Bank and the trustees. In our opinion the converse of proviso (*b*) is fully made out, and we must hold that the mortgagor fully condoned all defaults and defects in connection with and in the mortgage.

*There are some wild statements of opinion here and there in the record that this property was worth lakhs, but we see no reason to believe those statements. *Prima facie* an advance of Rs. 69,500 on a mortgage of Rs. 30,000 evidences an advantageous sale.

We have now to consider the 3rd proviso (*y*). Here the principal events to consider are:—

(I) The agreement of 21st June 1901, executed by defendant No. 4 for himself and on behalf of Dhanpat Rai;

(II) the signing by defendant No. 4 and Dhanpat Rai of the deed of 20th April 1903 (trust-deed);

(III) the acceptance by defendant No. 4 of the agreement of 10th May 1903 from the trustees and his receiving his monthly allowance thereafter without demur;

(IV) defendant No. 4's letters and receipt of 18th May 1903 and 10th July 1903.

(V) his withdrawal on 11th July 1903 of his appeal in Chief Court and the simultaneous execution by defendant No. 1 of his assignment to the Bank;

(VI) his denunciation of the trust on 4th January 1904;

(VII) his suit against the new trustees, defendants Nos. 2 and 3.

A good deal of capital has been made by Mr. Beechey out of the alleged weak-minded-

ness and want of intellect of defendant No. 4 It is urged that he was outwitted by the astute lawyers, Parker and Herbert, with whom he had to do in 1903 and that his consent to the various transactions of that year was not "free." We will come to that presently; but we must begin with the transaction of 21st June 1901 (I) above. It has never been hinted so far as we can see that defendant No. 5 hoodwinked or deceived defendaut No. 4 or exercised any coercion or undue influence over him, or that Messrs. Parker and Herbert as yet had any finger in the pie; and that agreement discloses, so far as it goes, a complete approval of defendant No. 4's father's dealings up to that time.

There are two questions to be decided in connection with this matter of defendant No. 4's mental condition and his "free consent", *viz.*, whether he is really a half witted man, and whether on 10th July 1903 he was given drink by Mr. Parker and so induced, being intoxicated, to assent to things he would not ordinarily have agreed to. We have no hesitation in answering both questions in the negative. We have carefully perused the passages in the lower Court's judgment, pages 272-273, regarding defendant No. 4's mental capacity and we find we cannot add much to what it has written. No doubt Mr. Harrison declined to make him *lambardar*, having a low opinion of his ability; but no other incident in his career seems to suggest his being a man incapable of transacting business and understanding his own interests. The learned District Judge had him before him for several hours in the witness-box and was unable to detect marks of weak intellect; and after considering all the evidence on the point we agree with the lower Court. We do not think there is any presumption that, in agreeing to this or that, defendant No. 4 was not in full command of his senses or intellect or was incapable of guarding his own interests. We even go so far as to say that considering the tangle into which his father's affairs had got, the engagements defendant No. 4 entered into, and the assent he gave to the arrangements between defendant No. 1, the first trustees and the Bank, were acts arguing a good deal of prudence and common sense.

As to the alleged drunkenness of defendant No. 4 on 10th July when he signed a letter to the trustees approving of the assignment of the mortgage to the Bank, we have Mr. Parker's version—Part I, page 64, lines 30-42; defendant No. 4's, page 156, lines 30-34 and Ram Chand's, page 179, lines 20-25. We have no hesitation in holding that the suggestion that Mr. Parker made defendant No. 4 drunk in order to gain his consent to the assignment is wholly unproved.

We may, therefore, take the seven incidents noted above (I) to (VII) as acts of defendant No. 4 done voluntarily: and the conclusion is clear that he condoned all Lachhman Das had done up to 21st June 1901: that he approved of the latter's entrusting of his affairs to Messrs. Parker and Herbert: that he withdrew his objections to the mortgage as such; and that he approved of the arrangement arrived at between defendant No. 1 and the Bank as to that mortgage. Defendant No. 4 appears to us to be fully estopped by these acts from denouncing the mortgage or the trust-deed or the assignment. Had he not done these acts the Bank would never have paid $1\frac{1}{2}$ lakhs in hard cash to defendant No. 1, leaving an enemy like defendant No. 4 on its flank; and Mr. Parker expressly says, and we believe him, that but for defendant No. 4's acquiescence he and Mr. Herbert would not have moved a yard in the matter. Thus defendant No. 4 made both the Bank and the first trustees think that he (defendant No. 4) recognized the mortgage to defendant No. 1, the management-deed of 21st March 1903, the trust-deed of 20th April 1903, and the assignment of 11th July 1913, and in this way he induced them to pay out large sums of money, to undertake heavy liabilities and so forth, himself gaining the benefit of a steady, if not very handsome, maintenance allowance. Section 115, Indian Evidence Act, fully applies to the case and it is too late for defendant No. 4 now to go back upon his repeated recognition and acceptance of the aforesaid transactions. The decision in regard to proviso (*y*) above is, therefore, against defendant No. 4; though he has *locus standi* as son of Lachman Das, yet, by the expressed acquiescence and consent of Lachman Das and himself to all he is now contesting, he is debarred from pressing his contention.

A number of minor and more or less incidental points have been taken by Mr.

Beechey, which we have excluded from the above discussion because to have introduced them each in its proper setting would have interfered with the general argument and perhaps have rendered this judgment obscure. We will now deal with the most important of these points and it will be seen that our decisions upon them do not injuriously affect the presentation of the case already made.

First, it is urged that the letter aforesaid of 10th July 1903, Exhibit G, in which defendant No. 4 expressed approval of the assignment, required registration and so is inadmissible in evidence. Mr. Beechey quotes section 17 (*c*), Registration Act, and says the letter declares a right in property valued at over Rs. 100 and he quotes *Karim Bakhsh* v. *Muhammad Bakhsh* (11) and *Kala Chand Muvdal* v. *Gopal Chunder Bhuttacharjee* (12). Mr. Pestonji on the other side relies on *Gongod Gir* v. *Sham Gir* (13). There was a difference of opinion in *Karim Bakhsh* v. *Muhammad Bakhsh* (11), Plowden and Elsmie, JJ., holding that a certain document required registration and Smyth, J., that it did not. The case turned upon the applicability of clause (*h*) of section 17 of the Act, Smyth, J., being of opinion that the document merely created a right in plaintiff to obtain a further document, and the other two Judges taking the view that it went further. Plowden, J., thought it declared that one party to it was jointly interested with the other party in certain rights in a well. One has only to read the description of the deed in the head-note to see how wide apart that document is from the one now under consideration. That document distinctly declared that plaintiffs were sharers in a certain decree for rights in a well, while Exhibit G here is a letter in which defendant No. 4 intimates to Messrs. Parker and Herbert that he intends to raise no objection to a certain transaction. He does not write that he has rights which he is giving up for a consideration or otherwise or that any other person is asserting new rights, which he, for consideration or otherwise, hereby expressly recognizes or that he is conferring any rights or privileges. He had already assented to the trust-deed, and, by implication, to the deed of management that preceded it, and in this letter he merely satisfies the trustees and the Bank that he approves of a very important transaction entered into by them with defendant No. 1, a transaction which was in reality well within their powers and which apparently defendant No. 1 and the Bank could have entered into without the consent *even of Lachhman Das*. The document then was simply a letter from a person who might possibly raise a dispute, however futile, later on, unless he was pinned down to express approval of what was being done.

It is hardly necessary to discuss the other two rulings noted above. The Weekly Reporter case is obviously distinguishable ; and the document in *Gongod Gir* v. *Sham Gir* (13) is so different from that which we are considering that no useful rule can be deduced from it. In short, we find that Exhibit G, though unregistered, is admissible in evidence.

The next point raised is as to the validity and legality of the trust-deed of 20th April 1903. We have seen that defendant No. 4 assented to it, and that but for his assent the trustees would not have entered upon the arduous and responsible task of mangement ; and probably this alone would be sufficient warrant for brushing aside such contentions as that Hindu Law does not recognize trusts in outsiders for management of family affairs ; that this is an " illusory trust " at best, and so forth. But we prefer to discuss briefly the arguments used by Mr. Beechey. The first is that a trust, whereby the whole business and affairs of a Hindu family are made over to a trustee of alien race and religion, is opposed to all the principles of Hindu Law, and so under section 4 (*b*) of the Indian Trusts Act, 1882, is unlawful. But here there is nothing to shew that Messrs. Parker and Herbert were to interfere with the daily life of the members of the family ; so far as we can see they were to take over all the estates, collect rents and outstandings, pay debts, bring and defend suits, raise loans and so forth at the same time paying certain maintenance allowances to Lachhman Das and defendant No. 4, who with all the other members of the family

(11) 82 P. R. 1884.
(12) 12 W. R. 163.
(13) 48 P. R. 1905; 33 P. L. R. 1905.

could live where and how they pleased without any interference on the part of the trustees. No authority is quoted by Mr. Beechey, while on the other side we need only refer to *Ghulam Ali* v. *Shiv Nath* (14), in which this very trust was fully recognised as valid and binding, defendant No. 4's own Counsel there expressing himself as unable to contend that the trust was void, and to such rulings as *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (Tagore case) (15), *In re Nilmoney Dey Serkar* (16) and *In re Kahandas Narrandas* (17). The next argument is that the trust was an "illusory trust" revocable at the will of the creator or his heir or representative after the creator's death: *Cf.* section 78 (*c*), Trusts Act, and pages 48-49, Hart's Digest of the Law relating to Private Trusts and Trustees (1909). We have some difficulty in seeing wherein the force of this contention lies. No doubt defendant No. 4 denounced the trust on 4th January 1904, and it is at least arguable that under section 78 (*c*) aforesaid the District Judge should upon the application of 12th February 1904 by Messrs. Parker and Herbert have declared the trust *revoked*; but this is not the same as saying that the trust was void *ab initio*. It was a valid trust though *perhaps* revocable by its creator, a point on which we need offer no opinion, *i.e.*, valid in so far that the acts of the trustees were binding on the creator of the trust up to revocation; and it was *during the continuance of the trust* that the assignment on which the present suit is based was engineered and carried through. It seems to us that the only possible bearing of Mr. Beechey's argument on the case is in connection with the question of the necessity or otherwise for impleading Dhanpat Rai. If in law the trust was extinct before the present suit was brought, then it might be argued that, notwithstanding the District Judge's appointment of fresh trustees, the property in suit was not really vested in them (defendants Nos. 2 and 3) but was vested in defendant No. 4 and his son Dhanpat Rai; but we have already dealt with the matter of the impleading of Dhanpat Rai in a way that renders it both unnecessary and undesirable for us to attempt to decide in his absence the thorny questions that crop up in regard to him. It will be seen—page 268 of paper-book, Part II—that the learned District Judge was under the impression that this matter of the legality of the trust was not at all referred to by Mr. Beechey in argument before him and that Mr. Grey thought issue V unnecessary. Had this been undoubtedly so, we should probably have declined to allow Mr. Beechey to argue the point here; but we have taken the other course upon Mr. Beechey's earnest assurance that the District Judge was mistaken. However, the result is much the same for we agree with the learned District Judge that the trust was legal and valid enough and that things done under it are binding on the estate. We would also like to point out that whether in law the trust was revoked on 4th January 1904 or not, the manner of settlement in 1909—see Part I, page 205, paper-book—between defendant No. 4 and defendants Nos. 2 and 3 of the former's suit seems to indicate that defendant No. 4 virtually withdrew his previous revocation and was prepared to let it be considered that the trust subsisted until the date of that compromise.

(14) 15 Ind. Cas. 845; 101 P. R. 1912; 158 P. W. R. 1912; 189 P. L. R. 1912.

(15) 9 B. L. R. 377 (P. C.); 18 W. R. 359; I. A. Sup. 47; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 85.

(16) 32 C. 143; 9 C. W. N. 179.

(17) 5 B. 154.

We have now dealt with most of the grounds of appeal. Nos. 9, 38, 42 and 44 were not pressed and so far as we can see the only questions still requiring discussion are these:—

Meaning, intention and effect of the transactions of 10th and 11th July 1913, taken as having been entered into and carried through in good faith and by free consent of parties—*Vide* grounds of appeal Nos. 8, 10, 11, 12, 35;

whether rate of interest charged by Bank is excessive—grounds 32 and 40;

whether life-policy money should not have been credited to this mortgage-debt rather than to the account against the trustees—ground 37.

It is convenient to clear the ground by taking the second and third questions first. The rate of interest is Rs. 15 per cent. per annum compound with yearly rests. Considering all the circumstances we do not

look upon this as exorbitant and we are unable to see in this rate of interest any foundation for the idea that Lachhman Das was deceived or his will dominated or that he was taken undue advantage of or was coerced. The rate was plainly stated in condition 1 of the deed—see Part I, page 43, bottom—and if the Bank is entitled to stand in the shoes of defendant No. 1 it is fully entitled to interest at this rate. We may note here that, apart from the matter of the life-policy money, there is no question that on the footing of the mortgage the sum claimed by the Bank is correctly calculated.

That the Bank was justified in its manner of dealing with the life-policy money seems to us clear enough. Since 1901 Mr. Parker has been the standing legal adviser of the plaintiff Bank—see line 5, page 68, Part II—and though he seems to have had a casual acquaintance with Diwan Lachhman Das earlier, he first came into business relations with him early in 1903 when the Diwan, having been threatened with arrest under a warrant taken out by a creditor named Gopal Das, came in distress to Mr. Parker, entreated his help and actually persuaded that gentleman to pay some Rs. 8,000 to that creditor on his behalf—see page 69, Part II. At that time the Diwan discussed his affairs with Mr. Parker and arrangements were made for the deed of management of 21st March 1903. Knowing that financial help in the shape of ready money would be required, Mr. Parker had already consulted the plaintiff Bank and apparently the Bank on 10th March 1903 considered things sufficiently forward to warrant its moving the "Sun Life Office" to grant a policy on the Diwan's life—Part I, page 74. At that time there is no reason to suppose that the plan of taking over defendant No. 1's mortgage had even been mooted and the reasonable inference is that Mr. Parker told the Bank that cash advances would be required from time to time to finance the estate should he and Mr. Herbert become Managers or Trustees. On this the Bank would ask what security would be offered for re-payment of such advance, and as yet Mr. Parker's knowledge of the resources of the estate and of its burdens would be insufficient to allow of his assuring the Bank that it might safely trust to recovering its money along with other creditors. The obvious remedy was that the Diwan's life should be insured and this was done. These facts and circumstances afford no warrant for Mr. Beechey's contention that the policy-money should be credited against the mortgage-debt now in suit. The policy was taken out to secure re-payment of advances to be made to the trustees by way of financing the estate. The trustees did take advances, which at date of assignment of mortgage already amounted to some Rs. 72,000 and which by 9th January 1904 (date of mortgage by the trustees to the Bank) seem to have risen to Rs. 1,37,000. It seems to follow that the natural and legitimate use to be made by the Bank of the policy-money was to set it against these advances. The policy itself has not been produced, and is, of course, no longer in possession of the Bank; but the necessary particulars can readily be gathered from Exbibits P. W. 35, P. W. 36 and P. W. 37—Part I, pages 74 and 107. The last Exhibit suffices to explain why though the insurance was for a lakh the Bank only received some Rs. 60,000.

The remaining problem, stated above as the meaning, intention and effect of the transactions of 10th and 11th July 1903, taken as having been entered into and carried through in good faith and by free consent of parties, stands to be solved mainly, if not entirely, on the actual words used in certain documents written and used on those days. Defendant No. 1 himself, when asked the question in the witness-box, said:—

"I sold thereby all my mortgagee rights": Page 109, line 25, Part II.

Mr. Parker seems to have no doubt as to the intention of the parties. Then (at page 176, Part I) in the aforesaid Exhibit G defendant No. 4 said: "I have no objection .....The Bank may secure the *transfer of mortgage of Bhai Kahan Singh* in its *own favour* on payment of Rs. 1,50,000." And in the deed of assignment itself—pages 104, 105, Part I—the following phrases occur: "I have got in mortgage the property of Diwan Lachhman Das.....The sum of Rs. 2,07,473-9-0 is due to me from the mortgagor.....I have received through the Alliance Bank of Simla, Limited, Lahore, with the consent of the trustees.....Rs. 1,50,000 and .....all and singular my claims and demands

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under the said deed have been satisfied. I..... .....hereby *assign, alienate and make over my all and singular rights*, titles, claims and interests which I had acquired by virtue of the said deed of mortgage, to the Alliance Bank of Simla, Limited, Lahore, in lieu of the same payment. The said Alliance Bank of Simla, Limited, Lahore, shall be *fully authorized and empowered to secure enforcement of the mortgage-deed aforesaid and to recover by means of suit or in other ways all sums due now or at any subsequent time under the mortgage-deed*.....I have made over the said deed of mortgage to the aforesaid Bank to-day." Then follows a postscript in which defendant No. 1 disclaims all liabilities for any losses the Bank may incur in connection with the transaction. These passages and especially those underlined by us seem to indicate a transfer to the Bank of all the rights of the mortgagee, defendant No. 1, and not the extinguishment of the mortgage and the mere survival of a claim by the Bank for the purchase-money ($1\frac{1}{2}$ lakhs with interest at Rs. 7 per cent. per annum) against the trustees. In favour of this interpretation which seems reasonable and inevitable enough apart from authority, we may quote *Gokaldas Gopaldas* v. *Purnmal Premsukhdas* (18), *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi* (19), *Ghanaya* v. *Chhajju Ram* (20), *Devi Ditta* v. *Pareman* (21) and *Radha Ram* v. *Ralla Ram* (22), (to which other rulings might be added); and against this interpretation we have only a few points of no great value adduced by Mr. Beechey. He points to such phrases as "all and singular my claims under the said deed have been satisfied" and argues that this implies extinction of the mortgage. It seems to us clear enough that the words signify no more than a declaration that he (the declarant) has no rights, left while the rest of the deed clearly sets forth that what were his rights aforetime have become the Bank's property.

Then Mr. Beechey tries to show that though the assignment-deed is ostensibly a transaction between the Bank and defendant No. 1, in reality the Bank paid $1\frac{1}{2}$ lakhs to defendant No. 1 not on its own account but *as agent for the trustees*, its own share in the affair being thus merely *a loan* to the trustees of $1\frac{1}{2}$ lakhs, which sum they paid (through the agency of the Bank) to defendant No. 1 to extinguish his mortgage. In support of this version Mr. Beechey is able to point to three peculiarities in the writings, accounts and conduct of the parties—*first*, the assignment-deed says: "I have received through the Alliance Bank of Simla.....with the consent of the trustees Rs. 1,50,000"; *secondly*, the Bank had and still has against the trust an account based on the aforesaid $1\frac{1}{2}$ lakhs, thus treating it as a loan to the trust; *thirdly*, Messrs. Parker and Herbert as trustees admittedly appropriated to themselves Rs. 7,500 as commission on this sum of $1\frac{1}{2}$ lakhs commission being due at Rs. 5 per cent. on the amount of all sums realised, recovered and received and "on all sums paid out by them"—see trust-deed Part I, page 156, "Eighthly", and Part I, page 164, management-deed, paragraph 11.—thus admitting by implication that the payment of $1\frac{1}{2}$ lakhs to defendant No. 1 was a payment by the trustees. We are not prepared to hold that these ingenious arguments are sufficient to compel us to throw over the plain wording of the operative sentences in the deed of assignment. As regards commission Mr. Pestonji concedes that probably the trustees were not entitled to it and we are inclined to agree with him; but obviously the Bank cannot be prejudiced by a mistake like this on the part of the trustees, who possibly thought themselves entitled to commission not only on sums paid by themselves but on all sums paid to the creditors of the estate in pursuance of the general policy of the management. As to the Bank's account against the trust based on this $1\frac{1}{2}$ lakhs the maintenance of such an account seems natural enough. It is not kept because the Bank proposes to sue on it as well as on the present mortgage, but in order that it may know where it is and consider its position should the present claim for one reason or another break down (see also page 197, last column, Part I). Lastly, we attach no importance to the wording "through the

(18) 10 C. 1035; 11 I. A. 126 (P. C.).
(19) 29 C. 154 at pp. 163, 165 (P. C.); 6 C. W. N. 209; 12 M. L. J. 73; 4 Bom. L. R. 238, 29 I. A. 9.
(20) 38 P. R. 1894.
(21) 71 P. R. 1898.
(22) 30 P. R. 1904; 139 P. L. R. 1904.

Alliance Bank with the consent of the trustees." These words do not imply that the Bank is agent for the trustees, and even if they were capable, standing alone, of being so interpreted, we must read them along with the rest of the deed. Nor can we assent to the proposition that the deed of the 11th July 1903, we are discussing, was merely a shield against the assumption of priority over the Bank of alienations, etc., earlier than that date but subsequent to the date of defendant No. 1's mortgage. We can see no reason why the Bank should have waived its obvious right so advantageous to itself of simply keeping the previous mortgage alive, and have adopted an unusual and less advantageous device.

This brings us to Mr. Beechey's last argument. He asks why should Lachman Das have agreed merely to substitute the Bank as his creditor for the much less formidable defendant No. 1, and contends that he at least and also defendant No. 4 must have thought they were gaining some substantial advantage by the assignment or they would never have agreed to it, the suggested advantage being the immediate reduction of the debt from Rs. 2,07,000 to $1\frac{1}{2}$ lakhs. The reply to this is not difficult. In the first place whatever defendant No. 4 might do in the way of objecting, Lachman Das most probably was in no position to object to one of his creditors transferring his claim to a third party: such a transaction does not ordinarily require the sanction of the debtor. Next there were in the transactions now attacked sufficiently clear advantages to defendant No. 4 and his father to account for their assent apart from any idea that Rs. 57,000 was being wiped off from their debts. There was, first, the assumption of control by two experienced and upright British lawyers. This would quiet impatient creditors, enable the trustees to finance the estate easily and not improbably here and there facilitate favourable compromises of claims. Then both defendant No. 4 and his father must have seen how important it was that the latter's power further to imperil the family fortunes should be curtailed, and they must have known that unless they agreed in the main to the policy of the trustees and the Bank, the latter would probably throw up the business and again leave them to their own resources. And, again, it must be borne in mind that the Bank has another account of Rs. 1,37,000 against the estate and that according to the remark at page 197, Part I, paper-book, in last column, the Bank intends to act thus to get its decree for Rs. 2,58,151-10-6 in this case, to execute this decree against the mortgaged property as far as may be, then to compare the amount so recovered with the total due on the $1\frac{1}{2}$ lakhs and Rs. 12,200 debts, and, if the former exceeds the latter, to credit the excess against the mortgage for Rs. 1,37,000 aforesaid. On the whole we think we have made it clear that there is nothing surprising in the assent of defendant No. 4 and his father to the assignment, even if it did not involve the immediate renunciation of a large part of the claim under defendant No. 1's mortgage.

Thus, though we do not in every particular agree with the learned District Judge, our final conclusion, in so far as defendant No. 4's appeal is concerned, agrees with his; and we dismiss this appeal with costs in favour of all the respondents.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2994 OF 1910.

July 30, 1913.

Present:—Mr. Justice Coxe and Mr. Justice Ray.

SATCOWRI CHATTERJEE—PLAINTIFF—APPELLANT

versus

PRIYANATH BASU AND OTHERS—DEFENDANTS—RESPONDENTS.

Patnidar—*Tenure specially registered—Revenue sale of parent estate—Purchase by* patnidar—Patnidar, *whether entitled to avoid—Bengal Land Revenue Sales Act (XI of* 1859), *s.* 52—*Merger.*

Where a *patnidar*, whose tenure has been specially registered under Act XI of 1859, purchases the parent estate at a sale for arrears of revenue, he does not thereby acquire the right of avoiding under-tenures subordinate to the *patni*.

Qwere:—Whether there can be merger in the case?

FACTS.—The plaintiff was a *patnidar* and his tenure had been specially registered under section 52 of Act XI of 1859, which had the effect of protecting it against sale of the parent estate for arrears of revenue. The parent estate afterwards fell into arrears, and being sold under the Act, was purchased

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by the plaintiff, who thereupon commenced this suit to avoid a *dar-patni* held under himself. His ground was that, by purchase of the parent estate at the revenue sale, his own *patni* rights had merged in the superior rights purchased, and he was entitled to avoid all incumbrances as such purchaser. It was conceded that, if a stranger had purchased the *zemindari*, the defendants would have been safe. The District Judge, on appeal by the defendants, dismissed the plaintiff's suit and hence this appeal by the plaintiff.

Appeal against the decree of the District Judge of 24-Perganas, dated the 11th of June 1910, reversing that of the Subordinate Judge, third Court, of that District, dated the 23rd of August 1909.

Dr. *Dwarka Nath Mitter*, for the Appellant.

Babus *Basanta Coomar Bose*, *Prokash Chandra Sarkar*, and *Khirode Narain Bhuian*, for the Respondents.

JUDGMENT.—In this case the plaintiff was the owner of a *patni* that was specially registered and so protected at a sale for arrears of revenue. The parent estate fell into arrears and was sold. The plaintiff purchased it and now sues to annul the tenures subordinate to the *patni*. The lower Appellate Court has dismissed the suit and hence this appeal.

In my opinion the lower Appellate Court is right. Several cases have been cited to show that the *patni* merged in the *zemindari* at the sale. The plaintiff himself did not take this view as he afterwards sold an interest in the *patni*. And the point of law is by no means free from doubt. But whether the doctrine of merger applies to such transactions or not, no authority whatever has been shown us for holding that it can prejudice the rights of innocent strangers. If any one else had purchased the *zemindari* the present defendants would have been safe. If the plaintiff had surrendered the *patni* they would have been safe. It seems unreasonable to hold that the only contingency that destroys their rights is the purchase of the *zemindari* by their immediate landlord by whose predecessors-in-interest their tenures were created.

If this view is correct it is unnecessary to deal with the other points raised in the appeal.

The appeal is dismissed with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 148 OF 1914.

July 31, 1914.

Present:—Mr. Justice Twomey.

MA SEIN NYUN—APPELLANT

versus

MAUNG U—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 123—Registration—Partition by private arrangement.

A partition of joint family property can be effected by private arrangement without an instrument in writing. The provisions of the Transfer of Property Act do not apply to such a partition.

Satya Kumar Banerjee v. *Satya Kripal Banerjee*, 3 Ind. Cas. 247; 10 C. L. J. 503, referred to.

Mr. *Halkar*, for the Appellant.

JUDGMENT.—The *D A* is the *P R*'s step-daughter and the piece of land in suit is one of the two pieces which were the joint property of the *P R* and his wife (mother of the *D A*). The *P R*'s case as set out in the plaint was that he "let out" the land to his step-daughter, the *D A*, three years before the suit on condition that they should pay the Government revenue, but he charged no rent. The *D A* denied the letting of the land to her and alleged that when her mother was dying about six years before the suit, there was a partition of the family property by which the piece of land in suit was allotted to the *D A* while the *P R* retained the other piece for himself. The learned Judge of the District Court was mistaken in proposing that the transaction alleged by Ma Sein Nyun was a gift which could be effected only by a registered instrument under section 123, Transfer of Property Act. What she alleged was a partition of the joint family property by private arrangement. There is abundant authority for the proposition that such an arrangement may be effected without an instrument in writing. The provisions of the Transfer of Property Act do not apply to it. [See *Satya Kumar Banerjee* v. *Satya Kripal Banerjee* (1) and cases therein cited].

It was only on this erroneous ground that the District Court upset the decree of the Township Court. Even if the view taken by the District Court were right, it was still necessary for that Court to consider whether the plaintiff-respondent had made out the case which he set up in the Township Court. As the defendant was in possession it was for the *P R* to prove that he had a subsisting title.

(1) 3 Ind. Cas. 247; 10 C. L. J. 503.

As remarked by the Township Judge, none of the *P R*'s witnesses were able to speak of their own knowledge as to the alleged letting of the land to Ma Sein Nyun and the *P R* himself gave a contradictory story. The *D A* on the other hand produced satisfactory evidence in proof of her statement that the land was assigned to her as her share of the family property.

The decree of the District Court is set aside and that of the Township Court is restored. The *P R* will pay the *D A*'s costs in all Courts.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 183 OF 1914.

July 29, 1914.

Present:—Justice Sir George KNOX, KT.

GANGA SAHAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHIB CHARAN—PLAINTIFF—RESPONDENT.

Easements Act (*V of* 1882), s. 15—*Right of easement, acquisition of—Burden of proof*

The burden of proving that a right of way has been peaceably and openly enjoyed by a person claiming title thereto as an easement and as of right without interruption and for 20 years lies upon the person who asserts the right.

Modhoosoodun Dey v. *Bissonath Dey*, 15 B L. R. 361, referred to.

Second appeal from the decision of the Additional District Judge of Moradabad, dated 22nd December 1913.

The Hon'ble Mr. *Gokal Prasad*, for the Appellants.

Mr. *Mohan Lal Sandal*, for the Respondent.

JUDGMENT.—Pundit Sheo Charan, respondent in this second appeal, was plaintiff in the Court of first instance. He there sued for the removal of a *chabutra* which, he said, had been made by the defendants on his land and also for an injunction on the defendants forbidding them to pass over the land covered by the *chabutra*. The *chabutra* in dispute will be found set out on a map which is on the record. It is that portion which is coloured pink. It will be observed from the map that the portion coloured pink stands in front of the house of the plaintiff. The boundary line separating the plaintiff's house from the defendants' house cuts right along the limit of the *chabutra* marked A B. The defendants, now appellants, have a similar *chabutra* running along the front of their house and it is coloured yellow. The defendants allege that their boundary extended one foot north of the house and that so far as that one foot north was concerned, the *chabutra* was on their land. With reference to the rest of the land they claimed a right of way over the land. In their written statement they speak about this portion as having been used as a passage to the house of the defendants for more than 20 years. There is no other passage except the said passage for the egress and ingress of the defendants nor can there be any. The Court of first instance gave a decree for the removal of a certain portion of the *chabutra*, which was made of earth and which adjoined the *pucca chabutra*, but dismissed the claim so far as the *pucca chabutra* was concerned. It passed no orders regarding the relief of a perpetual injunction except by saying that the rest of the plaintiff's claim was dismissed.

The lower Appellate Court granted the plaintiff's claim in full. With reference to the *chabutra* that Court found that both the *kuchha* portion and the masonry portion of the *chabutra* stands on the plaintiff's land and the defendants have failed to prove that they have acquired title therein. With reference to the right of way claimed to the north over the lands in dispute, the lower Appellate Court held that the appellants had not proved that they acquired any such right. It discussed the evidence bearing upon the point and particularly the Municipal Board's order of 1893, upon which the appellants appear to have laid much stress. The right the appellants claimed was founded upon section 15 of Act V of 1882. That section in paragraph 3 lays down 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 20 years, the right to such easement shall be absolute. The whole question really in dispute between the parties now is whether this right of way has been peaceably and openly enjoyed by the appellants as an easement and as of

right without interruption and for 20 years. The burden of proving that they are entitled to such an easement lies upon the appellants and after careful consideration, I find myself in accord with the lower Appellate Court that they have not proved their claim. There is no evidence on the side of the appellants, which has been believed, for any period prior to May 20th, 1893, and as regards the whole period I do not find myself in a position to say that this so-called easement has been enjoyed as of right and without interruption. In connection with this I would refer to what Mr. Justice Markby said in the case of *Modhoosoodun Dey* v. *Bissonath Dey* (1) and to the case of *Sheikh Khoda Bux* v. *Sheikh Tajuddin* (2).

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 15 B. L. R. 361.
(2) 8 C. W. N. 359.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 22 OF 1910.

June 10, 1912.

Present:—Mr. Justice N. Chatterjea.

KUMAR KULANAND SINGH AND ANOTHER —DEFENDANTS—APPELLANTS

versus

MOHAN MANDAR—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Sudhharna *bond—Usufructuary mortgage, conversion of, into simple mortgage—Lien on property previously mortgaged usufructuarily, nature of—Principal and interest—Charge, extinguishment of—Sale of mortgaged property in execution of third person's decree —Mortgagee, right of.*

Where, under an usufructuary mortgage bond, land is given in possession of the mortgagee in lieu of interest, it forms a security both for principal and interest.

The conversion of a *sudhharna* bond into a simple mortgage bond merely indicates a change in the form of the security.

The mere fact of a charge having been paid off by execution of a second bond does not decide the question whether it is extinguished.

Where, therefore, subsequent to the execution of an usufructuary mortgage the property was sold in execution of the decree of a third person and after the sale the mortgagor executed a simple mortgage in favour of the mortgagee in which he included the amount and the property of the prior mortgage:

Held, that by taking the simple mortgage bond the mortgagee did not intend to extinguish his lien under the earlier bond for the benefit of the intermediate purchaser.

Held, further, that when the mortgagee voluntarily gave up possession of the property and abandoned the only mode in which he could claim interest under the former bond, he could not claim any lien on the property for the interest which was due under that bond after the execution of the second bond.

Appeal against the decree of the District Judge of Zilla Bhagalpur, dated the 12th September 1909, reversing that of the Munsif, second Court at Bhagalpur, dated the 10th March 1909.

Babus *Umakali Mukerjee* and *Sailendra Nath Palit*, for the Appellants.

Moulvi *Khurshaid Hussain* and *Syed Mohammed Tahir*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit upon a mortgage bond dated the 16th February 1905 executed by the defendant No. 1 in favour of the plaintiff against the mortgagor and certain other persons who claimed interests in the properties mortgaged. The defendant 4th party had purchased some of the properties at a sale held in execution of a decree against the defendant No. 1 on the 4th January 1905 prior to the date of the bond upon which the plaintiff sued. The plaintiff, therefore, could not enforce his mortgage against the properties purchased by the defendant 4th party upon a bond executed by the defendant No. 1 at a time when his title to such properties had already passed to the defendant 4th party. He, however, claimed a lien upon the said properties under an earlier bond (*sudhharna* bond) dated the 23rd December 1901, which covered the properties purchased by the defendant 4th party.

Both the Courts below have held that although the usufructuary bond dated the 23rd December 1901 had been converted into the simple mortgage bond now sued upon, the intention of the plaintiff was to keep alive the lien under the earlier bond and that the property purchased by the defendant 4th party was subject to this lien. The defendant 4th party has appealed to this Court.

It has been contended on behalf of the appellant that the lands under the *sudhharna* bond were to be enjoyed in lieu of interest only and, therefore, the lands were security for interest only and not for the principal, that in case the lands were sold for debts due to

other creditors and also in certain other events the mortgagees would be at liberty to realize the money from the *sudhharna* property and that the lessee shall be held liable for the debt and similar other provisions. It seems to me that the lands were given as security not only for interest but for principal also.

The next contention is that the lien under the earlier bond was extinguished by the bond in suit. It has been argued that the first bond was an usufructuary mortgage bond under which the mortgagee was to enjoy the profits of the property in lieu of interests The principal money was Rs. 200 and only 5 *bighas* of lands were mortgaged; whereas the bond sued upon was a simple mortgage bond for Rs. 300 bearing interest at Rs. 2 per cent. per month and 15 *bighas* of lands (including the 5 *bighas* mortgaged under the earlier bond) were mortgaged. The earlier bond was satisfied by the bond in suit; and these circumstances are relied upon as showing that the lien under the earlier bond had been extinguished. These facts, however, do not show that the mortgagee intended to give up his lien for Rs. 200 in respect of the 5 *bighas* of land mortgaged under the earlier bond, in favour of an intermediate purchaser. The conversion of the *sudhharna* bond into a simple mortgage bond merely indicates a change in the form of the security. In the *sudhharna* bond there was a distinct covenant to pay—"I promise that I shall pay the said sum in the month of *Baisak* 1311." It was not a pure usufructuary mortgage as defined in section 58 of the Transfer of Property Act, and a suit could be maintained for sale of the mortgaged property upon the bond [see *Sivakami Ammal* v. *Gopala Savundram Ayyan* (1)]. By the second bond the debt due under the *sudhharna* bond was paid off as also some other debts. But the mere fact of a charge having been paid off does not decide the question whether it is extinguished. The fact that the second bond was for a larger amount and additional properties were mortgaged, would not also go to show that the lien of Rs. 200 over the properties which were covered by the earlier bond was intended to be given up.

The properties mortgaged in the second bond were stated therein as unencumbered, which I think means that there was no mortgage of any other person, and the obvious intention was that the mortgagee was to have the first and only charge. The facts relied upon do not show nor is there anything in the document to show any express intention to extinguish the lien under the bond and in the absence of any such express intention, it is to be presumed that the mortgagee intended to keep the earlier lien alive for his benefit [see *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (2)].

The fact that the mortgagee was not aware of the purchase by the defendant 4th party does not affect the application of the above principle [see *Girdhar Das* v. *Ram Autar Singh* (3)].

But the Courts below have held that the intention was to keep alive the earlier mortgage and I am of opinion that the plaintiff by taking the mortgage bond dated the 16th February 1905 did not intend to extinguish his lien under the earlier bond for the benefit of the intermediate purchaser, the defendant 4th party. The second contention accordingly fails.

Lastly it is contended that even if the lien under the earlier bond was not extinguished, the plaintiff can set up his lien only for Rs. 200 in respect of the 5 *bighas* of land covered by the earlier mortgage. I think this contention should prevail. The first bond was a *sudhharna* bond, and the plaintiff under that bond was to enjoy the profits of the property in lieu of interest and when the present bond was executed only Rs. 200 was due under that bond. There was no provision for payment of interest at the rate of 2 per cent. as stipulated in the bond sued upon or at any other rate, and the plaintiff voluntarily gave up possession of the property which was to be enjoyed by him under the earlier bond in lieu of interest. Interest at 2 per cent. was payable under the earlier bond only in case the mortgagee was dispossessed of the property mortgaged and on certain other contingencies which have not happened. The present suit is for sale of the mortgaged properties and I think the plaintiff cannot claim a lien for interest which was payable under the earlier bond in a particular manner, *viz.*, from the usufruct

(1) 17 M, 131 (F. B.); 4 M, L. J, 50.

(2) 10 C. 1035; 11 I. A. 126.
(3) 8 C. W, N. 690.

of the property when the plaintiff voluntarily gave up possession of the property and abandoned the only mode in which he could claim interest under that bond. He cannot claim any lien under that bond except for Rs. 200 which was due under it when the simple mortgage was executed.

The decree of the lower Appellate Court is accordingly varied. The properties purchased by the defendant 4th party will be liable only to the extent of Rs. 200 The costs of the lower Courts against the said defendant will be reduced in proportion. In all other respects that decree will be confirmed. Each party will bear his own costs of this appeal.

Decree varied.

PUNJAB CHIEF COURT.

CIVIL REFERENCE NO. 49 OF 1913.

January 13, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Chevis.

BIR SINGH AND OTHERS—PLAINTIFFS

versus

KAHAN SINGH AND OTHERS—DEFENDANTS.

Punjab Tenancy Act (XVI of 1887), s. 77 (3) (i)—Jurisdiction—Civil or Revenue Court—Suit by occupancy tenant for possession of land as threshing floor.

The plaintiffs sued for possession of a piece of land on the allegation that they were occupancy tenants of other lands in the village and in consequence of their holding these occupancy rights they were entitled to the use of the land in suit as a threshing floor. The defendants were the landlords:

Held, that the suit fell within the purview of section 77 (3) (*i*) of the Punjab Tenancy Act and was cognisable by the Revenue Courts alone.

Case referred by the Commissioner of the Jullundur Division, with his Endorsement No. 5422, dated 10 September 1913.

JUDGMENT.—In this case the Munsif in whose Court it was instituted stated in his order returning the plaint for presentation in a Revenue Court that—

"The plaintiffs are occupancy tenants and the defendants are their landlords. The plaintiffs allege that they have been using the land in suit as a threshing floor in their capacity as occupancy tenants, and that, therefore, the land in suit is part of the land held by them as occupancy tenants."

The Munsif cited section 77 (3) (*i*), Tenancy Act, as authority for holding the suit to be one for a Revenue Court; that is, he found the suit was one between landlord and tenant arising out of the conditions on which plaintiffs' occupancy rights are held.

Before the Assistant Collector, first grade, who next had to deal with the case, apparently plaintiffs' Pleader admitted that the relation of landlord and tenant did not exist between the parties in regard to the land *in suit*, but argued that so long as plaintiffs were occupancy tenants in the village, they were entitled to possession and use of the land in suit, which was *shamilat-i-deh* but has passed to defendants on partition as a threshing floor, as being such tenants. The Assistant Collector says he accepts this version of the claim and finds on it that the suit is a civil one.

In this both the Collector and the Commissioner agree with him, and thus a reference under section 99, Tenancy Act, reaches this Court. The Commissioner concedes that the plaintiffs are occupancy tenants of certain lands in the village, and that the defendants are their landlords *qua* those lands. He then puts the case of the plaintiffs thus:—

"The plaintiffs allege that for many long years they have used jointly with the defendants a piece of ground which was formerly *shamilat*, but has now passed on partition to defendants as a threshing floor and granary. They state that the defendants have recently prevented them from using this piece of land in this way, and ask that possession may be decreed to them."

Upon this the Commissioner holds that the claim is one for an easement gained "by long and unchallenged possession" and so a civil suit.

We are unable to agree with the Revenue Courts. We agree with the Commissioner that the plaintiffs are not occupancy tenants of the land in suit in the sense that, when in possession, they could plough it up; and thus there may be some force in the contention that at least clause (*g*) of section 77 (3), Tenancy Act, is not applicable; but defendants are landlords and plaintiffs occupancy tenants of other land in the village, and it is alleged by plaintiffs that it is in consequence of their holding those occupancy rights that

they are entitled to the use of the land in suit as a threshing floor. They ask for "possession", but they ask for it for the specific purpose of using it as a threshing floor. If this is not a suit "between landlord and tenant" arising out of the conditions of plaintiffs' occupancy tenancy, it is difficult to see to what classes of suits clause (*i*) aforesaid could possibly apply.

Dalel v. *Bhajju* (1) is a useful judgment in connection with this question.

We rule that the suit is one for a Revenue Court, and we direct the return of the plaint to the plaintiffs for presentation in the Court of an Assistant Collector, first grade.

(1) 16 A. 181; A. W. N. (1894) 15.

would probably never arise at all. The deed of gift complained of was not made to a stranger but was made to *Musammat* Gouri, and in reality amounted to no more than a relinquishment by *Musammat* Badamo of her life-interest in respect of this part of the property of her deceased husband. It seems to us that the suit can have been brought for no other purpose than to harass and put the defendants to unnecessary expense. We accordingly allow the appeal, set aside the decree of the Court below and dismiss the plaintiffs' suit with costs in all Courts including in this Court fees on the higher scale.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 415 OF 1912.

July 27, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

Musammat GOWRI—DEFENDANT—APPELLANT

versus

GOPAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Gift by widow in favour of her daughter having sons—Relinquishment—Suit by reversioner, whether maintainable.

A gift by a Hindu widow to her daughter having sons amounts to relinquishment by the widow of her interest in her husband's property and a reversioner's suit to set aside the gift is not maintainable.

First appeal from the decision of the Subordinate Judge of Saharanpur, dated the 1st October 1912.

Mr. *Nihal Chand*, for the Appellant.

The Hon'ble Dr. *Sunder Lal* (with him Mr. *Hamilton*), for the Respondents.

JUDGMENT.—We think that this is a suit which ought never to have been brought. The plaintiffs' right to the property would only arise after the death of the original defendant, *Musammat* Badamo (who has, as a matter of fact, died during the progress of the litigation) and her daughter, *Musammat* Gouri, and all the sons of *Musammat* Gouri of whom there are apparently four living. In the event of any one of these sons having male issue the plaintiffs' right

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MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1620 OF 1912.

August 3, 1914.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumarasawmy Sastri.

ALAGAPPAN—DEFENDANT No. 1—APPELLANT

versus

S. KR. S. KARUPPA CHETTY AND OTHERS—(PLAINTIFFS NOS. 1 TO 4 AND DEFENDANTS NOS. 2 TO 24)—RESPONDENTS.

Mandatory injunction—Trespasser building upon land even after objection.

Mandatory injunction should be issued when the person who builds on the land is a trespasser and does so, even when objected to.

Ulagappan Ambalam v. *Chidambaram Chetty*, 29 M. 497, distinguished.

Second appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura, in Appeal Suit No. 566 of 1911, preferred against that of the District Munsif of Sivaganga, in Original Suit No. 28 of 1909.

Mr. *K. Ramachandra Aiyar*, for the Appellant.

Mr. *C. V. Anantha Krishna Aiyar*, for the Respondents.

JUDGMENT.—The Courts below have found that the plaintiff is the owner of both the *varams* and that the defendant is a trespasser. Issues Nos. 2 to 4 depend upon the finding on the 1st issue and the Subordinate Judge is right in holding that on his finding in this issue against the defendant, no other question arises for decision.

The learned Vakil for the appellant relies on *Ulagappan Ambalam* v. *Chidambaram Chetty* (1) for the position that when the plaintiff does not take steps to prevent the erection of the building in time, there ought to be no mandatory injunction in his favour. In that case the defendant built upon land comprised in his holding. In the present case the defendant was a trespasser and built upon the plaint site notwithstanding objection.

We dismiss this second appeal with costs.

Appeal dismissed.

(1) 29 M. 497.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 371 OF 1909.

March 7, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Beadon.

BULANDA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

FATEH DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Conditional sale clause—Regulation XVII of 1806—Notice—Invalid—Interest for stipulated period—No independent covenant to further interest—Post diem *damages, when allowed.*

Notice proceedings under a conditional sale clause in a mortgage-deed are invalid and of no effect

(*a*) if no attempt is made to proceed against all the heirs of the mortgagor;

Maya Shah v. *Feroz Din*, 51 P. R. 1892, referred to.

(*b*) if no reference is made to section 7 of Regulation XVII of 1806;

Wasawa Singh v. *Rura*, 24 P. R. 1895; *Ram Chand* v. *Sandal Khan*, 21 P. R. 1903; 83 P. L. R. 1903 and *Balwant Singh* v. *Ram Das*, 28 P. R. 1908; 141 P. L. R. 1908; 41 P.W.R. 1908. referred to.

(*c*) if the notice does not specify the amount to be paid by the mortgagor within the year of grace.

Mehro v. *Suja*, 84 P. R. 1882, referred to.

Where the mortgage-deed specified that the mortgaged land should be taken over as sold outright on failure of the mortgagor to pay the principal with interest for three years:

Held, that the mortgagee in possession could not in terms of the deed pile up an interest demand against the mortgagor for more than three years, there being no independent covenant as to interest to justify him under the ruling in *Ghulam Haidar* v. *Phaphal*, 92 P. R. 1908; 155 P. W. R. 1908; 29 P. L. R. 1909.

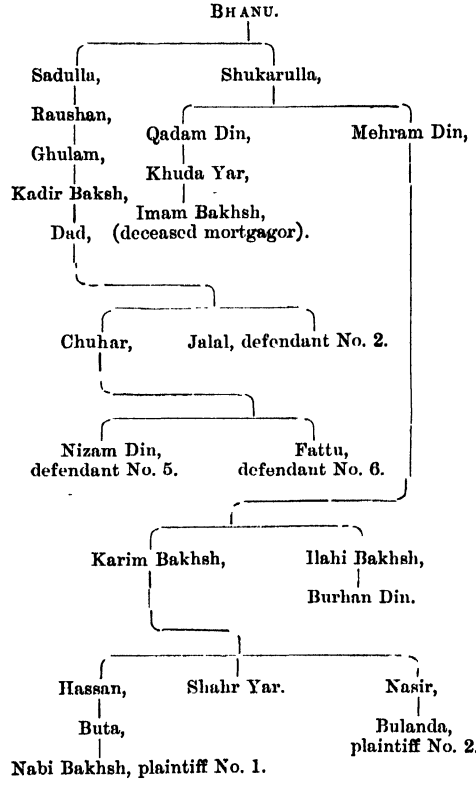
Where the mortgagee had enjoyed the profits of a very large area for a comparatively small outlay, the Chief Court refused to exercise its discretion of allowing *post diem* damages in his favour,

Second appeal from the decree of the Additional Divisional Judge at Sialkot, dated the 7th January 1909, reversing that of the Subordinate Judge, 2nd Class, Gujranwala, dated the 26th June 1907, decreeing the claim.

Pandit *Rambhaj Datta*, for the Appellants.

Lala *Balwant Rai*, for the Respondents.

JUDGMENT.—The following contains so much of the pedigree-table as is material:—



On the 28th May 1883 Imam Bakhsh mortgaged the 591 *kanals* in suit with *shamilat*, with possession, for Rs. 600 to (1) Bulaki, now defendant No. 1, (2) Jalal, now defendant No. 2, and (3) Jiwan Shah, *Arora*, father of defendants Nos. 3 and 4 who have transferred their rights to Nizam Din and Fattu, defendants Nos. 5 and 6. It will be observed from the pedigree-table that defendants Nos. 2, 5 and 6 are somewhat more remote collaterals of Imam Bakhsh than the plaintiffs, so that the latter are his immediate reversioners,

BULANDA *v.* FATEH DIN.

The terms of the mortgage were onerous considering the large area mortgaged, of which over two-thirds is cultivated and assessed at about Rs. 36. Possession passed at once of the entire holding, of which the profits are presumably not less than Rs. 100 a year, but the profits were to be set off against interest on Rs. 200 only, the remaining Rs. 400 mortgage money bearing interest at Rs. 18 per cent. or Rs. 72 a year. There was also a conditional sale clause.

The plaintiffs claimed redemption at Rs. 300 and were given a decree by the Subordinate Judge at Rs. 816, made up of Rs. 600 principal and Rs. 216 interest for three years. The plaintiffs accepted this decree; but on an appeal by the defendants the lower Appellate Court found that the conditional sale clause had taken effect under valid notice proceedings of 1887 and thereon dismissed plaintiffs' suit.

The notice proceedings were not carefully examined by the learned Divisional Judge, and we cannot agree with him that they were in order. On the contrary they were patently defective and this, no doubt, explains why the mortgagees did not follow them up with a foreclosure suit.

Imam Bakhsh died in 1884, and his heirs Buta, Shahr Yar, Nasir and Burhan Din (see pedigree) at once claimed possession of the land on the ground that the mortgage was fictitious. Their suit was dismissed on the 30th July 1884, but they had asserted their title as heirs in the plainest possible way and only failed because the mortgage was pronounced valid.

In the notice proceedings of 1887 no attempt was made to proceed against any of the heirs of Imam Bakhsh except Buta and Shahr Yar, though as admitted by defendants' Pleader Nasir and Burhan Din did not die till many years later. This defect alone is vital [*Maya Shah* v. *Feroz Din* (1)], but further the notice proceedings made no reference to section 7 of Regulation XVII of 1806 [*Wasawa Singh v. Rura* (2), *Ram Chand* v. *Sandal Khan* (3) and *Balwant Singh* v. *Ram Das* (4)] and did not specify the amount to be paid by the mortgagor within the year of grace [*Mehro* v. *Suja* (5)]. There were other minor defects also, but we need not specify them as it is clear that defendants did not rely on the 1887 proceedings in the first Court. They referred to them in paragraph 6 of their written statement, but in paragraph 7 they laid no stress on the point, and there was consequently no issue about the validity of the notice. Finally on the 26th June 1907, the very day on which the Subordinate Judge delivered judgment, all the defendants concerned jointly said in explicit terms that they surrendered any plea of absolute title by virtue of the conditional sale clause.

In the face of all this we must hold that the lower Appellate Court was wrong in allowing the question to be raised in appeal, as well as in finding that such defective notices should be acted on over 20 years afterwards. The defendants have established no title as owners and can only fall back on their position as mortgagees.

There is then no dispute about anything except the amount to be now fixed as redemption money. The defendants demanded Rs. 1,728 as interest, but we think that the Subordinate Judge was clearly right in allowing only Rs. 216 in addition to the principal of Rs. 600. The mortgage-deed was clearly drawn and specified that the land should be taken over as sold outright on failure of the mortgagor to pay the principal with interest for three years. The defendants themselves undertook this, as shown by their ineffectual notice proceedings in 1887. They were in possession and could not in terms of the deed pile up an interest demand against the mortgagor for more than three years, there being no independent covenant as to interest to justify them under the ruling in *Ghulam Haidar* v. *Phaphal* (6).

We are asked by defendants' Pleader to at least allow further *post diem* damages at Rs. 72 a year for six years with reference to the rulings *Sheo Chand* v. *Chunna* (7) and (more particularly) *Jawahir Mal* v. *Raja Shah* (8), but on the facts of the present case we do not see our way to exercising discretion of the kind in defendants' favour. They have enjoyed the profits of a very large area for

(1) 51 P. R. 1892.
(2) 24 P. R. 1895.
(3) 21 P. R. 1903; 83 P. L. R. 1903.
(4) 28 P. R. 1908; 141 P. L. R. 1908; 41 P. W. 1908.
(5) 84 P. R. 1882.
(6) 92 P. R. 1908; 155 P.W.R. 1908; 29 P. L.R. 1909.
(7) 73 P. R. 1892.
(8) 95 P. R. 1902; 21 P. L. R. 1903.

some 30 years in return for a comparatively small outlay. They are not in equity entitled to any larger sum than was contemplated by their deed, and by this their legal demand for interest is limited to Rs. 216. They could have foreclosed for that amount if they wished, but cannot benefit from their own negligence in the matter of notice under the conditional sale clause.

The appeal of the plaintiffs is accordingly accepted. The decree of the lower Appellate Court is set aside, and in its place we restore the decree of the first Court in plaintiffs' favour for possession, by redemption, of the land in suit on payment of Rs. 816. Under rule 7 of Order XXXIV, Civil Procedure Code, the decree will specify that this sum of Rs. 816 must be paid into the first Court by the plaintiffs within six months from the date of the decree. The plaintiff will, if they deposit the money within the period prescribed, recover their costs from the defendants Nos. 1, 2, 5 and 6 in the lower Appellate Court and in this Court, the Subordinate Judge's order that the parties should bear their own costs in his Court being maintained.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1118 OF 1912.

July 21, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

TEKANA KAVANDAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

ALIGIRI KAVANDAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 12, cls. (1) and (2)—Question of Court-fees—Decision of first Court final—Appellate Court, when can re-open.

Under section 12, clause (1), of the Court Fees Act, a decision on the question of Court-fees by the Court of first instance is final between the parties though it can be re-opened by the Appellate Court itself under clause (2) of the section only in the interest of revenue.

Second appeal against the judgment and decree of the District Court of Madura, in Appeal Suit No. 27 of 1911, preferred against that of the District Munsif of Periakulam, in Original Suit No. 279 of 1909.

Mr. *S. Ramasawmy Aiyar* for Mr. *K. N. Aiyar*, for the Appellants.

Mr. *C. S. Venkatachariar*, for the Respondents.

JUDGMENT.—Under section 12, clause (1), of the Court-Fees Act, the decision on the question of Court-fee by the Court of first instance is final between the parties and hence that decision cannot be questioned by the defendant at the later stages of the suit, though the Court of Appeal [under section 12, clause (2)] might itself take the question of Court-fees in the interests of the revenue and pass necessary orders for the protection of the revenue. We do not see sufficient ground to take up and consider that question in second appeal.

On the merits, we are not satisfied that any document has been misconstrued by the lower Courts and the facts have been found against appellants.

The second appeal is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL REFERENCE No. 2 OF 1914.

February 2, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge.

NAWAB KHAN—DEFENDANT—APPELLANT

versus

KARAM CHAND AND OTHERS—PLAINTIFFS—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), s. 100 (2)—Registering Collector's decree—Prejudicial to a party—Registration inadmissible.

Clause (2) of section 100, Punjab Tenancy Act, gives the Chief Court power to act only where it appears that the parties have not been prejudiced by a mistake as to jurisdiction. If they have been prejudiced, registration is inadmissible.

Where the effect of registering the Collector's decree in a suit of value under Rs. 500 (a Small Cause) would apparently be to deprive the defendant of all further remedy, the Chief Court will not intervene, especially where there is doubt as to the correctness of the Collector's decision on the merits.

Case referred by the Commissioner, Rawalpindi Division, for the orders of the Chief Court.

ORDER.—This is understood to be a reference by the Commissioner of Rawalpindi

under section 100, Punjab Tenancy Act, though this is not precisely stated in the order of reference. The Chief Court is asked to register the appellate decree of the Collector, dated 9th April 1913, as the decree of a Civil Court. By that decree plaintiff has been allowed in full the sum of Rs. 160 claimed.

I find it difficult to follow the argument of the learned Commissioner. As at present advised I am of opinion that the parties to the suit in question stand in the relation of landlord and tenant, and that the suit is covered by clause (*i*) of section 77 (3) of the Tenancy Act, and has, therefore, been properly heard in the Revenue Courts. The facts are, however, of an unusual nature and I do not wish to express too positive a view on the point.

But, even if it be assumed that the Commissioner is right on that point, I cannot agree with him that the parties would not be prejudiced by the course which he suggests. The suit, if heard by the Civil Courts, would be a Small Cause under Rs. 500 in value, and under section 41 (2), Punjab Courts Act, as amended in 1912, no second appeal will lie. The effect of registering the Collector's decree would, therefore, be to deprive the defendants of all further remedy as it can hardly be said that such material irregularity is disclosed as to justify interference by revision under section 70. This result can scarcely have been contemplated by the Commissioner who has himself indicated doubt as to the correctness of the Collector's decision on the merits.

Clause (2) of section 100, Tenancy Act, gives the Chief Court power to act only where it appears that the parties have not been prejudiced by a mistake as to jurisdiction. If they have been prejudiced, registration is inadmissible.

The reply to the reference must, therefore, be that the Chief Court cannot intervene. The records will be returned to the Commissioner for disposal of the appeal before him in whatever manner he may consider proper.

If notwithstanding what has been said above, he should still on further consideration hold that the Revenue Courts have no jurisdiction, it may be open to him to set aside the decrees of both the lower Revenue Courts and to return the plaint for presentation in the Civil Court having jurisdiction.

Reference rejected.

CALCUTTA HIGH COURT.

APPEAL AGAINST ORDER No. 251 OF 1912.

February 23, 1914.

Present:—Justice Sir Henry Stephen, KT., and Mr. Justice Mullick.

RAM EKBAL SINGH AND OTHERS—APPELLANTS

versus

BALDEO SINGH AND OTHERS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7 (v)—Suit for possession by tenant against landlord and another person claiming to be tenant—Court-fees—Value of subject-matter—Value of relief sought.

A suit for recovery of possession of land of which plaintiffs claim to be tenants, against the admitted landlords and persons who also claim to be tenants, is governed by the Court Fees Act, section 7 (*v*), and the value of the subject-matter of the suit is the value of the relief sought as stated in the plaint. The suit is not covered by the paragraphs (*a*) to (*d*) of the sub-section, as their effect is confined to land in respect of which revenue might be paid, which it could not be in respect of the land in suit regarded as lease hold land

Appeal against the order of the Additional Subordinate Judge of Shahabad, dated the 19th February 1912, reversing that of the Officiating Munsif, third Court at Arrah, dated the 7th December 1910.

Babu *Raghunath Singh*, for the Appellants.

Babu *Chandra Sekhar Prosad Singh*, for the Respondents.

JUDGMENT.—In this case the plaintiffs brought a suit for recovery of possession of land, of which they claimed to be tenants, against the admitted landlords and persons who also claimed to be tenants. The suit was brought in the Court of the Munsif of Arrah, and an objection was raised by the defendant that the value of the land, that is the value of the proprietary rights in the land, was over Rs. 1,000 and that the Munsif was, therefore, not competent to try the suit. He held, however, that though the value of the land was over Rs. 1,000, the value of the relief sought was Rs. 126, the amount stated in the plaint, and decreed the suit on the merits. On appeal the point was raised before the Subordinate Judge who held that the Munsif was wrong in looking to the value of the relief sought and had no jurisdiction to try the suit; he, therefore, remanded the case to the Munsif to settle the value of the land.

In this he was wrong. The case is governed, as he says, by the Court Fees Act, 1870, section 7 (*v*), as this is a suit for the

possession of land; but it does not come under any of the descriptions of land given in paragraphs (*a*) to (*d*) of the sub-section, as their effect is confined to land in respect of which revenue might be paid, which it could not be in respect of this land regarded as lease-hold land. The value of the subject-matter of the suit is, therefore, the value of the suit, and determines the question of jurisidiction. This is in accordance with the decision in *Furzand Ali* v. *Mohanth Lal Puri* (1) and is consistent with that in *Ram Raj Tewari* v. *Girnandan Bhagat* (2).

The result is that the appeal is allowed, the order of the lower Court is set aside, and the case is remitted to that Court in order that it may be heard according to law. The appellant is entitled to his costs, which are assessed at two gold *mohurs*.

Appeal allowed; *Case remanded.*

(1) 32 C. 268.

(2) 15 A. 63; A. W. N. (1892) 240.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 222 OF 1913.

July 24, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerjee, KT.

MUSHTAQ ALI KHAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

BEHARI LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage suit—Parties—Mortgage, integrity of, not split up—All mortgagees necessary parties.

Where the integrity of a mortgage has not been split up, all the owners of the mortgagee rights are necessary parties to the mortgage suit and no part of the mortgage debt can be recovered, nor can the property be sold to realise any part thereof, except by all the mortgagees bringing a suit within the time prescribed by law.

First appeal from an order of the District Judge of Moradabad, dated the 19th of August 1913.

Mr. *Muhammad Ishaq*, for the Appellants.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit on foot of a mortgage, dated the 8th of January 1895. The suit was not instituted until the 5th of August 1910, that is to say, just about the time when the special period of limitation allowed by the Act of 1908 was on the eve of expiring. The defendants raised the plea that there was a defect of parties. It appears that the original mortgagees were two persons, Baij Nath and Badri Prasad. Baij Nath had died leaving three daughters. Badri left four sons. The sons of Badri were parties to the suit, but the daughters of Baij Nath were not. The Court of first instance found that Baij Nath and Badri were separate and that accordingly the daughters of Baij Nath were necessary parties, the suit was defective and it could not be cured because limitation had expired before the application to add parties was made. The lower Appellate Court reversed this decision. While it agreed with the Court of first instance that Baij Nath and Badri were separate, it held that the suit was barred against the daughters of Baij Nath to the extent of half but that the sons of Badri were still entitled to the other half and that the suit to that extent could be maintained; and it accordingly remanded the case. From this order of remand the present appeal is taken.

In our opinion the decision of the Court of first instance was correct. All the owners of the mortgagee rights were necessary parties. The integrity of the mortgage was never split up. Accordingly no part of a mortgage debt can be recovered, nor can the property be sold to realise any part thereof, except by all the mortgagees bringing a suit within the time prescribed by law.

We allow the appeal, set aside the order of the lower Appellate Court and restore the decree of the Court of first instance with costs in all Courts including fees in this Court on the higer scale.

Appeal allowed.

AMIR ALI v. AYKUP ALI KHAN.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 12 OF 1912.

July 11, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Asutosh Mookerjee, KT.

AMIR ALI—APPELLANT

versus

AYKUP ALI KHAN SAUDAGOR AND OTHERS—RESPONDENTS.

Evidence—Kabuliat *unregistered, inadmissible in evidence—Oral evidence as to rent agreed upon, admissible.*

Where the *kabuliat* executed by a tenant is inadmissible in evidence for want of registration, oral evidence can be given to prove the rent which was agreed upon by the parties.

Banka Behary Christian (Beni Madhab Christian) v *Raj Chandra Pal*, 2 Ind. Cas. 202; 14 C. W. N. 141, referred to.

Letters Patent Appeal against the following decision of Mr. Justice Coxe, dated the 1st February 1912, in Appeal from Appellate Decree No. 1192 of 1909, against the decree of the Subordinate Judge, first Court of Chittagong, dated the 22nd March 1909, reversing that of the Munsif, first Court of Chittagong, dated the 11th April 1908:—

COXE, J.—This is a suit for rent. It has been decreed by the lower Appellate Court and the defendant appeals.

The first point taken is that the learned Subordinate Judge has erred in using the plaintiff's collective papers as independent evidence instead of corroborative evidence. But clearly he has done nothing of the sort. The plaintiff says that he has collected rent at the rate of Rs. 4 from the defendant and given him receipts and he himself has sworn to the counterfoils which show this. This was believed by the Subordinate Judge, who says that the defendant has accepted the receipts which show his *jama* to be Rs. 4.

The second point taken is that as the *kabuliat* executed by the defendant is inadmissible in evidence, not being registered, oral evidence could not be given of the relationship between the parties. But apart altogether from the *kabuliat*, if the evidence shows, as it does show, that the defendant, who admittedly holds this land, is paying rent to the plaintiff and is accepting receipts which show the proper rent to be Rs. 4 a month, that evidence, apart altogether from any evidence as to how the tenancy originated, justifies a finding that at the present moment the relationship of landlord and tenant exists between the parties and the defendant's rent is Rs. 4.

The appeal must be dismissed with costs.

Babu *Dhirendra Lal Kastgir*, for the Appellant.

Babu *Khitish Chandra Sen*, for the Respondents.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent against a judgment of Mr. Justice Coxe in a suit for rent.

The plaintiff sues to recover rent from the defendant. In his plaint he stated that the defendant had, on the 6th of July 1898, executed a *kabuliat* which was not registered and never came into operation. He claims rent at the rate of Rs. 4. It is urged before us that as the *kabuliat* was not registered and consequently never came into operation under section 107 of the Transfer of Property Act, no oral evidence could be given to show that the rent was fixed at Rs. 4. This contention is clearly unfounded. Section 92 of the Evidence Act, on which reliance is placed, is of no assistance to the appellant. It has been repeatedly laid down in this Court, as is clear from the case of *Banka Behary Christian (Beni Madhab Christian* v. *Raj Chandra Pal*(1) and the earlier decisions mentioned there, that a tenancy can be proved without proving the lease, if there be one. This is in accord with what is the settled law in England. Thus it was held in *De Medina* v. *Polson* (2) that when a rent is mentioned in the lease or agreement such rent will be the measure of damages, though the lease be void by the Statute of Frauds. In our opinion, oral evidence was admissible to prove the rent which was agreed upon by the parties and the suit has been rightly decreed.

The decree of Mr. Justice Coxe will, therefore, be confirmed with costs.

Appeal dismissed.

(1) 2 Ind. Cas. 202; 14 C. W. N. 141.
(2) (1815) Holt N. P. 47.

MUTHALAGIRI REDDY *v.* PAPPI NAICKEN.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 509 OF 1913.

September 4, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Oldfield.

MUTHALAGIRI REDDY—DEFENDANT—APPELLANT

versus

PAPPI NAICKEN—PLAINTIFF—RESPONDENT.

Evidence Act (*I of* 1872), *ss.* 3, 157—"*Fact*," *meaning of.*

The word "fact", used in section 157 of the Indian Evidence Act, does not mean merely "event" but also a continuing fact such as possession.

Documents proving possession are admissible in evidence under that section.

Second appeal against the decree of the District Court of Madura, in Appeal Suit No. 264 of 1911, perferred against that of the District Munsif of Periakulam, in Original Suit No. 205 of 1910.

Mr. *C. S. Venkatachariar*, for the Appellant.

Mr. *T. V. Venkatarama Aiyar*, for the Respondent.

JUDGMENT.—The only point of law raised is that the decision of the District Judge is based on inadmissible evidence, *viz.*, Exhibits B, C, and D. These are deeds of sale and mortgage executed by plaintiff's witnesses Nos. 2 and 3 in which the suit land is referred to as "*Guruvan's Nanja*" or "*Pappanaicken's Nanja*"—Pappanaicken being the plaintiff and Guruvan his father. The witnesses have deposed to the possession (not the title) of the plaintiff and his father in the suit land, and these documents have been admitted under section 157 of the Indian Evidence Act as corroborative of their evidence. Possession (as distinguished from title) is a "fact" within the definition of section 3 of the Indian Evidence Act, and we are unable to agree with the contention of the appellant's Vakil that the word "fact" in section 157 is used only in the limited sense of "event," and does not include a continuing fact, such as possession, which is embraced by the definition.

In our opinion the documents were admissible as evidence. The second appeal is dismissed with costs.

Appeal dismissed.

SATIS CHUNDER BHAUMIK *v.* SARODA PRASAD RAY.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1835 OF 1890.

February 11, 1891.

Present:—Mr. Justice Tottenham and Mr. Justice Trevelyan.

SATIS CHUNDER BHAUMIK, MINOR, BY HIS NEXT FRIEND, KALLY CHUNDER BHAUMIK—PETITIONER

versus

SARODA PRASAD RAY AND OTHERS—RESPONDENTS.

Pleader undertaking to prepare paper-book, duty of—Contract between Pleader and High Court enforceable like similar contracts by Attorneys.

An undertaking by a Pleader to prepare the paper-book in lieu of having it prepared in the office of the High Court is an agreement between him and the Court, which the Court expects him to fulfil.

It is a contract which is capable of being enforced by the Court, and which will, if necessary, be enforced in the same way as similar contracts by Attorneys of the High Court can be enforced.

The trust given to a Pleader who is allowed to undertake the preparation of a paper-book would not be fulfilled if he were allowed to have reservation of any kind in mind and to take an undertaking to mean only an undertaking to prepare a paper-book if he is paid for it. It is the business of a Pleader who gives an undertaking of this description, if he wants to run no risk, to see that he is indemnified before he gives the undertaking.

Civil Rule in connection with appeal from Original Decree No. 131 of 1890, against that of the Subordinate Judge of Rajshahi, dated the 30th January 1890.

Babus *Joges Chunder Dey* and *Tarit Mohan Das*, for the Petitioner.

Babu Kishori Mohan Roy, for the Opposite Party.

JUDGMENT

TOTTENHAM, J.—This is a Rule to show cause why the paper-book in appeal from Original Decree No. 131 of 1890 should not be dispensed with.

The Rule was obtained on the 22nd December last, the ground of the application being the poverty of the appellant.

The respondent has shown cause against the Rule. He contends that there is no ground for the indulgence asked for; and he points out that there would be great inconvenience in the absence of a paper-book at the hearing, the case being an important one and the record being bulky.

The Pleader for the opposite party further points out that in the month of August last the appellant's Pleader gave

notice to the Deputy Registrar that he would undertake to prepare the paper-book in lieu of having it prepared in the office of the High Court. Nearly four months afterwards, that is, when the paper-book should have been nearly ready, another Pleader presented an application to dispense with it. And in asking the Court to dispense with it, the appellant made no mention of what had already passed, or of the undertaking that his Pleader should prepare the book.

We desire to call the attention of Pleaders to the fact that an agreement of that kind to prepare paper-books is an agreement between them and the Court, which the Court expects them to fulfil. It is upon the faith of such agreement that the Court permits the appellant to abstain from making the necessary deposit in Court for the expense of the paper-book in time. We should not on future occasions be inclined to pass over an instance, such as this, of an attempt to withdraw such agreement without any notice to the Court.

In the present case, we have not to deal with that particular matter. But upon the whole merits of the case, we think it sufficient to say that we see no reason for granting the application made by the appellant.

We discharge the Rule, the costs, one gold *mohur*, being costs in the appeal.

TREVELYAN, J.—I desire to add a few words to what Mr. Justice Tottenham has just said with reference to a matter which has arisen in this case. Although it is not a matter which it is necessary for us to act upon expressly on this Rule, I do not think that it ought to be passed over without letting it be well understood by the learned gentlemen who practise the profession of Pleaders in this Court, that an undertaking to prepare a paper-book is a contract which is capable of being enforced by the Court, and which will, if necessary, be enforced in the same way as similar contracts by Attorneys of this Court can be enforced.

It was suggested by the learned Vakil who appeared in support of the Rule, and also by the Vakil who had given the undertaking, that the reason for not preparing the paper-book was the non-receipt of money from the client.

I desire to protest against any suggestion that a Pleader who is an officer of this Court, in making a contract with the Court, is entitled to make a mental reservation of this kind. The trust given to a Pleader who is allowed to undertake the preparation of a paper-book would not be fulfilled if he were allowed to have this reservation in his mind and to take an undertaking to mean only an undertaking to prepare a paper-book if he is paid for it. It is the business of a Pleader who gives an undertaking of this description, if he wants to run no risks, to see that he is indemnified before he gives the undertaking. If we were to allow a reservation of any kind, it seems to me quite clear that we would destroy the objects of the Rules for the preparation of paper-books.

It is not necessary in this case to take any steps as Mr. Justice Tottenham has pointed out. In other cases it may be necessary, and there can be no doubt that a contract of that kind is capable of being enforced.

I am glad that an opportunity has arisen to let the Pleaders know what the meaning of a contract of that kind is. It is as plain as plain can be.

Rule discharged.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1444 OF 1912.

April 23, 1914.

Present:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal.

AMAR DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SUKH DIAL AND OTHERS—DEFENDANTS RESPONDENTS.

Appeal, second—Concurrent finding of fact—Necessity, circumstantial evidence—Punjab Courts Act (XVIII of 1884), s. 40, as amended by Punjab Courts Acts (I and IV of 1912).

A concurrent finding as to receipt of consideration cannot be interfered with on second appeal.

Where an alienor has a large family to support and there is no allegation that he is a man of bad character or wasteful or extravagant or has any

cause to waste the property, the presumption is that the alienation has been made for necessity, particularly when it has been made at a period immediately following a severe famine and has not been attacked for about eleven years.

Second appeal from the decree of the Divisional Judge, Attock Division, dated the 24th May 1912, affirming that of the Munsif, first Class, Pindigheb, dated the 21st February 1912, dismissing plaintiffs' suit.

M. *Bhagat Ram Puri*, for the Appellants.

Mr. *Nand Lal*, for the Respondents.

JUDGMENT.—This was a suit by the plaintiffs-appellants for their 6/7ths share of certain land sold by Ram Ditta, father of plaintiffs Nos. 1 to 5 and father-in-law of plaintiff No. 6 for Rs. 400 on the 5th October 1900, on the ground that the land was joint family property and that Ram Ditta had no authority to sell it without consideration and necessity. Plaintiffs denied that they had consented to the sale.

The first Court found that the property was not acquired solely by Ram Ditta out of his funds but that it was acquired out of joint family funds. At the same time it held that the sale was for necessity and consideration and it, therefore, dismissed the suit. Plaintiffs appealed to the Divisional Court. Its findings are not a model of clearness, but so far as we understand them they are that Ram Ditta himself acquired the property and that the sale was for consideration and necessity. Plaintiffs have filed a second appeal to this Court.

With reference to the question whether the land was acquired by Ram Ditta alone out of his own funds or whether it was a joint acquisition by the family, Mr. Bhagat Ram in addition to adopting the argument of the first Court has pointed out that when the land was purchased in 1890 for Rs. 1,500, Rs. 900 out of the consideration was to be paid to the previous mortgagee, Chet Singh, and that this was not paid at that time. On the contrary it appears that on the 20th December 1895 Ram Ditta by a deed, Exhibit D-3, mortgaged some *chahi* land to one Mul Raj for Rs. 600 out of which he received Rs. 15 in cash and the balance was paid to Chet Singh, the original mortgagee. It is not clear how the rest of Chet Singh's mortgage-debt was paid off and Ram Ditta's sons or some of them may have helped to pay it. On the whole we are prepared to accept Mr. Bhagat Ram's arguments that the land was acquired out of joint family funds.

There is a concurrent finding of both the lower Courts that the sale of 1900 was effected for consideration and with that finding we cannot interfere upon second appeal. We consider that the first Court has disposed of the question of necessity in a very proper way. Ram Ditta had a large family to support and there is no allegation that he was a man of bad character or wasteful or extravagant. There was no reason why he should sell the property without necessity. As pointed out by the lower Courts the sale was made at a period immediately following a severe famine. We have no doubt that the family was in need of money and the fact that no objection to the sale was made for nearly eleven years fortifies us in the conclusion that there was necessity for it. Plaintiffs have been associating with their father in alienations since the date of the sale. We have no doubt that they were fully cognizant of it and had agreed to it. Some point was made of the fact that the land purchasd for Rs. 1,500 in the year 1890 was sold in 1900 for only Rs. 400. There has, however, been a mistake about this. Mr. Bhagat Ram admits that out of the land purchased in 1890 10 *kanals* 6 *marlas* of *chahi* land was sold on the 16th March 1899 to Ghulam Muhammad for Rs. 4,000. Again 13 *kanals* 6 *marlas* were sold for Rs. 98 on the 18th April 1897. After deducting these two plots the balance was sold for Rs. 400. We are certainly not prepared to say that it was sold for very much under the market-value. We do not, therefore, see any ground for interference on second appeal, and without calling upon Counsel for the respondent to reply we dismiss the appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 31 OF 1914.

April 27, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Rattigan.

SADR-UD-DIN—PETITIONER

versus

EMPEROR—RESPONDENT.

Legal Practitioners Act (XVIII of 1879), s. 36—District Magistrate ordering name of person to be included in list of touts—High Court's power of revising order—Punjab Courts Act (XVIII of 1884), s. 13—General power of superintendence and control.

Proceedings under section 36 of the Legal Practitioners Act are neither civil proceedings governed by the provisions of the Code of Civil Procedure, nor criminal proceedings governed by the Criminal Procedure Code, and, therefore, neither the civil nor the criminal jurisdiction of the High or Chief Court can be invoked for the purpose of revising orders passed under that section.

The High Courts have, however, held that in the exercise of the general powers of superintendence and control vested in them under the provisions of section 15 of the High Courts Act they have jurisdiction to interfere with such orders, and in *Man Singh* v. *Emperor*, 3 Ind. Cas. 977; 11 P. R. 1909 Cr.; 115 P.L.R. 1909; 10 Cr. L. J. 443; 28 P.W.R. 1909 Cr., a Division Bench of the Chief Court has also decided that it has similar jurisdiction under section 13 of the Punjab Courts Act in cases where an order under section 36 of the Legal Practitioners Act has been passed by a Civil Court. But section 13 of the Punjab Courts Act gives the Chief Court a power of superintendence and control only over Civil Courts and the provisions of that section are not relevant to a case where the Chief Court is asked to revise the order of a District Magistrate.

Chanan Das v. *Queen-Empress*, 3 P. R. 1900 Cr.; P. L. R. 1900 p. 17 Cr., dissented from.

Petition, under section 13 of the Punjab Courts Act, for revision of the order of the Sessions Judge of the Ferozepore Division, dated the 27th of November 1913, affirming that of the District Magistrate, Ferozepore, dated the 9th of September 1913, declaring the petitioner as a tout.

Mr. *Ganpat Rai*, for the Petitioner.

The *Government Advocate*, for the Respondent.

JUDGMENT.—By order, dated the 9th September 1913, the District Magistrate of Ferozepore directed that the name of the petitioner, Sadr-ud-Din, and the names of six other persons, specified in the said order, should be included in a list of "touts" to be hung up in his own Court and in all Courts subordinate to his Court. This order was passed by the District Magistrate as such, and purports to be one under section 36 of the Legal Practitioners Act of 1879 as subsequently amended.

This Court is asked to revise the said order on various grounds, but obviously the first question to be decided is whether we have jurisdiction to revise it. In our opinion, based upon authority, we have no such jurisdiction. It has been repeatedly held that proceedings under section 36 of the Legal Practitioners Act are neither civil proceedings governed by the provisions of the Code of Civil Procedure, nor criminal proceedings governed by the Criminal Procedure Code, and that as a result neither the civil nor the criminal jurisdiction of the High or Chief Court can be invoked for the purpose of revising orders passed under that section [see *In the matter of the petition of Madho Ram* (1), *In the matter of the petition of Kedar Nath* (2), *Hari Charn Sircar* v. *District Judge of Dacca* (3), *Ravinuthala* v. *Secretary of State* (4), *Man Singh* v. *Emperor* (5) and *Jaimal Singh* v. *Bhagwan Das* (6)]. On the other hand the High Courts have held that in the exercise of the general powers of superintendence and control vested in them under the provisions of section 15 of the High Courts Act (24 and 25 Vict., C. 104), they have jurisdiction to interfere with such orders, and in *Man Singh* v. *Emperor* (5), a Division Bench of this Court decided that it had similar jurisdiction, under section 13 of the Punjab Courts Act, in cases where an order under section 36 of the Legal Practitioners Act had been passed by a *Civil* Court. But section 13 of the Punjab Courts Act gives this Court a power of superintendence and control only over Civil Courts and the provisions of that section are not relevant to a case such as the present where this Court is asked to revise the order of a *District Magistrate* who has, in that capacity, taken action under section 36 of the Legal Practitioners Act. With such an order we are not empowered by

(1) 21 A. 181.

(2) 1 Ind. Cas. 143; 31 A. 59; 6 A. L. J. 22; 9 Cr. L. J. 59; A. W. N. (1908) 279.

(3) 6 Ind. Cas. 327; 11 C. L. J. 513; 11 Cr. L. J. 320.

(4) 16 Ind. Cas. 895; 12 M. L. T. 411; (1913) M. W N. 370.

(5) 3 Ind. Cas. 977; 11 P. R. 1909 Cr.; 115 P. L. R. 1909; 10 Cr. L. J. 443; 28 P. W. R. 1909 Cr.

(6) 41 P. R. 1888 Cr.

any provision of law to interfere and we must accordingly reject this and the connected petitions on that ground.

It is, no doubt, true that in a Single Bench ruling, reported as *Chanman Das* v. *Queen-Empress* (7), a late Chief Judge of this Court held that under section 13 of the Punjab Courts Act he had jurisdiction to revise an order of this kind passed by a District Magistrate, but speaking with every deference, we are of opinion that that decision is erroneous in law. Nor are we able to accept Mr. Ganpat Rai's argument that proceedings under section 36 of the Legal Practitioners Act are essentially civil proceedings and that an order passed thereunder by any Court or Officer must be regarded as the order of a Civil Court. Obviously this is not so, for the result otherwise would be that an order of the Financial Commissioner under section 36 of the Legal Practitioners Act would become revisable by this Court, and this too despite the fact that the Financial Commissioner is in no sense subject to this Court's general powers of superintendence and control.

It is with reluctance that we are obliged to hold that we have no power to interfere with the order of the District Magistrate, as we can readily conceive of cases where injustice may be done to the person affected by such order. Indeed we may even go so far as to say that we are by no means satisfied that the present petitioner, Sadr-ud-Din, was rightly included among the other persons as a "tout." It appears that the President of the Ferozepore Bar Association, Lala Kanshi Ram, Senior, was of opinion that Sadr-ud-Din's name had been wrongly included, and there are other reasons apparent on the record for believing that he is not a "tout" within the definition of that term in the Act. But as observed by the learned Sessions Judge to whom this petition for revision was presented in the first instance, the proper course for the petitioner is to petition the District Magistrate to review his order.

For the reasons given, we hold we have no jurisdiction to entertain this petition and we accordingly reject it.

Petition rejected.

(7) 3 P. R. 1900 Cr.; P. L. R. 1900 p. 17 Cr.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 109 OF 1914.
CRIMINAL REVISION PETITION No. 95 OF 1914.
September 10, 1914.

Present:—Mr. Justice Sadasiva Aiyar.

In re KARRI MANGADU AND ANOTHER—ACCUSED—PETITIONERS.

Penal Code (Act XLV of 1860), *ss.* 404, 424—*Mother of deceased owner taking possession of her son's effects, whether guilty under section* 404—*Debtor discharged by mother, whether liable under section* 424.

Section 404 of the Indian Penal Code is intended to punish servants and strangers who can have possibly no right to or interest in the effects of a dead man and not near relatives who take possession under a claim of right. Similarly section 424 is intended to punish fraudulent debtors and their accomplices and is not intended to punish persons who claim as heirs of a deceased man and deal with the property.

Where, therefore, a mother takes possession of her son's moveables as against her daughters-in-law and discharges one of the debtors of her son from his obligation, she cannot be convicted of an offence under section 404, nor can the discharged debtor be convicted under section 424, Indian Penal Code.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the first Class Deputy Magistrate of Peddapuram, in Civil Appeal No. 99 of 1913, preferred against the judgment of the Stationary Second Class Magistrate of Peddapuram, in C. C. No. 447 of 1913.

Mr. *P. Chenchiah*, for the Accused.

The *Public Prosecutor*, for the Government.

ORDER.—This is a criminal case which arose out of a dispute between the mother of a dead male owner and one of the two minor childless daughters-in-law of the said owner as to who was entitled to the assets left by the deceased man. The mother was present at the death, took possession of the moveables and is claiming them as belonging to her.

The lower Courts have elaborately considered the question of Hindu Law relating to succession and guardianship and also as to whether the 1st accused (the mother) has proved her case of ownership. The lower Courts have convicted her and one of the debtors of her son whom she discharged from his obligation. The convictions are under sections 404 and 424, Indian Penal Code.

As is shown by the illustration to section 404, that section was intended to

punish servants and strangers who could have possibly no right to or interest in the effects of a dead man and who misappropriated such effects and was not intended to punish near relatives who take possession of and deal with the deceased's effects under a claim of independent ownership, or a claim to succeed as heir to the deceased.

As regards section 424, it is the last of four sections (421 to 424) intended to punish fraudulent debtors and their accomplices and not intended to punish persons who claim as heirs of a deceased man and deal with the property.

The convictions and sentences are set aside and the fines, if levied, will be refunded.

Conviction set aside.

PUNJAB CHIEF COURT.
CRIMINAL REVISION No. 1669 OF 1913.
May 8, 1913.
Present:—Mr. Justice Shadi Lal.
EMPEROR—PROSECUTOR
versus
CHIRAGH—ACCUSED.

Workmen's Breach of Contract Act (XIII of 1859), s. 2—Advances in stores—Act inapplicable.

Section 2 of Act XIII of 1859 is inapplicable to a case where the advances are made in stores and not in money.

Case reported by the Sessions Judge, Lahore, with his No. 1036 of 15th September 1913.

FACTS.—It is alleged that complainant had been advancing various sums to accused at different times. When accused left complainant, a sum of Rs. 93-4-0 was outstanding against the former who is said to have been employed by the latter as his *jamadar*.

The accused, on conviction by Mr. L. A. Bull, exercising the powers of a Magistrate of the 1st class in the Lahore District, was ordered by order dated 12th August 1913, under section 2, Act XIII of 1859, to re pay to complainant the sum of Rs. 93-4-0.

GROUNDS.—The petitioner has been ordered under Act XIII of 1859 to re-pay a sum of Rs. 93-4-0 to the complainant.

It is argued that as complainant has no work in progress, following *In the matter of Anusoori Sanyasi*(1), only a civil suit lies. The complainant, however, stated that work was only closed owing to the rains and desertion of workmen and would be re-opened shortly. A temporary stoppage of this nature does not appear to me to affect the case.

As regards ground 2 no receipt for Rs. 40 has been produced in the lower Court and though I gave an adjournment until to-day for its production, it is not forthcoming. Grounds 3 and 4 are general grounds on which nothing has been put forward.

With regard to the complainant's advances, however, I find that on 28th March 1913 the petitioner received Rs. 116-8-3 in stores (the vernacular calls it "flour, etc."). This is more than the sum for which he now claims (Rs. 93-4-0). Section 2 lays it down that when the workman has received "money." I question if stores are money within the meaning of the Act. The Chief Court has held that as the Act is of a penal nature its terms should be construed strictly. I, therefore, forward this revision.

ORDER.—The petitioner received Rs. 116-8-3 in stores and not in cash. It cannot, therefore, be said that he received "money" as required by section 2 of Act XIII of 1859. That section is, therefore, inapplicable and the conviction of the petitioner is illegal. I accept the recommendation of the learned Sessions Judge and set aside the order of the Magistrate, dated the 12th August 1913, convicting Chiragh.

Order set aside.

(1) 28 M. 37; 1 Weir 671; 2 Cr. L. J. 149.

LOWER BURMA CHIEF COURT.
CRIMINAL REVISION No. 1188 OF 1914.
July 30, 1914.
Present:—Mr. Justice Twomey.
ISMAIL—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 177, 182, 193, 199—False report to Revenue Surveyor for securing mutation of name—Declaration contemplated by s. 199, nature of—Criminal Procedure Code (Act V of 1898, ss. 195, 537—Sanction to prosecute—Revision—Conviction under s. 193, whether can be converted to one under s. 182.

ISMAIL v. EMPEROR.

The declaration contemplated in section 199, Indian Penal Code, is a statement of facts in the form simply of a declaration which, for the purpose of proof of the fact declared to, has by itself all the legal force of evidence given on oath or solemn affirmation, that is to say, it must be a declaration which having been made is afterwards receivable as evidence of the fact declared.

By reporting falsely that his father had died the petitioner induced the Revenue Surveyor to enter his name in the Revenue Registers as owner of certain gardens and paddy lands in succession to his father:

Held, that the petitioner had not committed an offence under sections 199, 177 or 193, but that he had committed an offence under section 182, Indian Penal Code.

A conviction under section 199, Indian Penal Code, in respect of which no sanction is necessary, cannot be converted in revision to a conviction under section 182 in respect of which a sanction is necessary, especially where the attention of the trying Magistrate was drawn to the necessity of such sanction.

Review of the order of the Sub-Divisional Magistrate of Kawkareik, dated the 27th of March 1914, passed in Criminal Regular Trial No. 134 of 1913.

JUDGMENT.—The applicant has been convicted of two offences under section 199, Indian Penal Code, and has been sentenced to suffer rigorous imprisonment for a year.

The allegation against him is that he went to the Revenue Surveyor on two occasions and by reporting falsely that his father had died induced the Revenue Surveyor to enter his name in the Revenue Registers as owner of certain gardens and paddy lands in succession to his father. The accused denied having reported that his father was dead. But the Sub-Divisional Magistrate found that he had done so and the Sessions Court on appeal came to the same conclusion.

Apart from the defence on the facts, it was argued both before the Sub-Divisional Magistrate and the Sessions Court that the facts alleged by the prosecution do not constitute offences under section 199, Indian Penal Code, and I think it is clear that they do not. The declaration contemplated in section 199, as explained in the Madras case of *A. Vedamutu* (1), is a statement of fact in the form simply of a declaration which, for the purpose of proof of the fact declared to, has by itself all the legal force of evidence given on oath or solemn affirmation. It must be a declaration which having been made is afterwards receivable as evidence of the fact declared. But neither the report made by the accused as to the alienation of land nor the Revenue Surveyor's written record of the report is receivable in evidence as proof of the facts stated in the report. Examples of the kind of declarations contemplated in section 199 are affidavits in civil suits, statutory certificates under section 2 of the Bankers' Books Evidence Act, and declarations and certificates under the Special Marriage Act, 1872. The learned Sessions Judge thought that the report made by the accused being a report which he was bound to make under section 22A of the Land and Revenue Act was necessarily a declaration within the meaning of section 199 of the Indian Penal Code. But the mere fact that a party to an alienation is bound to report it does not make the record of the report "receivable" as evidence of any fact which is an essential factor in section 199. It may be doubted also whether the word "alienation" in section 22A, Land and Revenue Act, if strictly interpreted would cover a case of succession or inheritance. As it is clear that the alleged false information or the record of it made by the Revenue Surveyor is not a false declaration under section 199, it is necessary to consider whether the facts alleged by the prosecution amount to offences under any other section of the Code. They do not amount to an offence under section 177 because the accused's father being still alive, there was no information which the accused was "legally bound to furnish." Sections 191 and 193 would be applicable only if the accused was bound by an oath or by an express provision of law to state the truth in making his report to the Revenue Surveyor. He would have been bound by an express provision of law if the Revenue Surveyor were a Revenue Officer for the purposes of section 54B of the Land and Revenue Act. But Notification B on page 77 of the Land and Revenue Manual shows that Revenue Surveyors have not been appointed Revenue Officers for the purpose of section 54B. It is clear that a Township Officer is the lowest Revenue Officer before whom an applicant or other person appearing in a revenue matter is bound to state the truth under that section and there is no other express provision of law which binds a person to state the truth before a Revenue Surveyor. There remains, however, section

(1) 4 M. H. C. R. 185; 1 Weir 159.

182, the offence of "giving false information to a public servant with intent that he shall use his lawful power to the injury of another person." On the facts alleged by the prosecution it may be contended that the accused has committed offences under section 182. But for a private prosecution under section 182 the sanction of the Revenue Surveyor's Superior Officer (the Superintendent of Land Records or the Deputy Commissioner) would be necessary under section 195, Code of Criminal Procedure. Section 537, Criminal Procedure Code, provides that no conviction shall be set aside merely for want of sanction under section 195. But it would be going much further than this to pass orders in revision converting convictions under section 199, Indian Penal Code, in respect of which no sanction is necessary, to convictions under a section in respect of which sanction would be necessary, especially as the attention of the Magistrate who tried the case was drawn to the necessity of such sanction.

Moreover, the case is one in which it is expedient to apply the provisions of section 195, Criminal Procedure Code, strictly. There are features in it—I refer particularly to the numerous erasures and corrections in the exhibits—which render it desirable that the Superior Revenue Officers should exercise their judgment before a charge is laid under section 182, Indian Penal Code. The convictions and sentences are set aside and the applicant is acquitted of charges under section 199, Indian Penal Code. The Sub-Divisional Magistrate can submit the records to the Deputy Commissioner to whom it will be open to lay a complaint under section 182, Indian Penal Code, or to sanction an application to prosecute under that section, as he may think fit.

Conviction set aside.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 107 OF 1914.

March 21, 1914.

Present:—Mr. Justice Rattigan.

AHMAD GUL—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), Sch. V, Form 10—Bond to keep the peace—Offence not involving breach of peace—No forfeiture of bond unless breach probable—Offence committed before execution of bond does not forfeit.

A bond to keep the peace cannot be forfeited except on proof of the commission of an offence involving a breach of the peace and the use of the word 'probably' in Form 10, Schedule V, of the Criminal Procedure Code, limits forfeiture to cases in which a breach of the peace is the 'probable', and not merely the possible, result of the act of the person bound over. Thus a conviction for theft, wrongful confinement and extortion, for the abduction of a woman, or a secret attempt to poison a person, cannot justify a forfeiture of such a bond.

Where the offence was committed prior to the date on which the bond was executed, the bond could not be forfeited by reason of the commission of the offence.

Petition for revision, under section 439 of the Criminal Procedure Code, of the order of the District Magistrate, Mianwali, dated the 23rd July 1913, affirming that of the Magistrate, first Class, Mianwali, dated the 16th of June 1913, forfeiting bond for Rs. 200 with security.

JUDGMENT.—The petitioner, Ahmad Gul, was directed on the 4th of October 1912, to execute a bond, with one surety, in the sum of Rs. 200 to keep the peace for the period of one year. The bond is not on the record before me, but I presume that it was in accordance with Form 10 of Schedule V of the Criminal Procedure Code, and that under its terms the petitioner bound himself " not to commit a breach of the peace or do any act that might probably occasion a breach of the peace during the said term " of one year.

On the 9th of October 1912, Ahmad Gul and one Muhammad were arrested on a charge of having attempted to poison a person named Ahmad Khan and under section 11 of the Frontier Crimes Regulation, the Deputy Commissioner directed that the charges against them should be referred to a *jirga* for determination. A reference was accordingly made and the *jirga* found both persons guilty of the offence. The Deputy Commissioner, by order dated the 8th

December 1912, accepted the finding of the *jirga* and sentenced each of the accused persons to a term of seven years' rigorous imprisonment including three months' solitary confinement. The attempt to murder was by means of aconite poison administered in honey to the complainant by Muhammed at the instigation of Ahmad Gul.

On the 10th of May 1913, notice was issued by the Magistrate of the 1st class, Mianwali, to petitioner to show cause why his bond should not be forfeited, and though it must have been known to the Magistrate that the petitioner was then in Jail serving his sentence, his order states that petitioner has not filed any pleas and has not even put in an appearance. The bond was, accordingly, forfeited and an appeal by petitioner to the District Magistrate was rejected.

The petitioner has now applied to this Court through his agent for revision of the orders of the lower Court, and, in my opinion, those orders cannot stand.

In the first place I find, on referring to the evidence of Ahmad Khan, complainant in the case before *jirga*, that the attempt to poison him took place on the 17th or 18th *Asuj*, *Sambat* 1969, which I find corresponds to the 2nd or 3rd October 1912. Thus the offence was committed prior to the date on which the bond was executed and, therefore, not within the term of one year from its date. Again, it has frequently been held that a bond to keep the peace cannot be forfeited except on proof of the commission of an offence involving a breach of the peace, and that the use of the word "probably" in Form 10, Schedule V, of the Criminal Procedure Code, limits forfeiture to cases in which a breach of the peace is the "probable," and not merely the possible, result of the act of the person bound over. Thus a conviction for theft or for wrongful confinement and extortion will not justify a forfeiture of such bond [*In the matter of Haran Chunder Roy* (1) and *In the matter of Zearuddin Howladar* (2)], nor will a conviction for the abduction of a woman [*Muhammad* v. *Emperor* (3)]. In the present case a secret attempt to poison a person cannot reasonably be regarded as an offence which would probably result in a breach of the peace.

For these reasons I accept the petition and set aside the orders of the Magistrate and District Magistrate.

Petition accepted.

(1) 18 W. R. 63 Cr.
(2) 19 W. R. 48 Cr.
(3) 7 P. R. 1906 Cr.; 139 P. L. R. 1906; 4 Cr. L. J. 278.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 157 OF 1914.

March 17, 1914.

Present:—Mr. Justice Rafique and Mr. Justice Piggott.

GAYA PRASAD AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 62—Forfeiture of property, when allowed.

Under section 62 of the Penal Code an order of forfeiture of the convict's property should ordinarily be passed in cases of crimes against the State or affecting the safety of the public generally.

Criminal appeal from an order of the Sessions Judge of Cawnpore, dated 11th February 1914.

Messrs. *C. Dillon*, *C. Ross Alston*, *Satya Jhandra Mukerji* and *Sital Prasad Ghose*, for the Appellants.

Mr. *A. E. Ryves*, Government Advocate, for the Crown.

JUDGMENT.—In this case Gaya Prasad Brahmin, Chadammi Lal Mallah, Raja Ram Brahmin and Nannha Bhat were tried before the Sessions Judge of Cawnpore on a charge under section 302, Indian Penal Code, in respect of the murder of a woman named *Musammat* Janki Koer and a boy eleven or twelve years of age named Durga. They have been found guilty and sentenced to death. The Sessions Judge has also, under section 62, Indian Penal Code, passed an order of forfeiture in respect of all the property of the accused Chadammi Lal. The record is before us for confirmation of the sentences of death and the four accused have all appealed. The case has been fully and ably argued on their behalf. The evidence on the record is voluminous and the learned Sessions Judge has written a careful and elaborate judgment. In dealing with the

matter, we may consider first of all the antecedent circumstances of the parties concerned and the evidence of motive. *Musammat* Janki Koer married successively two brothers named Kesho and Manna, who were the sons of one Umrai. This Umrai was the son of one Subba Lal, and the accused Chadammi Lal is a great-grandson of the aforesaid Subba Lal. The evidence on the record shows that Kesho and Manna were co-sharers in a certain landed property and also that, in consequence of certain successful litigation, a sum of Rs. 7,000 payable to Kesho and Manna in equal shares was realized and deposited in the Court of the Subordinate Judge of Cawnpore. From the time of Kesho's death there was ill-feeling and litigation between his widow, *Musammat* Janki Koer, and the other branch of the family, which were represented, in the first instance, by one Lachman, another great-grandson of Subba Lal by a different line. Since the death of this Lachman the accused Chadammi Lal has acted as the head of this branch of the family. The result so far may be summed up as follows:—Kesho's share in the *zemindari* property seemed to have been lost to *Musammat* Janki Koer altogether. Manna's share was in the possession of Chadammi Lal, although Manna's name continued to be recorded as proprietor. Of the money deposited in Court, however, *Musammat* Janki Koer succeeded in securing half, Rs. 3,500, as representing the share of her first husband, Kesho. Lachman seems to have made an attempt, several years ago, to secure the other half by getting himself appointed guardian of the person and property of Manna, who was then a little under eighteen years of age. This attempt was defeated by Manna's appearance in Court, but shortly after this, and before he could himself take steps to secure the money, Manna disappeared. The witness Pukhai, who is *Musammat* Janki Koer's uncle and whose evidence contains most of the facts regarding the previous history of the family, seems convinced that Manna was in fact murdered by, or at the instigation of, Lachman or Chadammi Lal. At any rate *Musammat* Janki Koer's attempt to recover the remaining Rs. 3,500 was defeated by an order of the Court that the money would continue in deposit until Manna's death could be proved, or could legally be presumed by reason of his unexplained absence for a period of seven years. This period was drawing to a close at the end of the calendar year 1913. The evidence of Pukhai shows that towards the close of the year advances were made to *Musammat* Janki Koer on behalf of the accused Chadammi Lal. The accused Gaya Prasad, who is the *Patwari* of the village of Karhwa in which some of the family property is situated, came forward in the matter apparently as a friend of both parties. We think there is good evidence that this man was trusted by *Musammat* Janki Koer and had been of service to her in defeating a previous attempt to get Manna's name removed from the village papers. The position, therefore, was that, as soon as Manna's death could legally be presumed, *Musammat* Janki Koer might be expected to move in the matter of recovering the Rs. 3,500 lying in deposit in Court, and Chadammi Lal might be expected to move in the matter of getting Manna's name removed from the village papers and his own possession formally recognised. There was, therefore, clear ground for discussion and compromise; and at the same time it is idle for the defence to contend that Chadammi Lal had not a strong motive for putting *Musammat* Janki Koer out of his way. As regards the accused Gaya Prasad, the case for the prosecution is that he had been won over by a gift of land by Chadammi Lal. He has offered an explanation of this matter in his defence but we are not prepared to say that we find it proved. The other two accused, Raja Ram and Nannha, are merely the servants of Chadammi Lal's.

We may now pass on to another portion of the evidence and consider this point first, namely what has now become of Janki Koer and of the little boy Durga. The evidence of *Musammats* Dulli and Makho, Chandrika Prasad and Jai Lal, corroborated in certain particulars by Pukhai, is to the effect that on a date which on an examination of the evidence as a whole can be fixed as being September 8th 1913, *Musammat* Janki Koer left the house in Cawnpore where she was residing, and started ostensibly

for Karhwa, where her *zemindari* was situated. According to this evidence, the accused Chadammi Lal and Gaya Prasad came to fetch her and took her away with them. She insisted on being accompanied by the boy Durga who was a sort of nephew and *protege* of hers, and she also took with her, apparently on a sudden impulse, the witness *Musammat* Dulli, who is a distant cousin of hers and who had come to pay her a visit. According to *Musammat* Dulli the whole party travelled by rail to a station called Maitha, where Chadammi Lal temporarily separated himself from the others. Certain Kahars afterwards arrived with a *doli* for *Musammat* Janki Koer and the party proceeded by road to the village Karhwa. Misri, a Kahar who helped to carry the *doli*, gives evidence on this point. It is, as the learned Sessions Judge remarks, in his favour that he admitted that he did not see Chadammi Lal with the rest of the party. On reaching Karhwa the woman put up for a couple of days at Gaya Prasad's house, but subsequently moved into a *dera* or the *zemindar's* house belonging to the family in that village. There, according to her evidence, *Musammat* Dulli left them on the night of Wednesday, September 10th, and returned to Cawnpore. There are two Kahars, Majnu and Baladin, who supplied *Musammat* Janki Koer with water during her residence at the *dera* and their evidence corroborates the fact of her presence there up to and including Thursday, September 18th, 1913. The next important witness is *Musammat* Chitia, a Brahmin woman residing at Karhwa. She says she became aware of *Musammat* Janki Koer's arrival at that village by meeting her casually on the road. She paid her a visit on Sunday, September 14th, the day being positively identified by the fact that it was the day of *Anant Chaudas* festival. She had some conversation with her and *Musammat* Janki Koer assured her that she expected to have her possession in respect of her late husband's *zemindari* formally recorded and then to come and reside in the village. For the present, she said, she expected to return to Cawnpore in a few days. According to Chitia's evidence, *Musammat* Janki Koer actually left Karhwa after nightfall on Thursday, September 18th. She was then in a cart with the boy Durga. The accused Chadammi Lal and Gaya Prasad were also seated in the cart, the accused Raja Ram was driving it and the accused Nannha was following it behind. Similar evidence, though not so definite in respect of time, is given by Sheo Balak Brahmin. Assuming that these witnesses are speaking the truth, this was the last occasion that *Musammat* Janki Koer and Durga were seen alive. We may take next the evidence of Debi Dayal, *Chowkidar* of Karhwa. He deposes that on the morning of September 20th, 1913, while passing through a strip of *jungle* at some distance from Karhwa, he noticed that one of a number of stacks of wood, which had been recently cut and collected in for transport, had been burnt. The fire was still smouldering, and in the fire he observed traces of bones. The matter struck the *chowkidar* as so curious and suspicious that he first communicated with the witness Baldeo, and then went and reported the matter at the Police Station. The Investigating Officer, Sub-Inspector Ata Ullah, collected a number of bones from amongst the remains of the funeral pyre and he also found there, besides certain other articles with which we are not concerned, two keys. With one of these keys he was able to unlock a padlock which *Musammat* Janki Koer had left on the door of the room in the house which she occupied at Cawnpore. We have examined the lock and the padlock in question and, in our opinion, the evidence as to the recovery of these keys is clear and reliable and strongly corroborates the case for the prosecution. There has been one unfortunate matter in connection with the bones taken from the funeral pyre, which has served to complicate the case and has led to a great deal of discussion both in the Court below and in this Court. The bones were first examined by Dr. Wazir Singh, Assistant Surgeon, who came to the conclusion that a number of these charred fragments of bones could be identified as human and as those of a child whose age could be placed at about twelve years. At a later stage after the proceedings in the Court of the Committing Magistrate had commenced, the remains were forwarded to the Civil Surgeon for a second examination.

Lieut. Col. Young, I.M.S., reported and has deposed in evidence that the remains submitted to him included the bones of at least two persons one of whom was probably a child of about twelve and the other almost certainly an adult, and most probably a young adult woman. Unfortunately the custody of the bag containing these bones while they were in the Committing Magistrate's Court was defective, and the proceedings connected with the forwarding of this exhibit for inspection by the Civil Surgeon were irregular. It has thus been left open for the defence to contend that an opportunity was offered for an unscrupulous Police Officer to have added fragments of bones belonging to an adult woman to the contents of the bag after the examination by Dr. Wazir Singh and before they were examined by the Civil Surgeon. We have given our best attention to this point. The theory suggested on behalf of the defence seem to us seriously improbable and unsupported by the evidence. It must be remembered that the prosecution has put into the witness-box the constable Maqdum Bux, the investigating Sub-Inspector and the Court Inspector, all of whom must have been privy to this fraud if one was perpetrated. These witnesses have given evidence which if believed excludes the theory of such a malpractice, and have stood cross-examination on the point. It seems to us far more probable that Dr. Wazir Singh either made a mistake, or was deliberately misled by some person acting in the interests of the accused. At any rate we decline to hold that any such malpractice as is suggested on behalf of the defence can reasonably be inferred from the evidence before us. Even if nothing more than this were certain, namely, that among the remains taken from the funeral pyre were found bones which were the bones of a boy of about twelve years of age, this fact taken in conjunction with the other evidence and with the finding of the keys would justify the Court in inferring that the dead bodies of *Musammat* Janki Koer and the boy Durga were both consumed on this funeral pyre, and this is the conclusion we arrive at from the evidence. There was another witness Pema, *Gadaria*, who has been to some extent discredited by the Sessions Judge. His evidence, if believed, proves directly that the four accused whose cases are now before us set fire to the pile of wood from which the remains, to which reference has already been made, were subsequently taken. His evidence is not directly corroborated, but it is extremely probable that some person or persons would have seen the light caused by the burning of this pile of wood. The fact that Pema found it expedient to leave the village the following morning and to be absent some time is not in itself one which to our minds discredits his evidence. We think it deserves consideration. When the investigation of the case was first taken up by Sub-Inspector Ata Ullah he was unable to find any of the accused. Raja Ram was eventually found and arrested in Karhwa on September 25th, 1913. Nannha was arrested across the Jamna in the Jalaon District on October 10th, 1913. Two days later he was produced before a Magistrate of the first class at Cawnpore. The Magistrate in question has been examined as a witness. It is clear that he took all possible precautions to satisfy himself that the confession which he recorded was voluntarily made. He examined the person of Nannha and detected no marks of hurt of any kind. The confession then made by Nannha begins with the proceedings of September 18th and describes in detail the commission of the murder of *Musammat* Janki Koer and Durga and the subsequent burning of their bodies. It implicates the other three appellants as well as Nannha himself, though the latter does his utmost to minimise his own share in the crime. There is a curious piece of direct corroboration of this confession in the evidence of Kamta, village headman of Karhwa. It seems to us that this witness does not say anything more than he can help against the accused, but he proves that his bullocks were borrowed and used by Chadammi on the night of September 18th, 1913, and that when they were returned to him the following morning a piece of new rope was missing. According to Nannha's confession this rope was used to strangle, first *Musammat* Janki Koer and then Durga, and must, no doubt, have been burnt on the funeral pyre.

This is substantially the case for the prosecution. The accused have met it from

first to last by a blank denial. They have not even any suggestion to put forward as to the identity of the bones found on the funeral pyre. Against most of the witnesses for the prosecution they make suggestions of enmity which seem to be of very little weight. Nannha retracted his confession about a fortnight after it had been made, and about a week after the chief accused, Gaya Prasad and Chadammi Lal, had surrendered themselves and were placed in the lock-up. The accused have produced a quantity of evidence in their defence, most of which is directed towards proving that neither they themselves nor *Musammat* Janki Koer were in the village of Karhwa at any time between the 8th and 20th of September 1913. As regards the human remains which are put forward by the prosecution as the *corpus delicti*, they suggest that it was not an unusual thing for bodies of persons who died in the village to be removed to this spot and burnt. The evidence on this point seems to be most unsatisfactory and is contradicted in the clearest manner by the conduct of Debi Dayal *Chowkidar*, who obviously considered the facts observed by him so unusual as to necessitate a report at the Police Station. The defence, as a whole, has been sufficiently dealt with by the learned Sessions Judge and we do not think it necessary to discuss it further. The confession of Nannha we believe to have been voluntarily made, and we believe further that it contains a substantially true account of the manner in which this crime was committed, though it minimises his own share. Taking into account Nannha's confession, along with the evidence on the record, in our opinion the learned Sessions Judge has rightly convicted the four appellants of the offence charged. The murder had been carefully premeditated and was a singularly brutal one.

We are not prepared to interfere with the sentence, except as regard the order of forfeiture of Chadammi Lal's property passed under section 62, Indian Penal Code. It seems to us that that section should ordinarily be applied in cases of crimes against the state or affecting the safety of the public generally. Moreover, to confirm this order of forfeiture would be to punish the innocent members of Chadammi's family. We set aside this portion of the order. For the rest, we dismiss the appeals of Gaya Prasad, Chadammi Lal, Raja Ram and Nannha and confirming their conviction and sentences direct that the latter be carried out according to law.

Appeal dismissed.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL NO. 206 OF 1914.

August 15, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Scott-Smith.

NAWAB AND ANOTHER—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 300, cl. (iv) —Distinction between fourth clause and first three clauses —Intention.

The cases in which the fourth clause of section 300, Indian Penal Code, has any application are extremely rare, and though it is not easy, and perhaps not desirable, to attempt to define with any strictness the kind of cases in which that clause comes in, still there is one very broad distinction between it and the first three clauses—in the latter the important thing is an *intention* to kill or to hurt, while the fourth clause says nothing about intention.

Appeal from the order of the Additional Sessions Judge of the Gujranwala Division, dated the 11th of February 1914, convicting the appellants.

Mr. *Muhammad Mir*, for the Appellants.

Mr. *Manohar Lal*, for the Government Advocate, for the Respondent.

JUDGMENT.—Nawab and Dullah were placed before the Sessions Court of Gujranwala (Additional) charged with the murder, on 12th June 1913, of Allah Bakhsh *alias* Ilahia. The Assessors found Nawab guilty but absolved Dullah. The learned Sessions Judge, however, found both men guilty and sentenced both to transportation for life. He brought the case under the fourth clause of section 300, Indian Penal Code, and apparently this was the reason for not inflicting the extreme penalty; to this subject we shall return later.

Both convicts have appealed and we have heard the case fully argued by Mr. Muhammad Mir for the appellants and by Mr. Manohar Lal for the Crown, with the result that, notwithstanding the minute and

careful arguments of the former, our opinion is that both the appellants are guilty.

The case for the Crown, briefly put, is that there was bad feeling between the appellants, who are brothers, and the deceased and his son Khuda Dad, that two days before the murder Khuda Dad and his cousin Ghulam Rasul had had a fight with Nawab, appellant, over the lopping of their trees by the appellants and had beaten Nawab, that on 12th June 1913 the appellants came upon deceased in the fields and, setting upon him, beat him with sticks so severely that he died within a few minutes, no less than 14 ribs being fractured resulting in rupture of both lungs and of the spleen.

The medical evidence is clear and is quite in keeping with the testimony of the "eye-witnesses" who are five in number. Of these the most important are the three boys Nawab (7), Sardara (12) and Ranjha (7), P. W. Nos. 4 to 6, who were in the immediate neighbourhood pasturing cattle and whose stories are clear and consistent as to the actual occurrence. Their outcries brought on the scene the two adult eye-witnesses Fakiria (P. W. No. 7) and Rahmat (P. W. No. 8), who from a distance saw the beating going on and whose stories are also *prima facie* straightforward and substantially uniform.

We have said there were five eye-witnesses, though the prosecution have added Khudadad aforesaid, P. W. No. 3, as we have grave doubts about his having seen the actual beating of his father, our reason being that, when he made the "first report" at the *Thana* some three hours after the affair, he said plainly that he was at the village when the news of the outrage reached him (not, as he says in Court, at the Kasianwala well with P. W. Nos. 7 and 8), and that when he arrived on the scene his father was dead. We think this is sufficient ground for holding that he was really no eye-witness, but that, in his not unnatural zeal against the murderers of his father, he has pretended to have seen the actual affair and has persuaded his fellow witnesses to co-operate in the pretence.

The above case has been attacked by the learned Advocate for the appellants on various grounds. He first complains that the eye-witnesses are related to the deceased, but this is only partially true, for the boy Ranjha (P. W. No. 6) and the adult Rahmat (P. W. No. 8) are not so related. The presence of the boys is natural enough: they were with deceased tending the cattle, and the other two witnesses, both of whom work at the aforesaid well, were easily within earshot—see the *Patwari* P. W. No. 2, who says that the well is 160 *karams* only from the scene of the murder.

Then it is asked why other men did not come from other wells close by, two of which are mentioned by the *Patwari* as being about the same distance away as the aforesaid well. This criticism is seen to have little or no force, when it is considered that in the middle of June, unless extra *rabi* crops are being watered, there is not much doing in the way of agriculture, and those other wells may have been for the time devoid of human beings.

Next, a discrepancy is pointed out thus—in the "first report" Khuda Dad said that in the *fracas* two days previously he and his cousin were beaten by the appellants, whereas in Court he said the beating was on the other side. We think nothing of this: in both cases the real meaning is simple, that there was a fight.

Again, much stress is laid on the circumstance that Khuda Dad has changed his story, as stated above; but we are not disposed to look at this matter in a pedantic way. In this country, complainants with a good and true case frequently are foolish enough to try to improve it by devices so transparent that Courts have little difficulty in separating the false from the true; and here we have no hesitation in holding that, while Khuda Dad and his fellows are lying when they represent him as an eye-witness, their story of what occurred is, apart from this, substantially true.

It is hardly necessary to notice seriously the further arguments that there are discrepancies in the statements of the boys as to how many cattle they had with them and as to who stayed and who did not stay by the corpse; and so we turn to the defence. We think nothing of the evidence of Nur Din, D. W. No. 2, who says he was at one of the neighbouring wells that morning and heard nothing, for his own statement makes it clear that he could not have been there. An affair like this could not have gone

through without cries from the victim, if not from spectators; and any man within a few hundred yards must have heard, unless he was deaf or asleep. Then the *alibis* of both Nawab and Dullah are beneath contempt.

The Assessors give no reason for absolving Dullah, except that it did not need two men to pasture fifteen or sixteen goats; but they have overlooked the fact that it is unlikely that one man beating another could have inflicted the very numerous injuries found on the body of the deceased in this case. The reason given seems to us a singularly inadequate one for throwing over a mass of clear and straightforward evidence, and we can only conjecture that lurking in the Assessors' minds may have been the not uncommon sentiment that, for the murder of one man, only one man should be hanged.

This brings us to a consideration of the finding of the learned Sessions Judge and of the sentences passed. Looked at in a plain commonsense way, it seems to us that the crime falls under either the first or the second clauses of section 300, Indian Penal Code. It is hard to see how two ruffians, beating an unarmed man to a jelly and fracturing 14 ribs, could have had any intention short of causing death or causing such bodily injury as they knew was likely to result in death. Can it be supposed that, in inflicting such a cruel and barbarous beating, they really expected or wished their unfortunate victim to survive? No doubt there was only one (not very serious) injury to the head, but in view of the nature of the other injuries this is immaterial; and we really find it hard to see why these men should not have been sentenced to death, though, in the absence of application for enhancement of sentences and in consideration of the long time that has elapsed since the sentences were passed, we are not disposed to take the matter up.

A few words must be added as to the Sessions Judge's application of the fourth clause of section 300. The cases in which that clause has any application are, according to our experience, extremely rare; and, though it is not easy, and perhaps not desirable, to attempt to define with any strictness the kind of cases in which that clause comes in, we think there is one very broad distinction between it and the first three clauses, which should have warned the Sessions Judge against applying it here. In the first three clauses the important thing is an *intention* to kill or to hurt, while the fourth clause says nothing about intention. In the present case intention is clear, whether to kill or to cause dangerous injury, and thus the case is at once taken out of the purview of the fourth clause, which seems to apply to cases in which there is no *wish* to kill or to hurt. We commend these remarks to the learned Sessions Judge's most earnest consideration.

Holding both the appellants guilty of murder we dismiss this appeal.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 178 OF 1914.

September 16, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

REDDI RAMI REDDI—PETITIONER

versus

PUBLIC PROSECUTOR OF KURNOOL—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 164, 195 (b)—Penal Code (Act XLV of 1860), ss. 182, 193—Sanction to prosecute—Jurisdiction of Sessions Judge to set aside sanction where lower Court not subordinate—Contradictory statements—Sanction for perjury, when to be granted.

A Sessions Judge has no jurisdiction to quash, on appeal, a sanction granted by a Sub-Magistrate for an offence under section 182 of the Indian Penal Code if the latter is not "subordinate" to the Sessions Judge within the meaning of that term used in section 195 (*b*) of the Criminal Procedure Code.

It is necessary that a Court granting sanction for prosecution under section 193, Indian Penal Code, in the case of contradictory statements should be empowered to sanction prosecution in respect of each of the statement said to be contradictory of each other.

Petition praying that in the circumstances stated therein the High Court will be pleased to revoke the sanction granted by the Sessions Judge of Kurnool for the prosecution of the petitioner (respondent)

in Criminal Miscellaneous Petition No. 5 of 1914 on the file of the Sessions Court of Kurnool, in Sessions Case No. 54 of 1913, on the file of the said Sessions Court of Kurnool.

Dr. *S. Swaminadhan* (with him Mr. *O. Lakshmanaswami*), for the Petitioner.

The *Public Prosecutor*, for the Government.

ORDER.—As regards the sanction for prosecution under section 182, Indian Penal Code, neither the Police Officer nor the Sub-Magistrate to whom the reports, Exhibits H, H-1, were sent is a subordinate of the Sessions Judge within the meaning of section 195, clause 7, Criminal Procedure Code, so that the Sessions Judge's order of sanction is *ultra vires*.

The same must be said of the order sanctioning prosecution for an offence under section 193, Indian Penal Code, in giving contradictory statements. It is necessary that a Court granting sanction in such circumstances should be empowered to sanction prosecution in respect of each of the statements said to be contradictory of each other. In the present case one of the two contradictory statements was made before the Sub-Magistrate in the course of a local inquiry under section 164, Criminal Procedure Code, and for the reason above indicated, the Sessions Judge had no power to give sanction in respect of this.

The sanction is set aside. It is open to the Public Prosecutor to apply to the Sub-Magistrate for a fresh sanction in respect of the two statements made before him.

Sanction set aside.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 677 OF 1913.

November 17, 1913.

Present:—Mr. Justice Johnstone and Mr. Justice Beadon.

Musammat FATIMA *alias* FATTAN—APPELLANT

versus

EMPEROR—RESPONDENT.

***Evidence Act** (I of 1872), s. 122—Wife charged with murdering her step-son—Confession made to husband—Husband's evidence inadmissible—Offence 'against' a person—Confession in Police custody, retracted, value of.*

Where a woman is charged with the murder of her step-son, her husband's evidence, in so far as it relates to the alleged confession by her to him and to the alleged pointing out of the body by her to him alone, is inadmissible in view of section 122, Indian Evidence Act, and of the interpretation put upon it in *Milkhi* v. *Emperor*, 19 Ind. Cas. 705; 14 Cr. L. J. 273; 218 P. L. R. 1913; 24 P. W. R. 1913 Cr. An offence 'against' a person within the meaning of the section is an offence calculated to injure his person or property or reputation—as in cases of defamation—and does not include an offence against a son, though such offence may cause to the father grief of mind.

A confession by a woman in Police custody, to which she has been relegated by her own husband and to which she was remanded after the confession was made, is of little value when it is found to have been retracted only five days later before the same Magistrate.

Queen-Empress v. *Mahabir*, 18 A. 78, referred to.

Appeal from the order of the Sessions Judge, Ludhiana Division, dated the 9th August 1913.

Mr. *Brij Lal*, for the Appellant.

JUDGMENT.

JOHNSTONE, J.—In this case *Musammat* Fatima *alias* Fattan, wife of Abdullah, *Arain*, of *Mohallah* Chhauni, Ludhiana, has been convicted by the Sessions Court of the crime of murdering her step-son, Abdul Karim, a little boy of three and a half years of age, by strangulation with her hands, and, in view of the fact that she was pregnant when under trial—she has since then given birth to a child—instead of a capital sentence the more lenient punishment of transportation for life has been inflicted. She has appealed, declaring her innocence, and, we have heard her case argued by Mr. Brij Lal, her Counsel. We have given this somewhat difficult case our most anxious consideration, and I have arrived at the conclusion that the evidence on the record, so far as it is in law admissible and relevant, is insufficient to support the conviction.

The theory of the prosecution is that on the afternoon of 17th June last she took the child out to a pond to the south of the canal bungalow and there throttled it with her hands after removing from its neck a silver *tawiz* on a black thread, and then threw the body and the *tawiz* into

the water. The learned Sessions Judge has found this theory established upon evidence which may be classified thus :—

(*i*) the confession of the appellant before the Committing Magistrate on 21st June 1913 ;

(*ii*) the previous alleged confession by her to her husband on 18th June and the alleged pointing out by her on that day to him alone of the body floating in the pond ;

(*iii*) the production by her of the *tawiz* and thread from the pond on the 19th June at 3 P. M. in presence of the Police and others ;

(*iv*) the depositions of *Musammat* Rani, wife of Abdullah's brother, Ali Sher, and of *Musammat* Mehri, wife of Rukn-ud-din, to the effect that they had seen appellant carrying the child away from home on the afternoon of the 17th June.

In admitting the evidence under head (*ii*) above, the learned Sessions Judge misunderstood section 122 of the Indian Evidence Act. In view of the wording of that section and of the interpretations put upon it in *Milkhi* v. *Emperor* (1), I have no hesitation in holding that that evidence should never have been admitted ; and the effort must be made to imagine what the case against the appellant would amount to if it had been excluded. The learned Sessions Judge has taken it that, because the alleged murder was of Abdullah's son, therefore, the crime was committed "against" him; but I am unable to agree in this. An offence " against " a person is an offence calculated to injure his person or property or reputation, as in cases of defamation, and does not, in my opinion, include an offence against a son, though such offence may cause to the father grief of mind.

Then a confession by a woman in Police custody, to which she had been relegated by her own husband and to which she was remanded after the confession was made, is of little value when we find it retracted only five days later before the same Magistrate: *cf. Queen-Empress* v. *Mahabir* (2) and many other rulings. Her explanation is that an officious Police Officer assured her that confession was her best course and swore on the *Koran* that on confessing she would be released.

The production by her of the *tawiz* and thread (*iii*) is supported by very unsatisfactory evidence. Only Pala Ram, P. W. No. 5, whose statement is a very bold and brief one, supports the Police here, and there is no evidence to show that the so-called "production" was genuine and voluntary.

There remain (*iv*) the depositions of the women Mehri and Rani. Intimately connected with them is the matter of the conduct of Abdullah when he heard the boy was missing and the nature of the three successive reports he made to the Police on 17th June at 9 P. M., on 18th June at 7 A. M. and on 18th June at 5 P. M. In the first two he simply said the child was missing and asked for help; in the 3rd he simply said the body had been found in such a pond. In none of the reports did he mention his wife or the women Rani and Mehri as knowing anything, and it was only after the Sub-Inspector of the *Sadr* Police Station had gone to the spot, taken out the body, made statement No. 1 and despatched the corpse that Abdullah told the tale on which the case for the prosecution is based. His own various recorded statements and those of *Musammat* Rani and *Musammat* Mehri, albeit they contradict themselves and each other in such a way as to make the exact facts doubtful, at least show this much that, if general credence is to be accorded to their stories, probably before the first report of 9 P. M. on 17th June Abdullah knew the stories told by *Musammat* Rani or *Musammat* Mehri or both of them, and yet made no mention of them in any one of his first three statements to the Police. Here we have this problem to solve, or at least to suggest a solution for—did Abdullah, though he had heard their stories from *Musammat* Rani and *Musammat* Mehri implicating his wife, for some reason refrain from naming her to the Police, or are the stories of these two women fabrications? The learned Sessions Judge inclines to the former idea, surmising that Abdullah was anxious not to get his wife into trouble, and I am far from saying that there is nothing to be said for this view. But it must not be lost sight of that it was

(1) 19 Ind. Cas. 705; 14 Cr. L. J. 273; 218 P. L. R. 1913; 24 P. W. R. 1913 Cr.

(2) 18 A. 78.

Abdullah's only son that had been made away with; if, then, he had reason to suspect even his wife of such a crime against nature, a crime that deprived him of his only son, I very much doubt whether any feeling for his wife would have prevented him from speaking against her. I have said above that the various recorded statements of Abdullah and of the two women aforesaid differ in important ways, and I proceed to show that this is so. On 18th June to the Police Abdulla said that *Musammat* Mehri met him on the road and told him what she knew on 18th June in the forenoon, and never mentioned *Masammat* Rani at all. Next day he told the Police that *Musammat* Mehri came to his house on forenoon of 18th and told him her story, and *then* he met *Musammat* Rani who told him hers. To the Committing Magistrate he said that *Musammat* Rani first met him on evening of 17th June and told him she had seen appellant and the child earlier going towards the *mandi*, then *Musammat* Rani came to him at Haji Karim Bakhsh's house on the morning of 18th June and told him much the same, and then on his way home he met *Musammat* Mehri, who told him her tale. Finally, to Sessions Judge he said he came home, found child missing, made a short search, returned to his own house and found *Musammat* Rani there, heard her story and then made report at 9 P. M., hearing *Musammat* Mehri's story next morning. There are also differences as to what the women told him. *Musammat* Rani in Sessions Court says she told Abdullah what she knew first thing on evening of 17th June. In view of all this and of Abdullah's conduct I find it impossible to be certain that appellant is guilty. In the Sessions Court she roundly accuses one *Musammat* Sahran of the murder and says she (appellant) has been charged as being stepmother of the victim; and in this connection it is perhaps not insignificant that *Musammat* Rani says Abdullah told her that, after the body was found, appellant said to him that *Musammat* Sahran had joined her in committing the crime.

Further, I can find no adequate motive for the crime. *Musammat* Rani, who is certainly not inclined to favour appellant, has to admit that relations between appellant and Abdullah and the child had always been friendly and even affectionate. Then the little difference between husband and wife as to the purchased land had been amicably settled by his acceding to her wishes, and the difference regarding the manufacture of new *phuls* seems to me a shadowy affair, the details of which are not clear and which at the worst hardly furnishes motive for the murder. It is noteworthy here, both in regard to motive and in regard to the credibility of the confession, that in the confession (21st June 1913) appellant makes no mention of either of these two disputes but merely says she killed the boy because her husband beat her and turned her out and locked the door on her. This at all events is untrue; and the addition of this untrue statement throws some light on the circumstances under which her confession was made. It seems to me, in the interests of the appellant, a not unfair conjecture that she was told by some one in authority, or supposed authority, that nothing would be done to her if she could show that the crime she was taking on herself was the result of an act of Abdullah's displaying gross tyranny and cruelty.

The net result is that I find no sufficient proof against this woman and I would accept her appeal and, setting aside conviction and sentence, set her at liberty.

BEADON, J.—After full consideration, I with some hesitation, agree with the view taken by my learned colleague.

In view of section 122, Indian Evidence Act, and *Milkhi* v. *Emperor* (1) it must be held that the husband's evidence, in so far as it relates to the alleged confession by his wife to him and to the alleged pointing out of the body by her to him alone, has been wrongly admitted, and the task of excluding this evidence from consideration while weighing the remaining evidence is not an easy one.

It is not clear why the appellant should have taken the *tawiz* and thread of the child and should have thrown them separably into the same pond as the body and the alleged production of the *tawiz* and thread is open to suspicion.

My learned colleague has pointed out serious discrepancies which throw doubt on the evidence of *Musammat* Rani and *Musammat* Mehri and there remains only the confession to a Magistrate.

This confession was retracted a few days after it was made and it contains a false

statement as regards motive.

On the whole there seems to be a doubt of which the appellant must get the benefit and I concur with my learned colleague in acquitting her.

Appeal accepted.

ALLAHABAD HIGH COURT.

FIRST CRIMINAL APPEAL No. 5 OF 1914.

May 13, 1914.

Present:—Mr. Justice Rafique and Mr. Justice Piggott.

BARAN BARAI—OPPOSITE PARTY—APPELLANT

versus

MATA PRASAD—APPLICANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195 (6)—Sanction to prosecute—Sanction granted in appeal—Further appeal to High Court, whether lies.

No appeal lies to the High Court from an order of a District Judge granting sanction to prosecute under section 195 (6) of the Criminal Procedure Code, 1898.

Kanhai Lal v. *Chadami Lal*, I Ind. Cas. 5; 31 A. 48; A. W. N. (1908) 290; 5 M. L. T. 55; 9 Cr. L. J. 63; 6 A. L. J. 1, *Muthusawmi Mudali* v. *Veeni Chetty*, 30 M. 382; 17 M. L. J. 266, 2 M. L. T. 239; 6 Cr. L. J. 102 (F. B.), referred to.

First appeal from an order of the District Judge of Gorakhpur.

Mr. *P. L. Banerji*, for the Appellant.

Mr. *Jang Bahadur Lal*, for the Respondent.

JUDGMENT.—These are three connected first appeals which raise substantially one single point. An application under section 195 of the Code of Criminal Procedure for the grant of sanction to institute certain prosecutions for the offence of giving false evidence under section 193 of the Indian Penal Code was made in the Court of the Munsif of Gorakhpore City and was dismissed by him. The party applying for sanction carried the matter to the Court of the District Judge, as he was entitled to do under clause (6), section 195, of the Code of Criminal Procedure, with the result that the District Judge passed an order granting the sanction. The parties against whom the sanction was granted have filed these three connected appeals in this Court.

A preliminary objection is taken that under the provisions of section 195 of the Criminal Procedure Code aforesaid, it was not intended that the question of granting or withholding a sanction should be carried to a third Court. There is clear authority of a Bench of this Court in support of this objection in the case

of *Kanhai Lal* v. *Chadami Lal* (1), where the facts were precisely similar to those of the case now before us. We have been asked to reconsider this ruling, both with reference to the decision of a Full Bench of the Madras High Court in *Muthusami Mudali* v. *Veeni Chetty* (2) and to other cases referred to in the above-mentioned ruling of this Court. So far as we are aware the reported decision of this Court has never been dissented from and has been accepted in this Court for the last five or six years. On the principle of *stare decisis* we do not think it expedient to reconsider that decision, or the arguments on which it was based.

We hold accordingly that no appeal lies to this Court against the orders complained of and we dismiss each of the three appeals now before us with costs.

Appeal dismissed.

(1) 1 Ind. Cas. 5; 6 A. L. J. 1; 31 A. 48; A. W. N. (1908) 290; 5 M. L. T. 55; 9 Cr. L. J. 63;

(2) 30 M. 382; 17 M. L. J. 266; 2 M. L. T. 239, 6 Cr. L. J. 102 (F. B.).

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 351 OF 1914.

May 22, 1914.

Present:—Mr. Justice Chamier.

KUNDAN AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 118, 123—Failure to furnish security for good behaviour—Solitary confinement for rigorous imprisonment, sentence of, whether can be passed.

A Magistrate, while ordering rigorous imprisonment under section 123 of the Criminal Procedure Code for failure to furnish security for good behaviour, is not empowered to order a portion of the imprisonment to be spent in solitary confinement.

Criminal reference made by the Sessions Judge of Budaun.

JUDGMEMT.—In this case the Magistrate passed an order under section 118 of the Code of Criminal Procedure and when the security demanded was not forthcoming, directed that the persons concerned should be rigorously imprisoned for one year, of which two months would be spent in solitary confinement. He had no power to order solitary confinement in a case of this kind. So much of his order as directs that Kundan, Sumer Singh and Kallan Shah be kept in solitary confinement for two months is set aside.

Order modified.

MUHAMMAD NASIR v. RAM KARAN SINGH.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 30 OF 1914.
July 17, 1914.
Present:—Mr. Justice Rafique.
MUHAMMAD NASIR—DEFENDANT—APPELLANT
versus
RAM KARAN SINGH—PLAINTIFF—RESPONDENT.

*Evidence Act (I of 1872), s. 74—Public document—*Dakhalnama, *copy of, whether admissible in evidence without proof.*

As a *dakhalnama* is a public document its copy is admissible in evidence without proof.

Second appeal from the decision of the District Judge of Azamgarh, dated 5th August 1913.

Mr. *Parmeshwor Dayal*, for the Appellant.

Mr. *J. Mukerji*, for the Respondent.

JUDGMENT.—It appears that plaintiff-respondent instituted a suit in the Court of the Munsif of Mahmudabad on the 3rd of October 1912 for the recovery of possession of a grove and for damages, on the allegation that the said grove belonged to him from which he had been wrongfully dispossessed by the defendant-appellant. The latter resisted the suit on various grounds. It was alleged in defence that the plaintiff-respondent had not been in possession of the grove within limitation and that twelve trees only out of the said grove belonged to the defendant-appellant, half of which he owned as *zemindar* and the other six he had purchased. The first Court dismissed the claim on the ground that the plaintiff had failed to prove his title and his possession over the grove within limitation. On appeal the learned District Judge disagreed with the first Court and held that the plaintiff had proved his title as also his possession over the grove within limitation. The claim was accordingly decreed.

The defendant has come up in appeal to this Court. In order to understand the grounds taken in the memorandum of appeal it should be observed that during the hearing of the appeal in the Court below a document which was refused by the first Court was admitted by the learned Judge in evidence. The said document was a *dakhalnama*, dated the 12th of December 1889, and was filed on behalf of the plaintiff. The Court of first instance declined to take it on the ground that it was a copy and had not been proved. The learned Judge admitted it, and I think rightly, on the ground that it was the copy of a public document and required no proof. The appellant challenges the title of the plaintiff to the grove in suit. It is said that the two documents relied upon by the learned Judge, *viz.*, the *dakhalnama* and the report of the *Kanungo* do not prove the plaintiff's title. All that the *dakhalnama* shows is that the plaintiff or his ancestors got possession over seven trees in plot No. 576, *i. e.*, the plot upon which the grove in suit is situate. As to the report of the *Kanungo* it is said that all that it shows is that the plaintiff or his ancestor had only three trees in plot No. 576. It is argued that the onus was on the plaintiff to prove his title to the grove and as the said two documents on which the learned Judge has based his evidence are inconclusive, the claim of the plaintiff must fail. It is true that the *dakhalnama* relates to seven trees only. The report of the *Kanungo* refers really to more trees than three trees as has been pointed out by the lower Appellate Court. However the two documents—the *dakhalnama* and the report of the *Kanungo* taken together—do not make out the title of the plaintiff to the entire grove. If those documents were the only evidence in the case the contention for the appellant would be correct. But I find that there is another document on the record, and a much older one, which supports the title of the plaintiff. It is a judgment of the Munsif of Mahmudabad, dated the 7th of February 1885, in a case between the ancestor of the plaintiff and three sets of defendants in which the trees in plot No. 576 as also of many other plots were in dispute. It was there declared that the ancestor of the plaintiff was the proprietor of all the trees in plot No. 576 and the judgment of the Munsif was upheld both by the District Judge and by this Court. The title of the plaintiff, therefore, stands proved.

The appeal fails and is dismissed with costs.

Appeal dismissed.

KHITISH CHUNDER ROY *v.* BHIKAN MAMUD PRAMANIK.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 22 OF 1912.

July 8, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Sir Asutosh Mookerjee, KT.

KHITISH CHUNDER ROY AND OTHERS —DEFENDANTS—APPELLANTS

versus

BHIKAN MAMUD PRAMANIK AND OTHERS—PLAINTIFFS—RESPONDENTS.

Lease for definite term granted for general purposes —Heritable and transferable.

A lease granted for general purposes and for a term of no less than 105 years is assignable, especially where the conduct of the parties points to its having been regarded on both sides as transferable and treated as such.

Where the interest under a lease is created for a definite term, it is heritable.

Maharaja Tej Chand Bahadur v. *Sri Kanth Ghose*, 3 M. I. A. 261; 6 W. R. (P. C.) 48; 1 Suth. P. C. J. 152; 1 Sar. P. C. J. 27; 18 E. R. 497, referred to.

Letters Patent Appeal against the following decision of Mr. Justice Coxe, dated the 30th January 1912, in appeal from Appellate Decree No. 1203 of 1909, against the decree of the Officiating Subordinate Judge of District Rungpur, dated the 1st March 1909, reversing that of the Munsif, 2nd Court of Kurigram, dated the 29th March 1904.

COXE, J.—The appellant in this case was the *ijaradar* of a certain *taluk* within which the land in suit was situated. This *ijara* was terminable in 1967. She granted a *patta* of the land in suit to certain persons for the period of her *ijara*. The plaintiff purchased a portion of the land from these lessees. He was dispossessed by the appellant and brought this suit for recovery. It was decreed by the lower Appellate Court and the case then came up to this Court on second appeal. The learned Judge, who disposed of it, held that the *patta* granted by the appellant did not on face of it create a permanent lease. He went on to observe: "If during a long series of years, the successors of the lessees were recognised as tenants having the same rights as the lease granted to the original tenants and if the assignees of such successors were recognised and were dealt with in the same way as the original lessees themselves, the presumption might then arise that the instrument was intended to create an estate of inheritance transferable by the holders thereof for the time being." He remanded the case to the lower Appellate Court to come to a finding on this point, namely, whether having regard to the conduct of the parties, the lease should be regarded as creating an estate of inheritance which was, therefore, transferable. If this interest was transferable, then the plaintiff was entitled to succeed; if not, he was not so entitled.

On the case going back on remand, the learned Subordinate Judge held that the conduct of the parties showed that the tenancy created by the lease was transferable and heritable within its term. He based this decision on the fact that one transfer had been recognised by the then landlord and also on the fact that "for about 14 years the successors and transferees of the lessees were in possession and paid rent without being questioned of their rights."

It has been argued on behalf of the appellant that these premises do not justify the conclusion at which the learned Subordiante Judge has arrived: and reference has been made to the case of *Nilratan Mandal* v. *Ismail Khan Mahomed* (1).

Now, no doubt, the evidence that has been adduced in this case is far inferior to that adduced in the case of *Nilratan Mandal* v. *Ismail Khan Mahomed* (1). That, however, was a regular appeal in which this tenant was entitled to go into the evidence and to weigh it. It appears to me that the question raised in this appeal is one merely of weighng evidence. The facts on which the learned Subordinate Judge relies were evidence, so far as they went, in favour of the conclusion at which he has arrived. It must be conceded that they were not strong evidence; but it is not, in my opinion, within my power to weigh the evidence myself or to say that the Court below attached undue importance to it.

It has also been argued that the learned Subordinate Judge misconstrued Exhibit 3 which indicated a recognition of a transfer of the tenancy, not by the appellant who

(1) 32 C. 51; 31 I. A. 149; 8 C. W. N. 895.

was the *ijaradar* of the land, but by the *dar-ijaradar*. I do not think, however, that the lower Appellate Court was misled in this matter. No doubt, he uses the word " *ijaradar*", but he goes on to say : " It is contended that unless the plaintiff shows that the *ijaradar* had power to recoginse the transfer and to effect a mutation of name, it has no binding force against the landlord defendant " so that it is quite clear that he fully realised that the *ijaradar*, who granted Exhibit 3, was quite a different person from the landlord defendant. I do not think, therefore, that he has misconstrued this document or misunderstood its effect; and that being so, I cannot say that he has committed any error which can be corrected by me in second appeal.

The appeal accordingly must be dismissed with costs.

Babus *Dwarka Nath Chuckerbutty* and *Priya Sanker Mazumdar*, for the Appellants.

Babu *Purna Chunder Roy*, for the Respondents.

JUDGMENT.—This is a suit to recover possession of land. The plaintiffs based their title on a lease, creating a term for one hundred and five years, running from 1862 to 1967. If they acquired the rights created by that lease, then unquestionably they are entitled to succeed in this suit. They are resisted by the reversioner on the lease who claims that the interest under the lease was neither heritable nor transferable. The case came before this Court and was heard by Mr. Justice Sarada Charan Mittra sitting singly. He remanded the case for the determination of the question as to the interpretation of the document in the light of the conduct of the parties, and in this he seems to have had in view the interpretation of the document in relation to heritability as also transferability. So far as the heritability is concerend, I think there was no necessity to send back the case, for it has been decided by the Privy Council in *Maharaja Tej Chand Bahadur* v. *Sri Kanth Ghose* (2) that where, as here, there is a definite term, it is heritable.

The only question then is whether it is transferable. The lease was apparently granted for general purposes and for a term of no less than 105 years. These facts might perhaps be considered as themselves sufficient to show that the interest was assignable, as was the view of Sir Barnes Peacock in *Banee Madhab Banerjee* v. *Joy Kishen Mookerjee* (3), where the circumstances were somewhat similar to the present. But over and above that, we have here the fact that the Subordinate Judge has held that the conduct of the parties points to its having been regarded on both sides as transferable and treated as such. It seems to me, therefore, that the plaintiffs have made out their case, and are entitled to a decree for possession. This has been awarded to them by the Subordinate Judge, and we must, therefore, dismiss the appeal, and agree with Mr. Justice Coxe in confirming the decree of the lower Appellate Court.

The appellant must pay the costs of this appeal.

Appeal dismissed.

(2) 3 M. I. A. 261; 6 W. R. (P. C.) 48; 1 Suth. P. C. J. 152; 1 Sar. P. C. 27; 18 E. R. 497.

(3) 7 B. L. R. 152; 12 W. R. 495.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1514 OF 1912.

July 24, 1914.

Present:—Mr. Justice Rafique.

MATA DAYAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

DEBI PRASAD—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 194—One co-sharer alone, whether can sue for arrears of rent.

One of the several co-sharers cannot alone sue a tenant to recover the arrears of rent unless there is a local custom or special contract to the contrary.

Second appeal from the decision of the District Judge of Allahabad, dated 28th August 1912.

FACTS.—The plaintiff brought a suit for arrears of rent. One of the pleas in defence was that there being other co-sharers besides the plaintiff, the latter alone was not entitled to sue. The Court of first instance decreed the claim in part. The lower Appellate Court confirmed the decree.

Mr. *Haribans Sahai*, for the Defendants-Appellants:—The plaintiff alone is not entitled to sue. If the other co-sharers did not join as plaintiffs, they could have been arrayed as

defendants. The provisions of section 194 of Act II of 1901 are very explicit on the point. I rely on *Mahadeo Singh* v. *Bachu Singh* (1), *Ajudhia Prasad* v. *Bakar Sajjad* (2) and S. A. No 332 of 1905 decided on 11th January 1907.

Dr. *Sunder Lal*, for the Respondents:—Section 194 does not apply to the facts. The Revenue Court having determined the rent as against the defendants at the instance of the plaintiff, and he being solely entitled to the rent, the defendants' plea based on section 194 cannot succeed. In any case, the suit should not fail and the Court could make the other co-sharers parties, if their presence was necessary.

Mr. *Haribans Sahai* pointed out the ruling of the Full Bench case of *Debi Prasad* v. *Bhagwan Din* (3) where it was held that the defendants were the tenants of all the proprietary body and not of the plaintiffs alone.

JUDGMENT.—The two appeals Nos. 1514 and 1515 of 1912 are connected. They arise out of two suits brought by Lala Debi Prasad for arrears of rent against 2 sets of tenants. One of the pleas in defence was that Lala Debi Prasad being only one of the co-sharers could not sue alone for the recovery of the arrears of rent. The plea was based upon the provisions of section 194 of the Tenancy Act. The Courts below disallowed the said plea and decreed the claims. In the two appeals before me the only ground urged is that the lower Courts were in error in not giving effect to the provisions of section 194 of the Tenancy Act. It was decided in a case between Debi Prasad and some of the co-sharers that the tenants-defendants in the present suits were the tenants of all the co-sharers. The language of section 194 of Act II of 1901 is clear. One of the several co-sharers cannot sue alone unless there is a local custom or special contract to the contrary. No such local custom or special contract is alleged to exist in the present case. The contention for the appellants, therefore, prevails. I accept the appeal, set aside the decree of the lower Court and dismiss the claim of the plaintiff-respondent. In the circumstances of the case I make no order as to costs.

Appeal allowed.

(1) 11 A. 224; A. W. N. (1889) 87.
(2) 5 A. 400 at p. 402; A. W. N. (1883) 79.
(3) 16 Ind. Cas. 399; 10 A. L. J. 437; 35 A. 27.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 60 OF 1912.

July 1, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

UMA SINGH AND OTHERS—APPELLANTS

versus

RAI TARINI PROSAD BAHADUR—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 52 (6), presumption under—Rent determined by reference to area—Consolidated rent.

If once it be held that a Court is entitled to make the presumption permitted, though not made obligatory, by section 52 (6) of the Bengal Tenancy Act, it follows that the rent is one to be determined by reference to the area and is not a consolidated rent.

Letters Patent Appeal against the following decision of Mr. Justice N. Chatterjea, dated the 2nd July 1912, in appeal from Appellate Decree No. 2487 of 1910, against that of the District Judge of Bhagalpur, dated the 20th April 1910, affirming that of the Settlement Officer at Camp Kharia, dated the 16th October 1909.

N. CHATTERJEA, J.—This appeal arises out of proceedings for settlement of rent under section 105 of the Bengal Tenancy Act. The tenants are the appellants and two grounds have been urged in support of the appeal.

The *first* is that the special Judge has misunderstood the provisions of section 52, sub-section (6), and that he has not properly considered all the elements which must be established under section 52 of the Bengal Tenancy Act before additional rent can be assessed in respect of excess lands, and the *second* that the special Judge has not considered the question whether apart from the provisions of section 50 of the Bengal Tenancy Act the facts proved in the case give rise to an inference that the rents of the tenants were fixed in perpetuity.

As regards the first contention I do not think that the special Judge has mis-

understood the provisions of sub-section 6 of section 52 of the Bengal Tenancy Act. In order to entitle a landlord to claim additional rent in respect of excess lands, he must establish that the tenant is in possession of lands in excess of those for which he is paying rent. The fact that the tenant is in possession of lands in excess of the area entered in the *zemindari* papers and in his rent receipts, would not necessarily prove that he holds lands in excess of the area for which rent is paid by him. It must be shown that the Settlement was made on the basis of a measurement in which on a fresh measurement made by the same length of measure it has been found that the land is in excess of the area let out to him. Accordingly the landlord has to prove in each case that the area entered in the *zemindari* papers or rent receipts was so entered after actual measurement. Sub-section 6 of section 52 of the Bengal Tenancy Act, however, provides that if the landlord proves that at the time the measurement on which the claim is based was made there existed a practice of Settlement being made after measurement of the land assessed with rent, it may be presumed that the area specified in the counterfoil rent receipt was entered in it after measurement, so that if the landlord can prove such a practice, it will be presumed that the area entered in the rent receipt was entered after measurement though he is not able to prove that, as a matter of fact, the lands in the particular case were settled after measurement. It was contended on behalf of the appellant that all that sub-section 6 means is that if the practice mentioned therein is proved, the entry in the last *dakhila* or *kabuliat* in a series of adjustments of rents is to be presumed to have been made after measurement and not that the original Settlement was so made. But if there is no adjustment subsequent to the original Settlement and a practice is proved to have existed at that time, the presumption would apply to the original Settlement, and it does not appear that in the present case there was any subsequent adjustment. Assuming that there was any it would not, in my opinion, make any difference, because if the last entry is to be presumed to have been made after measurement (it being proved that there was a practice at the time of Settlement after measurement), and by the present measurement by the same length of measure the land is found to be in excess, the landlord will be entitled to additional rent unless it is shown that the rent was a consolidated one.

The present case does not rest on presumption alone. The learned Judge finds that there is evidence of practice of Settlement after measurement and though the evidence was not very strong: it has received the strongest possible corroboration from admissions, by certain tenants themselves who were examined as witnesses in the case, which whether they amount to admissions of actual measurement or not certainly show that the areas as entered in the landlord's papers were found by the tenants themselves to be correct. He also finds that the rents paid by the tenants were paid upon the areas as shown in the landlord's papers. The findings of the Court below are conclusive upon this matter.

The learned Pleader for the appellant, however, contended that the mere fact of a presumption arising under sub-section 6 of section 52 of the Bengal Tenancy Act as to the Settlement having been made after measurement would not be sufficient to establish excess area and that the special Judge should have considered whether other elements of section 52 had been established, for instance whether the rent was a consolidated rent for an area within the specified boundaries irrespective of its precise quantity at the inception of the tenancy, but the Court is to go into the questions mentioned in sub-section 2 of section 52 if so *required by any party to the suit*. It was for the tenants to raise such questions, but no such question appears to have been raised in the Courts below. In the case of *Lukhi Narain Sarouji* v. *Sri Ram Chandra Bhunya* (1) where a landlord proved that lands were once measured according to a known standard, that the rent was assessed on that measurement, that the area as well as the rent payable was entered in the *kabuliats* and that the area of the lands measured by the same standard was in excess of the original area, it was held that unless it were established that the rent payable was a consolidated rent within specified boundaries irrespective of the precise quantity, the landlord was entitled to claim additional rent.

(1) 11 Ind Cas. 212; 15 C W. N. 921; 14 C. L. J. 146.

The principle laid down above applies to the present case.

Besides the Court of Appeal below has come to the conclusion that rents were paid with reference to the areas shown in the landlord's papers, which negatives the suggestion of the rent having been a consolidated one irrespective of the precise quantity let out. The first contention accordingly fails.

It was next contended that the Court below ought to have considered the question whether the rent was fixed in perpetuity from the time it was being paid at an uniform rate, though the original rent might have been varied or the holding might have come into existence after the Permanent Settlement.

It is true a presumption as to fixity of rent may be drawn from long and uniform payment of rent apart from and independently of the provisions of section 50 of the Bengal Tenancy Act. But no such question was raised in the Court below. The tenants nowhere set up any contract subsequent to the Permanent Settlement whereby the rent was fixed and the Court cannot be asked to presume a contract where no such contract is set up.

This contention also, therefore, fails and the appeal is dismissed with costs.

Babus *Umakali Mookerjee*, *Joges Chunder Roy*, *Khetter Mohan Sen* and *Ambicapada Chowdhry*, for the Appellants.

Babus *Dwarka Nath Chuckerbutty*, *Nares Chunder Sinha*, *Upendra Nath Mookerjee*, *Janoki Nath Pal* and *Birbhusan Dutt*, for the Respondents.

JUDGMENT.—It appears to us that this is really a very simple case and one which we can dispose of very briefly: If once it be held that the Court was entitled to make the presumption permitted, though not made obligatory, by sub-section (6), it follows that the rent is one to be determined by reference to the area and is not a consolidated rent. The first point, therefore, to determine is whether the Court was entitled to make the presumption; we think it was. If that be so, we think there is an end of the case because it supports the conclusion that the rent was not consolidated but one to be determined by reference to the area. The area has been found and justifies the conclusion of the lower Appellate Court.

We must, therefore, dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL FROM ORDER NO. 432 OF 1912.

March 11, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

DOYAL CHANDRA MANDAL—DECREE-HOLDER—APPELLANT

versus

KAURI (CHARAN) NASKAR AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XX, r. 9—Decree for possession of immoveable property—Boundaries given—Decree, whether indefinite or incapable of execution—Evidence—Boundaries, determination of.

Where a decree for possession of immoveable property specifies the boundaries and the property can be identified thereby the decree is not indefinite and incapable of execution and the decree-holder can obtain delivery of possession.

The boundaries in such cases should be determined on evidence to be adduced by the parties.

Dwarkanath Roy v. *Jannobee Chowdhrain*, 19 W. R. 81; *Dirbaree Sayal* v. *Fatu Dhalee*, 23 W. R. 285; *Mohomed Ismail* v. *Lalla Dhundhur Kishor*, 25 W. R 39 and *Ajoodhia Lall* v. *Gumani Lall*, 2 C. L. R. 134, distinguished.

Appeal against the order of the District Judge of 24-Parganas, dated the 3rd of May 1912, modifying that of the Munsif, first Court of Baruipore, dated the 22nd of January 1912.

Babus *Mohendra Nath Roy* and *Sasi Sakhar Bose*, for the Appellant.

Babus *Dwarkanath Mitter*, *Biraj Mohan Mozumdar*, *Hem Chandra Sen* and *Sasadhar Roy*, for the Respondents.

JUDGMENT.—This is an appeal by the decree-holder against an order by which his application for execution has been dismissed, on the ground that the decree is vague and indefinite and is incapable of execution. The decree was made on the 26th June 1907 in a suit for recovery of possession of immoveable property which had been dismissed by the Court of first instance but was decreed on appeal. The decree is in these terms:—"The claim of the plaintiff is decreed; let it be declared that the land

within the boundaries mentioned below and measuring 145 *bighas* is the *mourasi mokarari* leasehold land of the plaintiff-appellant; let the plaintiff-appellant obtain possession of the land mentioned and let it be declared that the southern boundary of the decreed land is the land of Debnarain Naskar." In a schedule to the decree the boundaries were described in these terms: "Southern boundary: The leasehold land of Dharmadas Mandal recently purchased by Haribrahma. Eastern boundary:—The western bank of the silted-up channel of Chowsa river. Southern boundary: The land of Debnarain Naskar. Western boundary: The eastern bank of Horailkhal." The land, it will be observed, is bounded on the east and the west by two water-courses and on the north and south by the leasehold lands of Dharamadas Mandal and Deb Narran Naskar respectively. The decree-holder applied for delivery of possession of the land decreed to him by way of execution. A Commissioner was appointed to hold a local investigation and to compare the map with the locality. He determined what appeared to him to be the site of the land decreed to the plaintiff. The execution Court, however, did not agree with the Commissioner in his demarcation of some of the boundaries and directed possession to be delivered to the plaintiff in respect of a portion only of the land pointed out by the Commissioner. Both parties were dissatisfied with this decision and appealed to the District Judge, who has held that the decree is indefinite and incapable of execution. In this view, he has dismissed the appeal of the decree-holder, allowed the appeal of the judgment-debtors and disallowed the application for execution in its entirety. In our opinion the order of the District Judge cannot possibly be supported.

Section 207 of the Code of 1882, which was in force when the decree now under execution was made, provided as follows: "When the subject-matter of the suit is immoveable property, and such property is identified by boundaries or by numbers in a record of Settlement or Survey, the decree shall specify such boundaries or numbers." The rule embodied in section 207 has been reproduced in a slightly modified form in Order XX, rule 9, of the Code of 1908, in the following terms: "Where the subject-matter of the suit is immoveable property, the decree shall contain a description of such property sufficient to identify the same, and where such property can be identified by boundaries or by numbers in a record of Settlement or Survey, the decree shall specify such boundaries or numbers." In the case before us, the property can be identified by boundaries and the decree does specify the boundaries. But it has been argued on behalf of the judgment-debtors that the decree as drawn up is indefinite, inasmuch as there was no local investigation in the course of the suit. It has been suggested that the proper procedure was to appoint a Commissioner in the suit to have the locality surveyed and a copy of the map thus prepared should have been annexed to the decree. If this course had been pursued it may be conceded that the difficulty which has arisen in execution proceedings, might possibly have been avoided, although even in the case of decrees to which maps are annexed difficulties are known to have arisen in the course of execution proceedings in locating on the spot the boundaries of the land as indicated in the map. On behalf of the judgment-debtors reliance has further been placed upon the cases of *Dwarkanath Roy* v. *Jannobee Chowdhrain* (1) and *Darbaree Sayal* v. *Fatu Dhalee* (2) in support of the proposition that a decree of this character must be deemed indefinite and incapable of execution. There is, in our opinion, no force in this contention and the cases mentioned are clearly distinguishable. In the case of *Dwarkanath Roy* v. *Jannobee Chowdhrani* (1) the decree was for a portion only of the land claimed in the suit. As such portion was not specified by boundaries, it was impossible to determine from the decree which portion had been awarded to the plaintiff, and the Court very properly refused execution. A similar view was taken in the case of *Darbaree Sayal* v. *Fatu Dhalee* (2) where also the decree was for possession of a portion only of the land in suit and it was held for a similar reason that the decree was incapable of execution. The same

(1) 19 W. R. 81.
(2) 23 W. R. 285.

view was subsequently taken in the cases of *Mahomed Ismail* v. *Lalla Dhundhur Kishore* (3) and *Ajoodhia Lall* v. *Gumani Lall* (4). The case before us is, however, of an entirely different description. Here the land decreed is comprised within boundaries specified in the schedule to the decree; where these boundaries lie, is a question of fact to be determined upon evidence. As regards the eastern and western boundaries which are two water-courses, there is no real difficulty. The difficulty arises in connection with the southern boundary which is described as the land of Debnarain Naskar. The Court of first instance found it impossible to determine the northern boundary of the land of Debnarain Naskar which is the southern boundary of the land decreed to the plaintiff. It has been contended, however, on behalf of the respondent Sures Chandra Mukerjee that he has no interest in these proceedings, because his land lies to the south of Debnarain Naskar. We are unable to attach any weight to this contention. The southern boundary of the land decreed to the plaintiff is the northern boundary of the land of Debnarain Naskar, which means the land comprised in the lease of Debnarain Naskar and not the land in occupation of Debnarain Naskar; and it has been suggested on behalf of the appellant that the respondent Sures Chandra Mukerjee is in occupation of land which is really comprised in the tenancy of Debnarain Naskar. It is impossible for us to pronounce any opinion as to the accuracy of these allegations. But the Court of first instance must determine the northern boundary of the lands of Debnarain Naskar, for the decree-holder is entitled to obtain delivery of land up to that limit.

The result is that this appeal is allowed, the order of the District Judge set aside and the case remanded to the Court of first instance for re-consideration. There will be a fresh local investigation in the presence of all the parties interested and the boundaries as specified in the decree will be determined on evidence to be adduced by the parties.

We may add that the area of the land demised to the plaintiff was only approximately stated to be 145 *bighas*; too much stress cannot thus be laid upon the area, specially as, when jungle lands are let out, the area can only be stated approximately. It is conceivable that after the boundaries have been located, the plaintiff may obtain more or less than 145 *bighas*; he is undoubtedly not entitled to encroach upon the land of neigbouring lessees to make up 145 *bighas*.

The appellant is entitled to his costs both in this Court and in the Court of the District Judge. The costs incurred in the Court of first instance will be in the discretion of that Court. We assess the hearing fee in this Court at two gold *mohurs*.

Appeal allowed; *Case remanded*.

(3) 25 W. R. 39.
(4) 2 C. L. R. 134.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL NO. 4 OF 1912.

June 27, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Asutosh Mookerjee, KT.

Sheikh FAIZU—APPELLANT

versus

Sheikh DOMAN—RESPONDENT.

[*Civil Procedure Code* (*Act V of* 1908), *O. I, r.* 9—*Civil Procedure Code* (*Act XIV of* 1882), *s.* 31—*Non-joinder of parties—Suit dismissed.*

Where a person, who claimed a declaration of his exclusive right to certain property, omitted to join his sisters and mother who apparently were his co-sharers:

Held, that the plaintiff was not entitled to the declaration sought:

first, because he was not exclusively entitled to the property; and

secondly, because it was wrong to have omitted to join his co-sharers.

Order I, rule 9, of the present Code of Civil Procedure does not apply to a suit instituted before the Code came into force, and section 31 of the Code of 1882 did not contain a saving clause in favour of non-joinder of parties.

Letters Patent Appeal against the following decision of Mr. Justice Carnduff, dated the 5th December 1911, in Appeal from Appellate Decree No. 3133 of 1909, against the decree of the Additional

Subordinate Judge of Bhagalpur, dated the 13th September 1909, reversing that of the Munsif of Banka, dated the 13th January 1909.

CARNDUFF, J.—This appeal arises out of a suit instituted in consequence of an entry in a Record of Rights to the effect that the plaintiff and the defendant are jointly tenants of a certain *jote*. The plaintiff's case is that he alone is the tenant of the *jote*, and that the defendant is his sub-tenant and not his co-sharer. The first Court decreed the suit, declaring the plaintiff's right to, and possession of, the *jote* and ordering the record to be corrected by the expunction of the defendant's name as a co-sharer. On appeal the suit has been dismissed on the ground that it had transpired that the plaintiff's sisters were alive and were co-sharers with him, and that the suit must fail because they had not been joined as parties.

The plaintiff now appeals to this Court. It appears that the objection of non-joinder was taken in the written statement and an issue on the point was raised in the Court of first instance. The learned Munsif held that the sisters were not necessary parties and the suit proceeded accordingly; but the learned Subordinate Judge has, as has been indicated already, taken the opposite view. It seems to me that this is eminently a case in which Order I, rule 9, should have been applied and the suit ought not to have been allowed by the Appellate Court to be defeated by reason of the so-called non-joinder. Regard being had to the frame of the suit, the sisters were not, I am inclined to think, necessary parties. The defence was that the defendant and the plaintiff's father had obtained a joint settlement of the land; while the plaintiff's case was that the defendant had obtained a sub-settlement of the land from him. The defendant, it may also be mentioned, is the husband of one of the sisters of the plaintiffs. Moreover, if the sisters were necessary parties, then I think the learned Subordinate Judge ought to have given to the plaintiff an opportunity for remedying the defect. On behalf of the respondent it has been urged before me that the suit was dismissed by the Appellate Court, not for non-joinder of parties, but because the plaintiff had failed to establish his case, which was one of exclusive right to the land. I am unable, however, to take this view, having regard to the frame of the suit and the pleading.

The result, therefore, is that this appeal must be allowed, the decree of the lower Appellate Court set aside and the case remanded to that Court to be disposed of anew. The costs of this appeal will be borne by the respondents.

Babu *Jyotis Chandra Sarkar*, for the Appellant.

Babu *Monmotho Nath Mukherjee*, for the Respondent.

JUDGMENT.—This a suit whereby one of many sharers claims a declaration of his exclusive right to certain property. He has omitted to join his sisters and his mother who apparently are his co-sharers. There is apt to be some sinister motive in attempts of this kind, and this case does not, in our opinion, fall within Order I, rule 9, of the present Civil Procedure Code. We say this because Order 1, rule 9, did not apply to the suit at the time when it was instituted, but section 31 of the Code of 1882 which did not contain a saving clause in favour of non-joinder. But more than that, on the merits it appears to us that the plaintiff is not a person who is entitled to the declaration that he seeks, *first*, because he is not exclusively entitled to the property, and *secondly*, because it was wrong to have omitted to join his co-sharers.

We must, therefore, set aside the judgment of Mr. Justice Carnduff and restore the decree of the lower Appellate Court. The appellant is entitled to his costs of both appeals in this Court.

Appeal allowed.

BHAGWAN DAS *v.* RAM BAI.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1033 OF 1909.

March 7, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Beadon.

BHAGWAN DAS—PLAINTIFF—APPELLANT

versus

Musammat RAM BAI—DEFENDANT—RESPONDENT.

Burden of proof—Registered sale-deed—Proof of consideration—Delay in suing for possession after death of vendor—Vendee to prove consideration.

The plaintiff sued in March 1908 for possession of land and house property of which he claimed to be the vendee under a sale-deed executed on the 26th and registered on the 28th September 1900. The alleged vendor died in or about 1904, and the defendant, his widow, was apparently entered as owner of the land in his place without any attempt by plaintiff to contest the mutation order:

Held, that under the circumstances the lower Courts were amply justified in following the ruling of *Ram Chand* v. *Harnam Singh*, 68 P. R. 1900, and in placing the onus of proving consideration for the sale on the plaintiff notwithstanding registration of the sale-deed.

Second appeal from the decree of the Divisional Judge, Ferozepore Division, dated the 11th May 1909, affirmimg that of the District Judge, Hissar, dated the 18th November 1908, dismissing plaintiff's claim.

The Hon'ble Mr. *Shadi Lal*, R. B., for the Appellant.

The Hon'ble Mr. *Muhammad Shafi*, K.B., for the Respondent.

JUDGMENT.—The lower Courts have here agreed in dismissing plaintiff's suit for possession of land and house property of which he claims to be the vendee under a sale-deed executed on the 26th and registered on the 28th September 1900. The suit was instituted on the 17th March 1908 as against the vendor's widow, both parties being *Mahajans* by caste.

The alleged vendor died in or about 1904, and the defendant was apparently entered as owner of the land in his place without any attempt by plaintiff to contest the mutation order. There is, no doubt, a note by the *Patwari* on the extract from the records filed with the plaint, to the effect that the plaintiff was still disputing defendant's title, but this note seems to be an unauthorized comment by the *Patwari*, as it is dated 9th May 1907 and the defendant had been already entered as owner in the *Jamabandi* for 1905-06

The plaintiff's delay in suing both during the life-time and after the death of the vendor, Amra, and his failure to even apply for mutation in reasonable time, lay his claim open to very strong suspicion. He has attempted to explain the delay by asserting that the vendor took a separate lease of the land from him at Rs. 205 a year simultaneously with the sale. The deed of lease was unregistered and purported to be for one year only. It was produced by the plaintiff on the 17th November 1908, three days after both sides had closed their case. Nothing was said about it by plaintiff when examined on the 13th November. Neither the writer nor the attesting witness, Sahi Ram, were called to prove the deed, and Sahi Ram was not questioned about it when examined as plaintiff's witness on the 20th October. We must take it that the deed was not proved and could not be received in evidence, though even if this difficulty could be got over, it would still be of no assistance to plaintiff as the lease was clearly never acted on.

Under these highly suspicious circumstances we think that the lower Courts were amply justified in following the ruling of *Ram Chand* v. *Harnam Singh* (1) and in placing the onus of proving consideration for the sale on the plaintiff notwithstanding registration of the sale-deed. It is then unnecessary for us to discuss the grounds on which it has been held that consideration is not proved, as plaintiff's Counsel felt obliged to admit that he could not, on the evidence produced, argue that the decision against plaintiff was wrong. He could only hope to succeed in his appeal if he could establish an error in respect of the burden of proof, and we think that he was well advised in taking this line as the evidence goes far to show that no money really passed.

We cannot attempt to explain Amra's execution of the deed where so much is rendered obscure by plaintiff's negligence to assert his title in good time, but it seems clear enough that the transaction was, for some reason or other, recognized by the parties at the time as not amounting to a valid sale, and this probably accounts for the refusal of the arbitrators to act after reference was made to them at an early stage in the proceedings.

(1) 68 P. R. 1900.

However that may be, the appeal must fail on our finding that the onus was rightly placed on the plaintiff. It is dismissed with costs to the defendant.

Appeal dismissed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 28 OF 1912.

June 27, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

Sheikh SANOO AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MUHAMMAD SABED—PLAINTIFF—RESPONDENT.

Ejectment—Purchase of portion of holding—Vendor not authorised to sell whole—Landlord recognising sale, effect of.

The holding within which the land in suit was situate belonged equally to two persons *M* and *S*. *M* sold the whole plot to the plaintiff, and subsequently *S* sold half of it to the defendant. The plaintiff's purchase was recognised by the landlord; that of the defendant was not recognised. The plaintiff sued to eject the defendant:

Held, that it was not competent to the landlord to recognise the plaintiff to the detriment of the defendant, and, therefore, defendant could not be ejected. If the entire holding had been abandoned, the position of the parties might have been different.

Letters Patent Appeal against the following decision of Mr Justice Coxe, dated the 1st February 1912, in appeal from Appellate Decree No. 3168 of 1909, against the decree of the Officiating Additional District Judge of Dacca, dated the 14th September 1909, reversing that of the Munsif, second Court, of Manickgunj, dated the 15th March 1909.

COXE, J.—The facts found by the Courts below in this case were that the holding within which the land in suit was situated belonged equally to two persons named Mathura Nath and Shyama Sundari. Mathura sold the whole plot to the plaintiff in *Kartick* 1313. Shyama Sundari sold half of it to the defendants in *Pous* 1313. The plaintiff's purchase was recognised by the landlord; that of the defendants was not recognised. I am informed that this recognition was two months after the sales. The learned Additional Judge in the Court below declined to give the plaintiff a decree for recovery of the land. He says: "Mathura and his brother or Mathura alone admittedly occupies the holding *minus* the disputed plot. There has been no abandonment of the holding by the original tenant or tenants and that consequently the landlord's right of re-entry did not arise. I am, therefore, of opinion that the landlord's recognition of the plaintiff's right is of no avail whatsoever."

But clearly this view is erroneous. The tenant certainly cannot abandon a portion of his holding without the landlord's consent because such an abandonment would necessarily involve a sub-division of the holding to which the landlord's assent is essential. But where, as in this case, the landlord has recognised the sale of a portion of the holding and has thereby obviously agreed to a sub-division of the holding, the fact that the original tenant occupies the portion of the holding which has not been abandoned does not invalidate the landlord's right to recognise a new tenant for the other portion. It may be open to doubt whether Shyama Sundari is, in any way, bound by the sale of the entire holding by her brother-in-law. She is no party to this case and no decision can be arrived at in this case which will have a binding effect on her. But so far as the defendant is concerned, it is his case, as set out in the written statement, that he is in possession of the plot and that, therefore, presumably his vendor, Shyama Sundari, is not. That being so, both the original tenants having, on the pleadings of the parties, given up all concern with this particular plot and the landlords having recognised the sub-division of the holding and recognised the plaintiff's purchase of this portion of it, it appears to me that the plaintiff's claim to the land cannot be questioned.

Accordingly the appeal will be decreed, the judgment of the learned Additional Judge set aside and that of the Munsif restored. The plaintiff will be entitled to costs of this Court and of the lower Appellate Court.

Babu *Debendra Chandra Mullick*, for the Appellants.

Mr. *Z. R. Zahed* and Moulvi *Nuruddin Ahmed*, for the Respondent.

KALANAND SINGH v. SAIRA.

JUDGMENT.—This is an appeal by the plaintiff in a suit for declaration of title to and recovery of possession of land.

The plaintiff stated in the plaint that the land in dispute was included in a *jote* of one Mathura Nath Chowdhry, that he had purchased it on the 6th of November 1906 and that subsequently he got his purchase recognized by the superior landlord on the 14th of November 1907. On the 17th of December 1906, the defendants purchased a half share of the land from the co-sharer of the vendor of the plaintiff. It has been found by all the Courts below that the vendor of the plaintiff was not the sole owner and that consequently the transfer in favour of the plaintiff, if operative at all, operated to the extent of the half share. But the plaintiff relies upon recognition by the superior landlord. In our opinion it is impossible for the plaintiff to succeed on the strength of this recognition. It is plain from the first and second paragraphs of the plaint that the land did not constitute the entire holding of Mathura Nath Chowdhry but formed only a part thereof. Consequently when this portion was transferred, it was not competent to the landlord to recognize the plaintiff to the detriment of the defendant. If the entire holding had been abandoned, the position of the parties might have been different.

The result, therefore, is that this appeal must be allowed, the decree of Mr. Justice Coxe set aside and that of the Subordinate Judge restored. This order will carry costs of both the appeals in this Court.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 4031 OF 1912.

May 26, 1914.

Present:—Mr. Justice Coxe and Mr. Justice D. Chatterjee.

Rajah KALANAND SINGH AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

Musammat SAIRA AND OTHERS—DEFENDANTS —RESPONDENTS.

Landlord and tenant—Kabuliat—*Stipulation to pay tahwari and* salami—Abwab—*Finding of fact, question of—Second appeal—Regulation V of* 1812, *s.* 3.

Where a tenant stipulates in a *kabuliat* to pay *tahwari* and *salami* in accordance with the *zemindari* practice but not as a part of the consideration for the lease, the charges are *abwabs* and not recoverable.

The finding of the lower Courts as to whether certain charges are parts of rent or not, is a finding of fact and cannot be interfered in second appeal.

Radha Prosad Singh v. *Bal Kowar Koeri*, 17 C. 726 (F. B.), followed.

Tilukdhari Singh v. *Chulhan Mahton*, 17 C. 131 (P. C.); 16 I. A. 152, referred to.

The case of *Pudmanand Singh* v. *Baijnath Singh*, 15 C. 828, has been overruled and is no longer good law.

Section 3, Regulation V of 1812, refers to specific sums agreed to be payable to landlord as rent and not to indefinite impositions like *tahwari* and *salami*.

Chultan Mahton v. *Tilakdhari Singh*, 11 C. 175 (F. B.), relied on.

Appeal against the decree of the Subordinate Judge of Monghyr, dated the 24th August 1912, affirming that of the Munsif at Jamui, dated the 9th of May 1912.

FACTS.—The very important fact on which the decision in the case turned is contained in a *kabuliat* of 1873 on which the rent suit was brought and it is in these terms:—"I (the defendant) agree to pay a uniform annual *jama* of Rs. 350-8-0 of the imperial coin, half of which is Rs. 175-4-0, as per instalments given below." Then comes the stipulation for paying *tahwari* and *salami* in a distinct form and is said to be payable not in consideration of the lease but in accordance with the *zemindari* practice. On a construction of the *kabuliat* both the Courts below held these charges to be *abwabs* and disallowed them. In second appeal the appellant based his contentions on the authority of the ruling in *Pudmanand Singh* v. *Baij Nath Singh* (1) to which the present case was similar, as also upon section 3 of Regulation V of 1812.

Dr. *R. B. Ghose* and Babu *Sailendra Nath Palit*, for the Appellants.

JUDGMENT.—This appeal arises out of a suit for rent based on a *kabuliat*. The only question that arises is whether the defendant is bound to pay certain charges to the landlord. The Courts below have held that these charges are *abwabs* and have disallowed them. The plaintiffs appeal. The plaintiffs belong to the family of the Beneli Raj who were also plaintiffs in the case of

(1) 15 C. 828.

Pudmanand Singh Bahadur v. *Baij Nath Singh* (1) and the charges are the same as were claimed in that case. The present case is based on a *kabuliat* of 1873 while the case cited was based on one of 1869. The learned Judges in that case held that these charges were not *abwabs* and that they were included in the rent. This case, however, was considered in the case of *Radha Prosad Singh* v. *Bal Kowar Koeri* (2). It must be conceded that the charges in that case were very different from the charges in this case. But it seems to me perfectly clear that the correctness of the decision in *Pudmanand Singh Bahadur* v. *Baij Nath Singh* (1) was fully considered in that case and that all the learned Judges, including Ghose, J., who was a party to the former decision, were unanimously of opinion that it was wrongly decided. In the referring order the learned Judges (Petheram, C. J., and Banerjee, J.) said: "We are unable to agree in the interpretation put upon the Full Bench ruling, *Chultan Mahton* v. *Tilukdhari Singh* (3), by the decision in *Pudmanand Singh Bahadur* v. *Baij Nath Singh* (1)." In the first decision Petheram, C. J., observed: "We must hold the case of *Pudmanand Singh Bahadur* v. *Baij Nath Singh* (1) to be overruled by the decision of the Privy Council in that of *Tilukdhari Singh* v. *Chulhan Mahton* (4)." And he held that no imposition under any name whatever should be recovered from the tenant for or in respect of the occupation or tenure of the land beyond the sum which had been fixed for rent, whether that sum had been fixed by agreement or by judicial determination between the landlord and the tenant. O'Kinealy, J., dealt exhaustively with the history of the law on the subject. He held that the finding of the Courts below that these charges were not included in the rent, could not be questioned in second appeal. He dissented from the decision in *Pudmanand Singh Bahadur* v. *Baij Nath Singh* (1) as it seemed to him to be in direct conflict with the decision of the Full Bench in the case of *Tilukdhari Singh* v. *Chulhan Mahton* (4). Prinsep, J., was of the same opinion and Piggot, J., entirely agreed. Ghose, J., thought that if in any given case the Court found that any particular sum specified in the lease or agreed to be paid was a lawful consideration for the use and occupation of any land, that is to say, if it was really part of the rent although not described as such, it would be justified in holding that it was not an *abwab* and was recoverable by the landlord. But he held that the findings of fact arrived at by the lower Court that the charges were not part of the rent, were binding on him in second appeal, and that the legality or otherwise of the so-called *abwabs* hardly arose in second appeal. With regard to the case of *Pudmanand Singh Bahadur* v. *Baij Nath Singh* (1) he observed: "Having since more carefully considered the subject, I have come to the opinion that we were not right in holding that the items of *tahwari* and *salami* were part of the rent stipulated to be paid under the lease. They were, I now think, *abwabs*." It seems to me to follow from this decision that on the question whether these charges are part of the rent or not, the findings of the Courts below are binding on us in second appeal. It also follows that the decision in the case of *Pudmanand Singh Bahadur* v. *Baij Nath Singh* (1) that these charges of *tahwari* and *salami* were part of the rent was wrong. That being so, I do not think that it is open to us in second appeal to interfere with the decision of the Courts below in this case. Moreover, in my opinion, that decision is right. Under the *kabuliat* the defendant agreed to pay "At a uniform annual *jama* of Rs. 350-8-0 of the imperial coin, half of which is Rs. 175-4, as per instalments given below." The instalments are: *Assin* Rs. 43-13; *Pous* Rs. 65-11-6, *Magh* Rs. 87-10-6, *Falgoon* Rs. 65-11-6, *Baisakh* Rs. 43-13-6, *Jaith* Rs. 43-13-6 or total Rs. 350-8. The stipulation for paying *tahwari* and *salami* is totally distinct and is not said to be in consideration of the lease but to be paid in accordance with the *zemindari* practice. In this connection I may refer to the case of *Radha Churn Roy Chaudhuri* v. *Golap Chandra Ghose* (5). In that case the so-called *abwabs* were included

(2) 17 C. 726 (F. B.).
(3) 11 C. 175 (F. B.).
(4) 17 C. 131 (P. C.); 16 I. A. 152.

(5) 8 C. W. N. 529.

in the *kists* by which the rent was to be paid. But whether this decision of the Court below is right or not, that these two items are not part of the rent, it cannot, in my opinion, after the decision of the Full Bench, be questioned by us in second appeal.

It has been contended that as the sums were specifically agreed on between the parties, they must be paid under section 3 of the Regulation V of 1812. This argument seems to me to have great force, though I may observe that in the Full Bench case of *Chultan Mahton* v. *Tilukdhari Singh* (3) it was held that this provision referred only to the amount fixed as rent payable to the landlord. Therefore, if these charges are not included in the rent, they would not come within the scope of that provision. But whether that view is correct or not, we cannot, in my opinion, give effect to it in second appeal.

Our attention has been drawn to the case of *Kumar Kalanand Singh* v. *Eastern Mortgage and Agency Co. Ld.* (6). That was a suit relating to a lease of 1874 which contained a stipulation for paying these charges of *salami* and *tahwari*. It was held in that case that these were part of the rent. That case was, however, a regular appeal and the learned Judges were Judges of fact and were entitled to form their own opinion on the point whether these charges were or were not included within the rent. That being a question of fact the Judges were not bound by the decision of the Full Bench upon it. We are, however, in a different position. I would, therefore, hold that it is not open to us in second appeal to disturb the finding of the Court below that these charges are not included within the rent, even if we desired to do so, and I would, therefore, dismiss the appeal.

D. CHATERJEE, J.—I agree.

Appeal dismissed.

(6) 19 Ind. Cas. 701; 18 C. L. J. 83.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 655 OF 1911.

March 14, 1914.

Present:—Mr. Justice Shah Din and Mr. Justice Chevis.

DULLA SINGH AND OTHERS—PLAINTIFFS — APPELLANTS

versus

KHAZANA AND OTHERS—DEFENDANTS —RESPONDENTS.

Contract Act (IX of 1872), s. 70—Co-sharers—One co-sharer recovering property from trespassers, whether entitled to claim share of expenses from his co-sharers.

If one of the several co-sharers, without the authority of others, spends some money on recovering by litigation their joint property from a trespasser he is not entitled to claim contribution from them.

Abdul Wahid Khan v. *Shaluka Bibi*, 21 C. 496 (P.C.); 21 I. A. 26 and *Halima Bee* v. *Roshan Bee*, 30 M. 526; 17 M. L. J. 439; 2 M. L. T. 468, followed.

Section 70 of the Indian Contract Act is inapplicable to such cases.

Chedi Lal v. *Bhagwan Das*, 11. A. 234; A.W.N. (1889) 67, referred to.

Second appeal from the decree of the Additional Divisional Judge of Hoshiarpur, at Ludhiana, dated the 3rd of October 1910, varying that of the Munsif, first Class, Hoshiarpur, dated the 16th February 1910, dismissing the suit with costs.

Mr.. *Roshan Lal*, for the Appellants.

Mr. *Brij Lal*, for the Respondents.

JUDGMENT.—The plaintiffs and defendants are co-sharers in a joint *khata*. The land formerly belonged to one Kapur Singh and on his death, two trespassers, named Ram Singh and Narain Singh, took possession. The present plaintiffs sued them, and Ram Singh and Narain Singh brought a cross-suit against the present plaintiffs. Plaintiffs were successful and recovered the property from Ram Singh and Narain Singh. Recently the defendants applied to the Revenue Authorities for partition, and the plaintiffs then objected that defendants should contribute their share of the expenses of the former litigation. The plaintiffs have now brought this suit for a declaration that defendants are not entitled to partition until they pay the plaintiffs a sum of Rs. 500 as their share of the expenses of the former litigation.

Both the lower Courts have dismissed the claim, holding, on the strength of *Halima Bee* v. *Roshan Bee* (1) and *Abdul Wahid Khan* v. *Shaluka Bibi* (2), that in the

(1) 30 M. 526; 17 M. L. J. 439; 2 M. L. T. 468,
(2) 21 C. 496 (P. C.); 21 I. A. 26,

absence of any contract, the defendants are not liable for any portion of the costs of the former litigation. The plaintiffs have preferred a further appeal to this Court.

The ruling of the Privy Council in *Abdul Wahid Khan* v. *Shaluka Bibi*(2) seems to us conclusive. In that case plaintiffs and defendants were co-sharers in an estate. The defendants being in possession of the estate, the plaintiffs sued for possession of their share. One of the pleas raised by the defendant was that plaintiffs should pay their share of money which defendant had expended in good faith in litigation for the protection of the estate. The decision of their Lordships on this part of the case is to be found on page 504, and is as follows:—

"The proceedings were taken by the defendant for his own benefit, and without any authority, express or implied, from the plaintiffs; and the fact that the result was also a benefit to the plaintiffs does not create any implied contract or give the defendant any equity to be paid a share of the costs by the plaintiffs."

We are unable to distinguish the present case from the above. The fact that in the present case it is the plaintiff who is seeking to make the defendants liable, makes no difference whatever in principle. The above ruling is followed in *Halima Bee* v. *Roshan Bee* (1), and as the learned Divisional Judge remarks, there is no ruling to the contrary. The Divisional Judge rightly finds that *Azmat* v. *Gurmukh* (3) and *Sahib Singh* v. *Sher Singh* (4) which were cited before him, do not help the plaintiffs; in the former case the only question argued before the Chief Court was whether the suit was cognizable by a Small Cause Court and in the latter case the only dispute was whether the matter in dispute was *res judicata*.

In the first Court it was argued that section 70 of the Contract Act was applicable to such cases. This was not argued before us, and we need only say that we fully agree with what is said in *Chedi Lal* v. *Bhagwan Das* (5), as to the non-applicability of section 70 to such cases.

In the present case it is not argued before us that the plaintiffs were in any way authorized by the defendants to enter into the former litigation, and the Privy Council ruling—*Abdul Wahid Khan* v. *Shaldka Bibi* (1)—fully applies. We dismiss the appeal and uphold the decision of the lower Courts dismissing the claim, but it is, as the learned Divisional Judge remarks, rather hard on the plaintiffs that the defendants should reap the profit of the former litigation without having to bear a share of the expenses, and we pass no order as to costs of this appeal.

Appeal dismissed.

(3) 118 P. R. 1888.
(4) 70 P. R. 1900.
(5) 11 A. 234 at pp, 242, 243; A, W. N, (1889) 67.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 72 OF 1912.
July 4, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

JATRA MOHAN NANDI—DEFENDANT—APPELLANT

versus

PITAMBAR MISTRI—PLAINTIFF—RESPONDENT.

Judgment—Lower Appellate Court setting aside judgment of first Court not bound to dispose of all reasons given by first Court

A lower Appellate Court is not bound to dispose *seriatim* of all the reasons given by the first Court, if it gives special reasons of its own for coming to an opposite conclusion.

Dabee Pershad v. *Joy Lall Chowdhry*, 12 W. R. 361 at p. 362, followed.

Letters Patent Appeal against the following decision of Mr. Justice Richardson, dated the 23rd July 1912, in appeal from Appellate Decree No. 3446 of 1910, against the decree of the District Judge of Chittagong, dated the 9th July 1910, reversing that of the Munsif, 2nd Court, at Satkania, dated the 21st March 1910.

RICHARDSON, J.—A preliminary objection has been taken to the hearing of this appeal on the ground that the appeal is incompetent under the provisions of section 153 of the Bengal Tenancy Act. In answer to the plaintiff's suit for arrears of rent

the defendant pleaded that the land belonged to him. He set up a proprietary title to the land in opposition to the title set up by the plaintiff. That question was decided by the first Court in favour of the defendant and by the Court of Appeal below in favour of the plaintiff. In my opinion the decree of the lower Appellate Court has decided a question relating to the title to the land as between the parties having conflicting claims thereto. The preliminary objection, therefore, fails.

On behalf of the defendant, who is the appellant before me, it is contended that the learned District Judge has committed an error of law in so far as he has arrived at a conclusion in favour of the plaintiff, without displacing the finding of the first Court to the effect that the defendant has established a good title to the land by adverse possession for the statutory period. This omission, as I understand, was due to the fact that the appeal was heard *ex parte* by the learned Judge. It seems quite clear that the question was not considered as it ought to have been.

The appeal, therefore, succeeds, the judgment and the decree of the lower Appellate Court are set aside and the case is remitted to that Court in order that the appeal thereto may be re-heard in accordance with law.

Costs will abide the result.

Babu *Khitis Chunder Sen*, for the Appellant.

Babu *Probodh Chunder Das*, for the Respondent.

JUDGMENT.—This is a Letters Patent Appeal arising out of a rent suit valued at Rs. 3. It has already passed through three Courts and is now in the fourth, and unless we can interfere with it, it will go to a fifth Court with the further prospect of going to a sixth and seventh. But we think we can put a stop to this.

The main contention in this suit was, whether the relationship of landlord and tenant existed between the litigants. The Munsif who decided in the defendants' favour held that the defendants and their predecessor had held the land, for which rent is claimed by the plaintiff, for a long period in the assertion of the *maliki* right. That conclusion was based on two documents, Exhibits A and B. There was an appeal from the decree of dismissal by the Munsif, and the case came before the District Judge of Chittagong. In the opinion of the District Judge Exhibits A and B are not shown to have any relevance to the case; and, on the strenght of an entry in the *khatian* and the presumption to which it legally gave rise, he held the relationship of landlord and tenant had been established, and he accordingly set aside the decree of the Munsif and decreed the appeal. The effect of that apparently was that the claim as made by the plaintiff was decreed, that is to say, not only was the relationship of landlord and tenant established, but rent at the rate of twelve annas was decreed to be paid. There was an appeal to this Court and Mr. Justice Richardson thought that the learned District Judge had not really considered the defendants' claim to the *maliki* right by adverse possession. In this connection I would cite what was said in *Dabee Pershad* v. *Joy Lall Chowdhury* (1) to the effect that the lower Appellate Court is not bound to dispose *seriatim* of all the reasons given by the first Court, if he gave special reasons of his own for coming to an opposite conclusion. The learned District Judge, in my opinion, certainly gave special reasons of his own for holding that the relationship of landlord and tenant had been established, and that was a reason which was good in law: and I am inclined to think that, in effect, he did dispose of the reasons given by the Munsif. Whether he did so or not, I am satisfied that he gave sufficient reason for his own conclusion. In the circumstances I do think there was any justification for terfering with the decree of the lower A pellate Court which is complete in itself self-contained. I say that although it been brought to our notice that the learne Judge does not discuss the question whether the rate of rent would be six or twelve annas, the fact is that that was not a point at issue between the parties: the real contest was whether or not the relationship existed.

(1) 12 W. R. 361 at p. 362.

For these reasons I think that we ought to reverse the judgment of Mr. Justice Richardson and confirm the decree of the District Judge.

The appellant before us will receive his costs of both appeals in this Court.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 910 OF 1911.

January 28, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Chevis.

Musammat BHAG BHARI AND OTHERS — APPELLANTS

versus

JAWAHAR SINGH AND OTHERS— RESPONDENTS.

Court Fees Act VII of 1870), *s.* 7 (V) (*e*)—*Suit for possession of land forming garden—Assessed to land revenue—Market-value.*

In a suit for possession of land forming a garden, though assessed to land revenue, the valuation for Court-fee is governed by section 7 (V) (*e*), Court Fees Act, and is not to be arrived at either for Court-fee or in ascertaining jurisdiction by the artificial thirty times *jama* rule.

Second appeal from the decree of the Additional Divisional Judge of the Jhelum Division, at Rawalpindi, dated the 1st June 1911, varying that of the District Judge, Jhelum, dated the 25th August 1910, decreeing the claim on payment of Rs. 999.

Messrs. *C. H. Oertel* and *Badr-ud-Din Qureshi*, for the Appellants.

Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—In this suit for 16 *kanals* of land, forming a garden and two houses, the first Court gave plaintiffs a decree for possession on payment of Rs. 999 with half costs. The lower Appellate Court on appeal by defendants, with cross-objections by plaintiffs, reduced the amount payable by the latter to Rs. 699.

Defendants have filed this further appeal under the old law, and have been met at the outset by Mr. Nanak Chand (for plaintiffs-respondents) with the objection that no appeal lies, because

(*i*) the value of the land at thirty times *jama* being Rs. 234-6-0, and the value of the houses (in their original state) Rs. 130-8-0, and with the additional value allowed by the lower Appellate Court Rs. 730-8-0, the suit, *qua* "land suit," has a value below Rs. 250, and *qua* unclassed suit, a value under Rs. 1,000 (*i.e.*, Rs. 964-14-0). *Cf. Fateh Singh* v. *Chetu* (1) and Civil Appeal No. 929 of 1910;

(*ii*) the decree of the lower Appellate Court has varied the decree of the first Court otherwise than as to costs and, therefore, Rs. 250 or Rs. 1,000 is the critical value according as the suit is treated as a land suit or an unclassed suit: section 40, Punjab Courts Act, as it stood before amendment by Punjab Act I of 1912.

Mr. Oertel, however, has had no difficulty in repelling this objection. The land here is a "garden," though assessed to land revenue. It was called a garden in the first Court without objection, and it was valued at Rs. 1,074 as a garden by the Local Commissioner. In short, the valuation for Court-fee is governed by section 7 (V) (*e*), Court Fees Act, and is not to be arrived at either for Court-fee or in ascertaining jurisdiction by the artificial thirty times *jama* rule. We hold that the appeal lies.

But we see no force in the appeal when we come to the merits. The essential issue in the case is—Have plaintiffs sufficiently proved that they are collaterals of the late Fatteh Sher of a degree sufficiently near to make them heirs? Mr Oertel is forced virtually to admit that his clients have not proved *their* relationship to Fatteh Sher, so that no question of competition between distant collaterals and a nearer female relative arises, and on the question stated the lower Courts have come to concurrent and identical findings. There is evidence of a variety of kinds, and by piecing it all together we see no difficulty in believing in the alleged relationship between the deceased and the plaintiffs; and it is not the practice of this Court to disturb concurrent findings of two Courts on questions of fact except for very special reasons. In

(1) 100 P. L. R. 1904.

our opinion we should not disturb these findings here, based as they are on the evidence of the bard Gokhra and his official record of the family, on the Settlement *shajra nasab* of *Mauza* Choa Saidan Shah, and on the other evidence in the case. The points specially taken by Mr. Oertel to combat the finding do not appear to us sufficient. Thus, the confusion between the names Ibrahim and Abdul Rahim is to our mind unimportant; and we cannot see that a delay of less than a year and a half from Fatteh Sher's death renders plaintiffs' suit suspicious. As to plaintiffs not objecting at first mutation to the entry of defendants' name, and again at the second mutation in favour of defendants Nos. 2 and 3, we need only remark that it is not shown that plaintiffs were in the village at the time, and that plaintiff No. 3 resides in Jammu State and naturally would know nothing of what was going on. It is quite true that conjectures cannot take the place of proof [*Atar Singh* v. *Thakar Singh* (2)], but here we have proof of a sufficiently complete kind, if the evidence is believed.

We may note that in the paper-book at page 8 there is a mistake in the pedigree-table: the father of plaintiffs Nos. 1 and 2 was not *Gora* but *Jora* or *Zorawar*.

A subsidiary question is how much plaintiffs should pay. Mr. Oertel contends for Rs. 999 as allowed by the first Court; but we are disposed to agree with the lower Appellate Court that the figure Rs. 600 estimated by the Local Commissioner is a good guide, to which has been added the Rs. 99 found to have been spent on Fatteh Sher's funeral.

We dismiss the appeal with costs.

Appeal dismissed.

(2) 6 Ind. Cas. 721; 42 P. R. 1910 (P. C.); 12 C. W. N. 1049; 8 C. L. J. 359; 18 M. L. J. 379; 35 C. 1039, 35 I. A. 206; 128 P. W. R. 1908; 4 M. L. T. 207; 10 Bom. L. R. 790.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 3 OF 1912.

July 1, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

LAKHI KANT DAS MAHAPATRA—APPELLANT

versus

BALABHADRA PROSAD DAS AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 22 (2)—Transfer of non-transferable occupancy holding, creates no interest as against landlords—Purchase by one of landlords similarly ineffective.

Sub-section 2 of section 22 of the Bengal Tenancy Act (VIII of 1885) applies only to a case in which a transferable occupancy holding has been purchased. If the holding which has been transferred is a non-transferable holding the purchaser acquires no interest as against the landlords, and it is so even if the purchaser is himself one of the landlords.

Letters Patent Appeal against the following decision of Mr. Justice Carnduff, dated the 13th December 1911, in Appeal from Appellate Decree No. 3127 of 1909, against the decree of the District Judge of Cuttack, dated the 10th September 1909, affirming that of the Additional Munsif of Balasore, dated the 24th February 1909.

CARNDUFF, J.—The parties to this appeal are co-sharer landlords. The appellant purchased two occupancy *jotes* and the finding is that such *jotes* are not transferable. The respondent sought to recover *khas* possession of them jointly with the appellant on the ground that they must be treated as having been abandoned. Both the Courts below have concurred in decreeing the suit, the learned District Judge holding on appeal that section 22 (2) of the Bengal Tenancy Act, 1885, on which the appellant has relied, does not apply to non-transferable *jotes*. It seems to me that the learned District Judge is clearly right and that there is no substance in the appeal.

On the words of the section itself I should say that transferability is implied; and it has been so ruled by this Court in the case of *Girish Chandra Chawdhry* v. *Kedar Chandra Roy* (1). The learned Vakil, who appears on behalf of the appellant, agrees that that decision has been practically overridden by a Full Bench of this Court in the case of *Ram*

(1) 27 C. 473; 4 C. W. N. 569.

Mohan Pal v. *Sheikh Kachu* (2), in which it was declared that the ruling in the earlier case of *Jawadul Huq* v. *Ram Das Saha* (3) was good law. It seems to me, however, that neither of the cases last mentioned clashes with or affects the ruling in *Girish Chandra Chowdhury* v. *Kedar Chandra Roy* (1) or is of any avail to the present appellant. For in the Full Bench case there was the finding that the lands in dispute was transferable by custom with the consent of the landlord and it is clear that in the case of *Jawadul Huq* v. *Ram Das Saha* (3) the holdings concerned were likewise transferable. The appeal must, therefore, be dismissed with costs.

Mr. *Z. R. Zahed* and Moulvi *Nuruddin Ahmad*, for the Appellant.

Babu *Provas Chunder Mitter*, for the Respondents.

JUDGMENT.—In 1907 before the Bengal Tenancy Act was amended the appellant, who is a co-sharer, landlord purchased a non-transferable occupancy holding. The tenant, after the transfer, vacated the land, and the appellant came into occupation thereof. His co-sharers thereupon commenced the present litigation for joint possession. His defence was that he had acquired a valid interest under sub-section (2) of section 22 of the Bengal Tenancy Act. This defence is of no avail. That sub-section clearly applies only to a case in which a transferable occupancy holding has been purchased. If the holding which has been transferred is a non-transferable holding the *purchaser* acquires no interest as against the landlords. Consequently the defendant is in occupation of this parcel of land without any title, and his co-sharers, the plaintiffs, are entitled to joint possession to the extent of their shares. This is the view taken by Mr. Justice Carnduff who cites in support a decision of this Court in the case of *Girish Chandra Chowdhury* v. *Kedar Chandra Roy* (1).

The result is that the decree of Mr. Justice Carnduff is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(2) 32 C. 386 (F. B.); 9 C. W. N. 249; 1 C. L. J. 1.
(3) 24 C. 143; 1 C. W. N. 166.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEALS NOS. 111 AND 112 OF 1911.

July 4, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

KALAR SINGH AND OTHERS—DEFENDANTS —APPELLANTS

versus

MATHURA PROSAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 29—Abwab—Illegal cesses—Stipulation as to payment of husks over and above certain nakdi rent, whether legal.

Where a *kabuliat* stipulated for the payment of one cart-load of *bhusa* over and above certain *nakdi* rent, and the plaintiff in his plaint did not treat the husks as a part of the rent, nor were cesses claimed or paid on the basis of the husks being a part of the rent:

Held, that the claim as to husks came within the statutory prohibition against *abuabs* and other illegal cesses and could not be recovered.

Letters Patent Appeals against the following decision of Mr. Justice Holmwood, dated the 28th April 1911, in Appeals from Appellate Decrees Nos. 2027 and 2499 of 1908, against the decrees of the Additional Subordinate Judge of Monghyr, dated the 1st June 1908, modifying those of the Munsif, 2nd Court, at Monghyr, dated the 30th September 1907.

HOLMWOOD, J.—The two appeals relate to claims for, in one case one cartload of *bhusa*, and in the other two, cartloads of *bhusa*, over and above certain indicated *jama*. In Second Appeal No. 2499 there is a *kabuliat* which stipulates for the payment of one cartload of *bhusa*, and it has not been seriously argued that the Munsif's decision which is supported by the Subordinate Judge that that portion of the rent is recoverable, is erroneous. Appeal No. 2499 must, therefore, be dismissed with costs.

As regards Appeal No. 2027 it has been argued that there is no *kabuliat* and that the imposition of two cartloads of *bhusa* must be taken to have been sometime after the inception of the tenancy and to be in the nature of enhancement of rent even if it is not itself an illegal *abwab*.

Now taking the second point first, it appears to me at the stipulation for two cartloads of *bhusa* over and above the rent if made at the inception of the tenancy would not fall within the principles which have been laid down by this Court as to the nature of *abwabs*,

Bhusa is a by-product of the land. It is a product which the *zemindar* could not obtain except through the tenant, and there seems to be no reason why the tenant should not give a small portion of his produce by agreement to the *zemindar* in addition to any indicated rent which he stipulated to pay. It is not, as is laid down in the cases, an uncertain and arbitrary payment. But then, as the Munsif finds, even if it were not *abwab*, it would be an enhancement if it had been imposed at some time after the inception of the tenancy; and if, as the Munsif finds, it was contrary to section 29 of the Bengal Tenancy Act it would be not recoverable. But the learned Subordinate Judge has set aside the Munsif's finding of fact on this point. He has held that the documentary evidence shows that these husks have been delivered and acknowledged since the year 1294, that is, the year after the passing of the Bengal Tenancy Act, and he further found that the plaintiff's case is that it was always delivered as part and parcel of the rent from the inception of the tenancy which was admittedly long before the passing of the Bengal Tenancy Act. It is argued that he has not expressly said that he accepts the plaintiffs' case. But I find in the very next sentence that he clearly does; for he says, "I, therefore, think that the learned Munsif was not right in disallowing the plaintiffs"—claim, thereby clearly showing that he accepts the plaintiff's case in its entirety. That being so the objection to the payment taken by the learned Munsif, which would be a quite proper objection on the findings of fact by him, fails; and on the findings of fact of the learned Subordinate Judge the plaintiff is entitled to recover Rs. 12 over and above *jama* allowed by the Munsif in Suit No. 520 which is Appeal No. 2027 of 1908. This appeal, therefore, must also be dismissed with costs.

Babu *Karunamoy Bose*, for the Appellants.

Babu *Joges Chunder Dey*, for the Respondents.

JUDGMENT.—These two appeals involve the question whether a part of the claim made by the plaintiffs is open to objection as coming within the statutory prohibition against *abwabs* and other illegal cesses. The circumstances of each case may be briefly stated: Suit No. 520 relates to a case where there was no *kabuliat*. In No. 521 there was a *kabuliat* and that *kabuliat* has been placed before us. I will deal with the second of these two suits first. This *kabuliat* states: "that there is an annual *nakdi* rent of Rs. 4-4 per *bigha* making in all the specified amounts of Rs. 42-8 annas" and that is followed by the usual provisions to be found in documents of this kind. It is then finally provided that over and above this (that is over and above the rent to which reference has been made), they (that is the tenants) would pay a cartload of husk year afer year till the period of the *patta* was at an end, and in case they fail to do the same they would pay Rs. 6 as the value thereof; and that if they did not pay the said rent annually they should be held liable for interest at the rates specified. Then there is a schedule which gives the following items: Area of land 10 *bighas*, rate per *bigha* Rs. 4-4, total rent Rs. 42-8; value of husk, Rs. 6; annual *jama*, Rs. 48-8. The question in this case is whether the husk is or is not really a part of the rent.

We have these circumstances that are significant; *first*, the plaintiffs themselves in their plaint do not treat the husk as a part of the rent in totalizing Rs. 48-8 because they make a claim in excess of that, that is to say, at the rate of .Rs. 10 per cartload. Then again, cesses have not been claimed or paid on the basis of the husk being a part of the rent. These were circumstances which were present in the case of *Mathura Prasad* v *Tota Singh*(1), and it is manifest that they must be regarded as having a material bearing on the question whether or not the cartload of husk, whatever may have been said in an isolated part of the document, really was or was not a part of the rent.

No doubt in Suit No. 521, the Munsif, the Subordinate Judge and Mr. Justice Holmwood before whom the case came thought that the husk was a part of the rent, and that is a circumstance that is to be taken into consideration. But we have the fact that, in circumstances which I think cannot fairly be distinguished from the present, it was distinctly held that the husk was not a part of the rent; and Mr. Justice Holmwood was a party to that decision: *Mathura Prasad* v. *Tota Singh* (1). I think we must accept that decision as correct, and in fact there is no suggestion before us that it is incorrect,

(1) 17 Ind. Cas. 177; 16 C. L. J. 296.

and also as conclusive of this case. So much for Suit No. 521.

Suit No. 522 appears to me to be stronger in the appellants' favour, because there is not even the slender circumstance of an apparent consolidation of rent. In that case there is no *kabuliat*. There is merely the circumstance that on the evidence the learned Judge of the lower Appellate Court came to the conclusion that two cartloads of husks were supplied every year. The decision of the Munsif was in favour of the defendants, but the learned Subordinate Judge as also Mr. Justice Holmwood were in the plaintiffs' favour. Those factors which were treated in *Mathura Prasad* v. *Tota Singh* (1), as showing that the obligation in respect of husk was really an obligation in respect of illegal cesses, are present in this case, and I am unable to distinguish in any particular this case from that. The result is that we reverse the judgments of the learned Judge of this Court, as also the decree of the Subordinate Judge, in both Nos. 520 and 521. In No. 520 we restore the decree of the Munsif and in No. 521 we vary his decree by disallowing the plaintiffs' claim in respect of the cartload of husk.

The defendants will get their costs in each case in the lower Appellate Court and in this Court including the costs of two appeals. We do not interfere with the Munsif's order as to the costs in either suits.

Appeals decreed.

PUNJAB CHIEF COURT.

FIST CIVIL APPEAL NO. 1340 OF 1911.

April 9, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Shadi Lal.

SHAHAB DIN—DEFENDANT—APPELLANT

versus

MIRAN BAKHSH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 20—Discretionary—Discretion not to be exercised in case of extreme negligence—Law of limitation inapplicable to action taken under rule.

The law of limitation has no application to action taken by the Court under Order XLI, rule 20, of the Civil Procedure Code.

Sohna v. *Khalak Singh*, 13 A. 78; A. W. N. (1891) 1; *Bindeshri Naik* v. *Ganga Saran Sahu*, 14 A. 154 (F.B.); A. W. N. (1892) 13; *Kanagappa* v. *Sakkalinga*, 15 M. 362 (F. B.); 2 M. L. J. 175; *Girish Chander* v. *Sasi Sekhareswar*, 33 C. 329, *Umed Singh* v. *Dalip*, A. W. N. (1893) 35; *Corporation of the Town of Calcutta* v. *Anderson*, 10 C. 445; *Mussummat Masum Begam* v. *Madan Mohanlall*, 9 Ind. Cas. 222, 8 P. W. R. 1911, referred to.

The power to take action under Order XLI, rule 20, Civil Procedure Code, is discretionary, and in an extreme case of appellant's negligence, where the omission to make a party is not of the same character as a clerical error or slip of the pen, but seems to have been due to an essential misunderstanding of the case and of the law applicable to it, the Appellate Court will decline to exercise the discretion.

First appeal from the decree of the District Judge, Hoshiarpur, dated the 28th August 1911, decreeing the claim.

Mr. *Fazal-i-Hussain*, for the Appellant.

Mr. *Shah Nawaz*, for the Plaintiffs-Respondents.

Mr. *Badr-ud-Din Kureshi*, for the Defendant-Respondent.

ORDER.—(*March* 30, 1914.)—Miran Bakhsh, Nur Elahi and Mir Ahmad are defendants in this case, and the plaintiffs are Mahtab Din, Shahab Din and Jiwa. The claim was for Rs. 5,905 and the prayer was that a decree be passed for this sum and that it be recovered by auction sale of certain properties in accordance with the mortgage-deed * of 23rd May 1909, on which the claim is based, and also from the person and other property of defendant Mahtab Din; or "any other relief," etc. The properties mentioned in that deed, executed by Mahtab Din, defendant, alone are these:—

(*i*) Half of 153 *kanals* 2 *marlas* of land held in mortgage in equal shares by Mahtab Din and Shahab Din;

(*ii*) Mahtab Din's share in 24 shops and houses held jointly by him and Shahab Din by virtue of mortgage and purchase.

Of the house property details are given of 14 premises thus:—

(*a*) One-fourth of a *tawela* in Kotwali Bazar, Hoshiarpur, with 8 shops;

(*b*) One-half of shop known as Sandhe Khanwali;

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* Exhibit P. I, page 6, paper-book.

SHAHAB DIN v. MIRAN BAKHSH.

(*c*) One-half of shop near Khara well;
(*d*) One-half of house known as Phillaurianwala;
(*e*) One-half of house purchased from Nizam Din at auction sale;
(*f*) One-half of house and well known as Nawab Sahibwala.

In the plaint further details of the property are given, but we need not reproduce them here, except this that among the mortgaged property are nine shops known as Sodhi Kartar Singhwali.

The claim of Rs. 5,905 is thus arrived at:—

	Rs.
Principal	3,500
Interest for 12 years at Rs. 35 per mensem...	5,040
TOTAL ...	8,540
Repaid in connection with the Sodhi Kartar Singhwali shops*	2,635
BALANCE ...	5,905

Two reasons are given in the plaint for impleading Shahab Din as defendant, namely, in paragraph II, that he claims some of the property as wholly his, and, in paragraph VI, that he is co-partner in "the *khata*" (*i*) above. As to defendant No. 3, Jiwa, the land in (*i*) consists of two parts thus:—

(A) 73 *kanals* 1 *marla* owned by Fazl Muhammad and others; (B) 80 *kanals* 12 *marlas* owned by defendant No. 3. [It will be seen that there is a slight difference (11 *marlas*) between the total here and in mortgage-deed; but for the purposes of this appeal the matter is unimportant.] It is alleged by plaintiffs that Mahtab Din, defendant, has received half the mortgage-debt due on (B) from Jiwa, defendant, and has allowed him to redeem to that extent; and this is the reason for impleading Jiwa.

Mahtab Din, defendant, put in pleas, ending up with the admission that plaintiffs are undoubtedly entitled to a decree, and with the contention that the decree should be against Shahab Din as well and should be realised by sale of the joint property of both, without specification of shares, as both are liable, and not from the person and property of Mahtab Din alone.

Shahab Din denied all knowledge of the mortgage-deed and claimed as his own:—

The shop near the Khara well, (*c*) above;

The house known as Phillaurianwala, (*d*) above;

The house known as Nawab Sahibwala, (*f*) above.

Tawela and 8 shops, (*a*) above;

and he also contended, *inter alia*, that the claim could not be enforced against the joint property until partition had been effected.

Apparently Jiwa, defendant, put in no pleas.

The Court below found:—

That the shop near Khara well was joint of the two defendants;

That in the Phillaurianwala shop defendant Mahtab Din has no share;

That in the Nawab Sahibwala house defendant Mahtab Din has no share;

That the mortgage by Mahtab Din of his own share in joint property was lawful and enforceable;

That that defendant's share in the Sandhe Khanwali and Nizam Dinwali properties could be sold under this claim, even though possession is with Shahab Din;

That Rs. 175 should be recovered from the person of Shahab Din, and the rest of the debt from the person of Mahtab Din and from such parts of the properties in suit as have been found to be owned by him.

A few words are necessary in order to explain the allocation of this sum of Rs. 175; [but first it may be noted that it is by no means clear why no issue was framed and no decision arrived at regarding the *tawela* with 8 shops, (*a*) above]. One house included in the mortgage-deed in suit was owned by one Bhola and was in mortgage with Mahtab Din and Shahab Din for Rs. 200. The latter realised the whole sum and allowed redemption, and so has been held personally liable for Rs. 100 principal *plus* Rs. 75 interest thereon.

The decree based on these findings bears date 28th August 1911. On 27th November 1911 Shahab Din presented this appeal, making only the plaintiffs respondents. The

* *i.e.*, Rs. 1,741-14-6 principal *plus* Rs. 892-1-6 interest on that sum.

appeal was admitted, on 4th January 1912 printing notices were issued, and on 20th December 1913 the case actually came before a Division Bench, though it was not reached and had to be adjourned. Up to that time Mahtab Din had not been mentioned as a party to the appeal, and it was only on 27th February 1914 that application was made to a Judge in Chambers to add the name of Mahtab Din as a respondent, the usual order, dated 5th March 1914, being passed adding the name "subject to all just exceptions."

Mr. Kureshi and Mr. Shah Nawaz appear for Mahtab Din and for plaintiffs, respectively. Both object to the impleading of Mahtab Din at this late stage; and we have heard Mr. Shah Nawaz who contends, *first*, that to implead him is illegal; *secondly*, that, if the mere adding of his name is not illegal, nevertheless the fact remains that the appeal as against him is barred by time; *thirdly*, that the Court has a discretion in the matter and should refrain from exercising it in favour of the appellant; *fourthly*, that, if the name is excluded, virtually all the questions raised in the appeal are *res judicata*.

The order of the Judge in Chambers aforesaid was an order under Order XLI, rule 20, Civil Procedure Code. Mahtab Din certainly is "interested" and he was a party to the suit. This Court, therefore, has power to implead him as respondent; and in connection with the plea of limitation we think the authorities are in favour of the view that the law of limitation has no application to action taken by the Court under the rule quoted: *Cf. Sohna* v. *Khalak Singh* (1) *Bindeshri Naik* v. *Ganga Saran Sahu* (2); *Kanagappa* v. *Sokkalinga* (3); *Girish Chander* v. *Sasi Sekhareswar Roy* (4). Against this view Mr. Shah Nawaz refers us to *Umed Singh* v. *Dalip* (5); *Corporation of the Town of Calcutta* v. *Anderson* (6) and *Musammat Masum Begum* v. *Madan Mohan Lal* (7); but none of these lays it down that an order under Order XLI, rule 20 (corresponding to section 559, old Civil Procedure Code), impleading a respondent at a time when appeal against him would be barred, is illegal, or that the law of limitation has any application in such a case.

In the Allahabad case of 1893 it was found that the order impleading the respondent was not passed under section 559 at all. In *Musammat Masum Begam* v. *Madan Mohan Lal* (7), the decision was merely that omission through ignorance to put in within time, along with a memorandum of appeal, copy of decree appealed against, could not be condoned under section 5, Limitation Act.

In the Calcutta case the matter was dealt with under section 5, Limitation Act, and it was held that in the circumstances stated no case for condonation of delay had been made out.

In *Ram Ratan Chuckerbutty* v. *Jogesh Chandra Bhattacharya* (8) it is true that there occurs a *dictum* which seems to support Mr. Shah Nawaz's argument. An application had been made in the lower Appellate Court for impleading respondents after time and had been refused. The High Court as to this remarked that the application had been rightly refused, inasmuch as it "was made long after the time for presenting the appeal. They could not, at the stage at which the application was made, be made parties." The question is not discussed and the authorities to the contrary are not refuted or even mentioned; and we think the learned Judges meant really no more than this, that in all the circumstances leave to implead the new respondents was rightly refused and the Court's discretion wisely exercised.

The power to take action under Order XLI, rule 20, Civil Procedure Code, is, however, discretionary; and we are of opinion that we should decline to exercise it here. Appellant's negligence was extreme. The whole contest really was between him and Mahtab Din, for neither of them denied that plaintiffs were entitled to the sum claimed by them. The real questions at issue were which defendant was liable and to what extent, and which of them owned this or that part of the

(1) 13 A. 78; A. W. N. (1891) 1.
(2) 14 A. 154 (F. B.); A. W. N. (1892) 13.
(3) 15 M. 362 (F. B.); 2 M. L. J. 175.
(4) 33 C. 329.
(5) A. W. N. (1893) 35.
(6) 10 C. 445.
(7) 9 Ind. Cas. 222; 8 P. W. R. 1911.
(8) 12 C. W. N. 625.

mortgaged property. The omission was not of the same character as a clerical error or slip of the pen, but seems to have been due to an essential misunderstanding of the case and of the law applicable to it. We, therefore, cancel the order of 5th March 1914 and dismiss the application of 27th February 1914.

We have not yet heard fully argued the question of the effect of a finding like this on the appeal as a whole. Respondents argue that the whole appeal goes, while appellant contends that in part it survives. A convenient date will be fixed for hearing Counsel further.

Mr. *Fazl-i-Hussain*, for the Appellant.

Mr. *Shah Nawaz*, for the Respondents.

JUDGMENT.—This case was adjourned for further argument as to the effect on the appeal of the findings arrived at in our order of 30th March 1914, which with this will form our judgment in this case. We have now heard Mr. Fazl-i-Hussain at some length, with the result that, without calling upon Mr. Shah Nawaz for reply, we think the appeal wholly fails except in one small particular. We do not think the ruling of *Brojo Behari Mitter* v. *Kedar Nath Mozumdar* (12), quoted by him, is in point; and indeed it seems to us obvious that cases of this sort stand to be decided each on its own peculiar facts.

The state of affairs now is briefly this. Apart from the amendment of decree asked for in ground 4 of appeal, Shahab Din defendant-appellant's prayers are contained in grounds 1 to 3. In each one of these he asks this Court to rule that certain property is his and not Mahtab Din's, or that he is not liable for a certain small sum of money. In no case does he contest plaintiff's right to the sum of money decreed in his favour.

Now it has been finally decided that the property in question (*i.e.* half of the shop near Chah Khara and so on) belongs to Mahtab Din, and that Shahab Din and not Mahtab Din is liable for the small sum of money aforesaid; and in consequence of our finding in our previous order, that decision cannot now be contested. What Shahab Din now asks us to do, therefore, is to rule that, though as between him and Mahtab Din these matters have been finally disposed of in favour of Mahtab Din, yet we should give exactly the contrary decision on these same matters of fact as between Shahab Din and plaintiff.

This, in our opinion, we cannot do; nor can we allow Mr. Fazl-i-Hussain, as he has attempted to do, to import into his appeal matters not mentioned in the grounds.

As regards ground 4, in which as well as in ground 1, we may observe that "Chah Khadar" appears to be a mistake for "Chah Khara", there is certainly an ambiguity in the decree. There is no dispute on the point. We order amendment of the decree by the insertion of the words "½ of" before "shops adjacent to *khara* well," and of the words "½ of" before "the house known as *khola* Nizamdinwala."

In all other respects we dismiss the appeal with costs throughout.

Appeal dismissed.

(9) 12 C. 580 (F. B.).

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 2046 OF 1910.

May 13, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

RAJABALA DEBI BHADURI—PLAINTIFF—APPELLANT

versus

SRISH CHANDRA GHOSH AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 51—Rate of rent, presumption as to—Presumption, how arrested.

The presumption, arising under section 51 of the Bengal Tenancy Act, 1885, applies not only in respect of a particular succeeding year when it is proved that rent was realised for the immediately preceding year at a particular rate, but also to each successive year one after another, until its operation is arrested by proof on the part of the tenant that the conditions of the tenancy were altered in the meanwhile.

Appeal against the decree of the District Judge of Zillah Nadia, dated the 22nd of March 1910, affirming that of the Munsif,

second Court, at Krishnagar, dated the 3rd of December 1909.

Babu *Panchanan Ghosh* for Babu *Hari Prosad Chatterjee*, for the Appellant.

Babu *Ambica Pado Chowdhury*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit for arrears of rent and cesses for the years 1312 to 1315. The plaintiff claimed rent at the rate of Rs. 17 a year. The defendants contended that the rate of rent was Rs. 14 a year. In support of this claim the plaintiff produced an *ex parte* decree for arrears of rent for the years 1308 to 1311. This decree had been made at the rate of Rs. 17 a year and had been executed against the defendants. The plaintiff argued on the strength of this decree that under section 51 of the Bengal Tenancy Act, the presumption was that the defendants held at the rate of Rs. 17 a year during the year 1312 and the subsequent years. The Court of first instance gave effect to this contention, but came to the conclusion upon the evidence that the defendants had rebutted the presumption and had established that the rent was, during the years claimed, payable at the rate of Rs. 14 a year. In this view the primary Court made a decree in favour of the plaintiff only at the rate alleged and proved by the defendants. Upon appeal by the plaintiff, the District Judge has held that the presumption mentioned in section 51 applies to the year 1312 and not to the subsequent years because rent has not been proved to have been realized at the rate of Rs. 17 a year for the year 1312. According to the District Judge, the presumption under section 51 applies in respect of a particular year only if it is proved that the rent for the immediately preceding year had been actually realised at a particular rate. In our opinion the District Judge has taken an erroneous view of the true scope of section 51. That section is in these terms:—"If a question arises as to the amount of a tenant's rent or the conditions under which he holds in any agricultural year, he shall be presumed, until the contrary is shewn, to hold at the same rent under the same conditions as in the last preceding agricultural year". To apply the provisions of this section to the case before us, the plaintiff has first to prove the fact that the tenants held at the rate of Rs. 17 a year during the year 1311. This the plaintiff shows by production of the rent-decree. The question next arises, at what rate did the defendants hold in 1312? The presumption is that the rent is payable for the year 1312 at the same rate as for the year 1311. This is a rebuttable presumption, and it is open to the tenants to prove the contrary. Whether they have or have not been able to do so, we do not know, because the District Judge has not found the rate of rent for the year 1312; until it is shown, however, that the rate of rent for the year 1312 is different from that of the year 1311, the presumption is that the two rates are identical. But as soon as it is found that the rate for the year 1312 is Rs. 17 a year, the presumption arises in respect of the year 1313 that the rate is identical. No doubt, it is open to the tenants here again to establish in respect of the year 1313 that the rate is different from that of the year 1312. The presumption thus applies to successive years, but its operation may be arrested at any stage by proof on the part of the tenants that the conditions of the tenancy have altered.

The result is that the appeal is allowed, the decree of the District Judge set aside and the case remanded to him in order that he may re-hear the appeal.

Costs will abide the result.

Appeal allowed.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 2460 OF 1913.

January 19, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Rattigan.

THE PEOPLE'S BANK OF INDIA, LTD., THROUGH DIWAN CHAND AND OTHERS—LIQUIDATORS—APPELLANTS

versus

NARAIN DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Companies Act (VI of 1882), ss. 128, 141—Company—Petition by creditors for winding-up—During pendency of petition, share-holders resolving on voluntary liquidation—Appointment of liquidators by shareholders—Court ordering compulsory winding-up and appointing its own liquidators—Right of appeal.

After a petition had been presented by certain creditors to the District Judge of Lahore for the

PEOPLE'S BANK OF INDIA, LD. *v.* NARAIN DAS.

winding-up by the Court of the Peoples' Bank, Limited, and the 14th November 1913 had been fixed for the hearing of the said petition, a meeting of the shareholders of the Company was held on the 9th November 1913 and a resolution passed to the effect that the Company should go into voluntary liquidation, subject to the supervision of the Court, and that the present appellants should act as liquidators. This resolution was brought to the notice of the District Judge on the said 14th November by an application addressed to him by the appellants which was ordered to be filed on the record. The District Judge after full consideration of the facts and with the said resolution of the Company before him, decided to direct a compulsory winding-up by liquidators appointed by him:

Held, that the liquidators appointed by the Company *pendente lite* had no right to contest the order directing the compulsory winding-up.

Miscellaneous first appeal from the order of the District Judge, Lahore, dated the 17th November 1913, ordering compulsory liquitation of the People's Bank of India, Limited, Lahore.

Mr. *Gobind Ram*, for the Appellants.

ORDER.—I am not sure that present appellants have any *locus standi*, but this appeal can be heard with the appeal of the Company-Bank. Admitted. Division Bench. Two weeks' extension of time allowed under section 169.

Mr. *Gobind Ram*, for the Appellants.

Mr. *Petman* and Lala *Gulshan Rai*, for Narain Das, Bhagwan Das and Nihal Singh.

Mr. *Parker*, for the Official Liquidators.

JUDGMENT.—After a petition had been presented by certain creditors to the District Judge of Lahore for the winding-up by the Court of the People's Bank, Limited, and the 14th November 1913 had been fixed for the hearing of the said petition, a meeting of the shareholders of the Company was held on the 9th November and a resolution passed to the effect the Company should go into voluntary liquidation, subject to the supervision of the Court, and that the present appellants should act as liquidators. We are informed that this resolution was brought to the notice of the District Judge on the said 14th November by an application addressed to him by appellants, but that the only order passed thereon was in vernacular and was to the effect that the application was to be filed on the record. Apparently no further action in the matter was taken by appellants, but the District Judge after full consideration of the facts and with the said resolution of the Company before him, decided to direct a compulsory winding-up by liquidators appointed by him. From that order appeals have been filed not only by the present appellants, but also by the Directors of the Company and certain depositors. The hearing of the latter appeals has, for reasons given in our order in Civil Appeal No. 2443 of 1913, been adjourned to the 2nd March next. and Mr. Gobind Ram, on behalf of the present appellants, requested us to adjourn the hearing of this appeal also. We saw no reason, however, to accede to this request, as there is here a preliminary question as to the *locus standi* of appellants to impugn the order of the District Judge, and in the order of the Judge in Chambers who admitted the appeal to a hearing, express reference is made to this point. Mr. Gobind Ram urged that he had had no opportunity to study this question, as he had been led to believe that all the appeals before us to-day would be postponed. There was no justification for this belief, and the learned Counsel admits that he did not take the trouble to inquire into the matter or to find out from the Counsel for the respondent whether he was willing to consent to such adjournment. Furthermore, the rumour that an adjournment was possible reached Mr. Gobind Ram, through his client, on Saturday afternoon (the day before yesterday), and he had thus ample opportunity of preparing himself to meet an objection which had been expressly brought to his notice by the admitting order. In the circumstances we saw no sufficient reason for postponing the hearing of this appeal which stands upon a footing entirely distinct from the other appeals, and we accordingly proceeded to hear argument upon it. Mr. Gobind Ram was unable to cite any authority in support of his client's right to challenge the order of the District Judge. At the time when the appellants were appointed liquidators by the resolution of the Company, the question whether the Company was to be wound-up compulsorily was *sub judice*, and though it might well have been open to appellants, as representing the wishes of the majority at the meeting when they were appointed, to apply to the District Judge to give effect to the resolution in question, we cannot accept the proposition that they had any further *locus standi* when the Court decided to direct a compulsory

winding-up of the Company. Once that order was passed, the only persons competent, in our opinion, to appeal therefrom were the Company itself or such shareholders or creditors as felt aggrieved by it. The case might possibly have been different had the appellants been appointed liquidators *ante litem motam*, that is a question upon which, as it does not arise before us, we give no opinion. But we hold that appellants whose appointment was made *pendente lite*, have no right to contest the order from which they are appealing; and we, therefore, dismiss this appeal with costs. Mr. Parker, for respondents' official liquidators, does not ask for costs, but Mr. Petman for the petitioning creditors, Narain Das, Bhagwan Das presses for his, and we allow him Rs. 64.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL FROM ORDER NO. 513 OF 1911.

May 25, 1914.

Present:—Mr. Justice Stephen and Mr Justice Mullick.

RAM LAL PAHARI—DECREE-HOLDER—APPELLANT

versus

BABULAL BARIK AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

Execution—Benamidar *decree-holder, application for execution by son of—Step-in-aid of execution—Limitation—Compromise—Assignment by* benamidar, *effect of.*

A *benamidar* decree-holder cannot apply for execution of the decree

Denonath Chuckerbutty v. *Lalit Coomar Gangopadhaya*, 9 C. 633; 12 C. L. R. 146, followed.

Therefore, an application for execution of a decree by the son of a *benamidar* decree-holder which was disallowed, is not a step-in-aid of the execution and does not extend the period of limitation so as to include within it an application of the real decree-holder.

Balkishen Das v. *Bedmati Koer*, 20 C. 388, distinguished.

A compromise with a person owning no beneficial interest in the subject of the compromise cannot operate as an assignment, as he has no interest to assign.

Appeal against the order of the District Judge of Gaya, dated the 27th of July 1911, affirming that of the Munsif, first Court of that place, dated the 11th of May 1911.

Babu *Surendra Madhab Mullick*, for the Appellant.

Babu *Rajendra Prasad*, for the Respondents.

JUDGMENT.—This case stands thus. In 1904 one Narayan Panday obtained a money-decree. He died in the year 1907 and in the same year two of his sons who happened to be minors applied for execution of the decree. After various proceedings which are not material, the application for execution was struck off and execution was never granted by the Court. After this had happened, the present appellant brought a suit in May 1909 for declaration against the sons of Narayan Panday that the decree obtained by the latter was obtained on his behalf, that is to say, that Narayan Panday was his *benamdar* in the matter. This was decreed on compromise in the same year and the terms agreed upon were that Narayan Panday was the *benamdar* and that the appellant should have the power to execute the decree. On the 1st October 1910, an application was made for execution but was refused on the ground that it was time-barred. To this it is argued in appeal that the application by the sons of Narayan Panday dated the 7th December 1907 was a step-in-aid of the execution which has the effect of extending the period of limitation so as to include within it the application now before us. The question whether this is so, depends upon the question whether the application of the 7th December 1907 was made in accordance with law. It is now decided that Narayan Panday obtained the original decree as a *benamdar* of the appellant. What was the position then of the sons. It seems to be impossible for the appellant to put forward any other case than that they succeeding through their father's inheritance also became *benamdars* on his behalf. But the question arises, how far the *benamdar* has power to execute decrees, and in this case there is a further question whether his sons can have that power. The decision in the case of *Denonath Chuckerbutty* v. *Lalit Coomar Gangopadhaya* (1) seems to show that the *benamdar* could not have the power in question. It is argued that the decision in the case of *Balkishen*

(1) 9 C. 633; 12 C. L. R. 146.

Das v. *Bedmati Koer* (2) distinguishes this case on the ground that when a decree is obtained by the person beneficially interested and is subsequently transferred to a person who takes it as a *benamdar* and execution is sought by him, the execution cannot be had. But according to this rule, whatever may be the position of Narayan Panday, in this case his sons at best can only be regarded as transferees from him or possibly from the appellant. In this view of the case they were not competent to make the application of the 7th December 1907, and that application cannot consequently be called in aid by the present appellant as a step-in-aid of the execution. The Rule laid down in the case in *Balkishen Das* v. *Bedmati Koer*(2) does not apply to this case as the execution in the present case was never allowed by the Court to be carried into effect. The appellant has sought to argue the case on the ground that the compromise of July 1909 acted as an assignment. We cannot, however, accede to this point of view, because at most the two sons of Narayan Panday were like him mere *benamdars*, and we must take it that they had no interest of any kind in the decree. Consequently the act of assignment could not be valid, since there was nothing for them to assign. No notice was given to the judgment-debtor and there is no indication that it has ever been treated as an assignment before the present occasion.

The result is that we dismiss the appeal with costs, the hearing-fee being assessed at two gold *mohurs*.

Appeal dismissed.

(2) 20 C. 388.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 170 OF 1912.

February 12, 1914.

Present:—Mr. Justice Rattigan and Mr. Justice Scott-Smith.

LAL KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NURA AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Awans *of Tallagang Tahsil, Attock District—Alienation by proprietor in presence of sons*—Onus probandi—*Distinction between alienation by sonless proprietor and proprietor having sons—Evidence of alienations not contested, value of.*

Amongst *Awans* of the Tallagang Tahsil, District Attock, a proprietor cannot sell or dispose of his ancestral property to the prejudice of his sons except for a necessary purpose.

The onus of establishing that an *Awan* proprietor having sons has absolute power of disposing of ancestral property lies heavily upon the person asserting it.

Custom recognises a distinction between cases where an alienation is by a proprietor who has sons, and cases where it is by a sonless proprietor.

In order to establish absolute power of disposing of ancestral property, the evidence that a number of alienations have taken place within recent years and have not been contested, without disclosing the particulars and details of those alienations, is of but little value and inconclusive.

Khuda Bakhsh v. *Wahab Ali*, 10 Ind. Cas. 36; 116 P. W. R. 1911; 144 P. L. R. 1911; 88 P. R. 1911; *Khuda Bakhsh* v. *Ahmad Khan*, 19 Ind. Cas. 459; 151 P. L. R. 1913; 124 P. W. R. 1913; 114 P. R. 1913; *Rasul Khan* v. *Musammat Mastur Bano*, 81 P. R. 1894, referred to.

Second appeal from the decree of the Divisional Judge, Attock Division, at Campbellpore, dated the 24th July 1911.

Mr. *Shah Nawaz*, for the Appellants.

Mr. *Badr-ud-Din Qureshi*, for the Respondents.

JUDGMENT.—On the 20th February 1908, one Nura *Awan* of the Tallagang Tahsil, which was formerly a part of the Jhelum District but is now included in the District of Attock, sold his ancestral land for a consideration of Rs. 1,250 in favour of Shera and others.

The present suit was instituted on the 12th of August 1910, and in it the sons of Nura pray for a declaration that the sale in question will be ineffective as against their rights upon the death of the vendor. Of the consideration money, Rs. 891 are alleged to have been paid to previous mortgagees and the balance of Rs. 359 is said to have been paid in cash at home.

The first Court held that the sale, as such, was not binding upon the plaintiffs, but that necessity in respect of the Rs. 891 had been duly established and accordingly granted a declaration to the effect that plaintiffs would be entitled to possession of the land, on the death of their father, upon payment of that sum.

Both parties appealed to the Divisional Judge, who was apparently of opinion that the sum paid to the prior mortgagees was duly established and was for necessity, and further that the balance was actually paid. The learned Judge, however, gave no definite

finding upon these points, inasmuch as he held that the vendor had practically unlimited powers of alienation and could not be controlled in respect of their exercise by his son. He accordingly dismissed the plaintiffs' suit with costs throughout.

The latter have preferred a further appeal to this Court and we have heard the case argued by Mr. Shah Nawaz for them and by Mr. Badr-ud-Din Qureshi for respondent.

In our opinion there can be no doubt that the prior mortgagees were duly paid off to the extent of Rs. 891 and the alienation in favour of defendants is, to that extent, valid and binding upon the plaintiffs.

As regards the balance, it is possible that some sum of money was paid to the vendor in order to induce him to consent to the sale, but there is absolutely no proof of "necessity" in respect of any amount so received by him. Upon this finding, if the sale is to be upheld, it will be necessary for us to agree with the finding of the Divisional Judge, that by custom among *Awans* of the Tallagang Tahsil, a proprietor, who has sons, has nevertheless absolute power of disposing of ancestral property.

Obviously the onus of establishing so unusual a custom must lie heavily upon the defendants.

In the present case, all that the latter have been able to show is that a number of alienations have taken place within recent years and have not been contested, but the particulars and details of these alienations have not been disclosed. Evidence of this kind is of but little value and inconclusive.

Defendants' Counsel has further referred to a large number of authorities in which it has been held by this Court that a sonless or a childless proprietor has among *Awans* of the Tallagang, Mianwali, Khushab, Shahpur, Jullundur and Pindi Tahsils very extensive, if not indeed unlimited, powers of alienation. In one case, *Khuda Bakhsh* v. *Waham Ali* (1), a single Bench of this Court did, no doubt, hold that the plaintiff had failed to prove that among *Awans* of Tallagang Tahsil, a proprietor is incompetent to make an alienation of his ancestral property in the presence of the son. That case has been discussed and explained in *Khuda Bakhsh* v. *Ahmad Khan* (2) and it is unnecessary for us to say more than that it is not clear whether the son, there referred to, was born before the alienation in question took place. The authorities relied upon by the learned Judge do not themselves support the proposition that a proprietor, with sons, has unlimited power to deal with the property as he pleases.

In *Khuda Yar* v. *Fatteh*(3), which was also a case from this Tahsil, the gift by the proprietor was contested by a nephew but had received the assent of the proprietor's own son; clearly this is not an authority upon which the vendees can rely for purposes of the present case.

The Customary Law of the Jhelum District by Mr. Talbot prepared in 1901 is not very satisfactory so far as the answers given by *Awans* to Questions 89, 90 and 105 are concerned. But considered generally, those answers would suggest that even a sonless proprietor is incompetent to alienate ancestral property without the consent of reversioners related to him within 4th degree [see as to this *Yakub Khan* v. *Fatteh Khan* (4)].

Rasul Khan v. *Musammat Mastur Bano* (5) and *Khuda Bakhsh* v. *Ahmad Khan* (2) are, however, direct authorities in support of the plaintiffs' contention that their father was not competent to deal with the land as he pleased.

In a recent case in which the parties were *Pathans* of the Mianwali Tahsil, this present Bench found that the *Riwaj-i-am* of that Tahsil (which applies equally to *Awans* and *Pathans*) makes a clear distinction between cases where an alienation is by a proprietor who has sons, and cases where it is by a sonless proprietor (see Civil Appeal No. 446 of 1911.)

We ourselves are satisfied that custom does recognize this distinction, and that even those tribes, which concede very extensive rights to proprietors in present possession, differentiate between the powers of a proprietor who has and a proprietor who has not sons living at the time of the alienation.

(1) 10 Ind. Cas. 36; 116 P. W. R. 1911; 144 P. L. R. 1911; 88 P. R. 1911.

(2) 19 Ind. Cas. 459; 151 P. L. R. 1913; 124 P. W. R. 1913; 114 P. R. 1913.

(3) 8 P. R. 1906; 64 P. L. R. 1906.

(4) 20 Ind. Cas. 14; 253 P. L. R. 1913; 161 P. W. R. 1913; 5 P. R. 1914.

(5) 81 P. R. 1894.

In the present case no instance has been cited in which it has been definitely found that amongst *Awans* of this Tahsil a proprietor can sell or dispose of his property to the prejudice of his sons unless, of course, the alienation is for necessary purposes. We accordingly accept this appeal and reversing the decree of the Divisional Judge, we restore that of the Munsif. As plaintiffs have only partially succeeded in their claim, we direct that the parties bear their own costs throughout.

Appeal accepted.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEALS NOS. 44 AND 45 OF 1912.

July 9, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

ANNADA HAIT—APPELLANT

versus

KHUDIRAM HAIT AND OTHERS—RESPONDENTS

AND

HARIS CHUNDER MONDAL AND ANOTHER—APPELLANTS

versus

KHUDIRAM HAIT AND OTHERS—RESPONDENTS.

Mortgage—Usufructuary—Suit for redemption in substance a suit for possession of land—Defence that mortgage is void—Plaintiff establishing title entitled to decree.

A suit for possession on redeeming a usufructuary mortgage is in substance a suit for possession of the land. If the plaintiff establishes title and the only answer the defendant has is that the mortgage is void in point of law, the plaintiff would be entitled to get the land, because the defendant on his own showing has no title whatever to detain possession of the land.

Letters Patent Appeals against the following decision of Justice Sir Richard Harington, Bart., dated the 3rd April 1912, in Appeals from Appellate Decrees Nos. 2004 and 2055 of 1910, against the decrees of the Subordinate Judge, third Court of Hooghly, dated the 17th March 1910, affirming those of the Munsif, third Court of Howrah, dated the 26th August 1909.

S. A. No. 2004 OF 1910.

HARINGTON, J.—This is an appeal by the defendant in a suit which the plaintiff brought for possession of certain disputed property on redeeming the usufructuary mortgage thereon in favour of the defendant in possession.

The learned Judge in the Court below found that the mortgage was valid in law and gave the plaintiff the relief he claimed.

It is now argued in appeal to this Court that the mortgage was void under section 12 of the Bengal Tenancy Act. It was in fact a verbal mortgage. There is a dispute between the parties as to whether the subject-matter of the mortgage is a property of the nature which would come within the provisions of that section. The appellant's contention is that the mortgage being void the plaintiff cannot succeed in his action, because there is no mortgage in law which he is entitled to redeem. Therefore, he argues that the suit ought to have been dismissed.

Now, the difficulty appears to me to be this. If the appellant's argument is sound then the mortgage transaction gave him no right to the possession of the land. He had then no title at all, because the title by purchase which he set up, has been expressly negatived by the learned Judge in the lower Appellate Court,—the plaintiff succeeded in proving a title paramount to the land. The first conveyance was a conveyance of an eight-anna share by the plaintiff's mother in favour of a man named Nogendra. Subsequently there was a conveyance by Nogendra to a man named Baikuntha which was admittedly a *benami* transaction made according to the plaintiff in his favour. The defendant, on the other hand, says Baikuntha was his *benamdar* and he asserted his right to the possession of the land which he had got on the ground that he was the person for whom the purchase by Baikuntha was made. But that matter the learned Judge has found against him. He found that he did not purchase the land through Baikuntha. Therefore the title he set up to justify his possession failed. Then comes the story of the verbal usufructuary mortgage made by the plaintiff's mother in favour of the defendant which the Judge has found to be a true story and on the basis of which he gave the plaintiff possession on payment of the money advanced

on the mortgage. In my view, as intimated at the beginning of the judgment, the appellant has put himself into this difficulty. He claims to be in possession of the land under a purchase, but he fails to establish that purchase. He must be taken as having no title under the purchase through Baikuntha. He then says that the usufructuary mortgage under which the plaintiff put him in possession is one which is void in point of law. Therefore he is not entitled to the land on his own showing under the arrangement under which the plaintiff says he holds possession. So that if his argument is well-founded, the plaintiff by virtue of his title would be entitled to possession as against the defendant. The argument that has been addressed to us is that if the plaintiff is given possession in this suit, it would be substantially altering the character of the suit. I do not agree with this. It appears to me that a suit for possession on redeeming a usufructuary mortgage is in substance a suit for possession of the land. If the plaintiff establishes his title and the only answer the defendant has is that the mortgage is void in point of law, still nevertheless the plaintiff would be entitled to get the land, because the defendant on his own showing has no title whatever to detain possession of the land. For this reason even if his argument is well-founded, the judgment for possession will stand.

The result is this appeal is dismissed with costs.

S. A No. 2055 of 1910.

My judgement in Second Appeal No. 2004 of 1910 will also govern this appeal, which is also dismissed with costs.

Babu *Monmotho Nath Roy*, for the Appellants.

Babus *Nilmadhub Bose* and *Sib Chandra Palit*, for the Respondents.

JUDGMENT.—Both the appeals are dismissed with costs.

Appeals dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1476 OF 1910.

July 28, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

NOOR MAHAMMAD SAIB AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KARIMA BIBI AMMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Mosque properties—Suit for possession by worshippers, maintainability of.

A suit for possession of mosque properties cannot be maintained by the worshippers in their individual or collective capacity.

Srinivasa Ayyangar v. *Srinivasa Swami*, 16 M. 31; *Kamaraju* v. *Asanali Sheriff*, 23 M. 99; *Dasondhay* v. *Muhammad Abu Nasar*, 11 Ind. Cas. 36; 33 A. 660; 8 A. L. J. 710, followed.

Second appeal against the decree of the District Court of South Arcot, in Appeal Suit No. 261 of 1909, preferred against that of the District Munsif, Chidambaram, in Original Suit No. 381 of 1908.

Mr. *M. Krishnamachariar*, for the Appellants.

Messrs. *T. Rangaramanujachariar*, *T. Narasimha Aiyangar* & *C. Padmanabha Aiyangar*, for the Respondents.

JUDGMENT.—The lower Courts seem to have rightly held that a suit *for possession* of the mosque properties could not be maintained by the worshippers in their individual or collective capacity, as that principle of law seems to be derivable from the observations in *Srinivasa Ayyangar* v. *Srinivasa Swami* (1), *Kamaraju* v. *Asanali Sheriff* (2) and *Dasondhay* v. *Muhammad Abu Nasar* (3). The plaintiffs have not established that by Muhammadan Law the worshippers as a body can be collective *mutawallis* of the plaint mosque and we are further unable to hold that the suit is brought by the plaintiffs in this case as trustees and not as merely belonging to and representing the community of worshippers.

We dismiss this second appeal with costs.

Appeal dismissed.

(1) 16 M. 31.
(2) 23 M. 99.
(3) 11 Ind. Cas. 36; 33 A. 660; 8 A. L. J. 710.

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ABDUL ALI *v.* PURAN MAL.

PUNJAB CHIEF COURT.
FIRST CIVIL APPEAL No. 1200 OF 1910.
April 12, 1914.
Present:—Mr. Justice Johnstone and
Mr. Justice Shadi Lal.
ABDUL ALI—DEFENDANT—APPELLANT
versus
PURAN MAL—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 34—Mere entry in book of account not sufficient to charge a person with liability—Contract Act (IX of 1872), ss. 59, 60, 61, 74—Appropriation of payments—Compound interest—Not at enhanced rate—Not penalty—Plaintiff cannot ask Court to go behind his plaint—Set-off—Value of building work done—Pleadings.

In order to charge a defendant with liability something more is required than mere entry in a book of account, however well and regularly kept.

Where a defendant has failed to prove that he intimated appropriation against a particular account and also fails to show that the circumstances point to such an appropriation having been intended, under section 60, Indian Contract Act, the option rests with the plaintiff to make such appropriation against debts legally due as he might please.

Compound interest not at an enhanced rate is not a penalty within the meaning of section 74 of the Contract Act

The plaintiff cannot ask the Court to go behind what he himself admitted in his own plaint.

Where the defendant claims to set-off against pro-notes and cash account the value of building work done by him, the matter stands to be adjudicated according to equity and common sense apart from the provisions of the Contract Act contained in sections 59, 61, which have no application to the case.

First appeal from the decree of the District Judge of Simla, dated the 3rd of October 1910, decreeing Rs. 8,276-13-10.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Appellant.

Messrs. *Bevan Petman* and *Mir Muhammad Khan*, for the Respondent.

JUDGMENT.—This appeal and No. 27 of 1911 arise out of two connected suits which have been discussed and disposed of by the learned District Judge in one judgment. That judgment is sufficiently full and clear, and it is unnecessary for us to re-state the pleadings, issues and findings thereon.

It is enough to note (*a*) that in Case No. 27 of 1911 the Court below has dismissed with costs the claim, which was for Rs. 4,700 on pro-notes and cash account and for future interest, on the ground that, though this claim standing by itself was made out, defendant was entitled to set-off against it the value of building work done by him,—*i.e.*, Rs. 5,646-4-0 principal *plus* Rs. 1,731-6-0 interest, total Rs. 7,377-10-0—the whole claim being thus wiped out and Rs. 2,677-10 remaining to be credited to defendant in Case No. 1200 of 1910; and (*b*) that in the latter case, in which the claim was for Rs. 8,461-10-6 on two mortgage-deeds, the Court passed a decree in favour of plaintiff for Rs. 8,276-13-10 with costs in proportion and future interest at 6 per cent. per annum.

Defendant has appealed in No. 1200 of 1910 and plaintiff in No. 27 of 1911, and we have heard arguments and have examined the records; and we may note at once that grounds 4, 5 and 6 in the former appeal have been given up. To clear the ground further we also decide here that the objection in ground 2 of the latter appeal regarding Court-fee on defendant's claim on account of the value of the work done by him is, in our opinion, unsound. We can see no good reason for supporting the objection, defendant's claim being properly taken to be merely a matter of account.

Analysis of the remaining grounds of appeal and of the arguments of Counsel shows that the first question calling for decision is as to the item Rs. 3,250 (see Exhibit D 5, page 23, paper-book A) admittedly paid by defendant to plaintiff in cash on 7th April 1904, and as to its appropriation by plaintiff to liquidation of certain debts—see page 13, *bahi* account. As stated in the account those debts were:—

	Rs.
On pro-note, dated 8th April 1901	350
On three other pro-notes of 1902, 1903 and 1904... ...	1,300
Two small amounts secured by pledge of jewellery ...	220
Interest at 2 per cent. per mensem on above pro-notes	615
TOTAL ...	2,485

leaving only Rs. 765 to be credited to defendant against the mortgage debts.

Defendant's first contention in this connection is that the whole of this account

of Rs. 2,485 as due from him is fictitious, and he challenges plaintiff to show that he has proved it on the record. In our opinion plaintiff has only proved the first item of Rs. 350, in connection with which he has called the petition-writer, Nand Lal, with his register. That pro-note has clearly been sufficiently proved, unless we are to attribute perjury and forgery to Nand Lal, against whom nothing of the sort is alleged; but we cannot follow Mr. Petman when he contends, on the principle *ex uno disce omnes*, that because one item, covering only a small fraction of the account, has been proved, the mere inclusion of a number of other items in that same account is in law sufficient to render defendant liable.

The law is quite clear * that in order to charge a defendant with liability something more is required than mere entry in a book of account, however well and regularly kept; and Mr. Petman has been unable to show on the record any evidence whatever that these disputed items ever passed.

The next question is whether plaintiff was entitled to apply the payment of Rs. 3,250 to this cash account or should be compelled to apply it to the mortgage account. Here defendant's case is that he went into the witness-box and swore that he had, at time of payment, expressly intimated that he wished the latter appropriation to be made, that plaintiff has not in the witness-box denied this, and that plaintiff, who was not present when the money was paid, has not called his man, who received the money, to contradict defendant's allegation.

In reply Mr. Petman points to the wording of Exhibit D5, in which no mention is made of any specific appropriation, the words being "towards principal and interest and credited to his account," and contrasts this with another receipt, Exhibit D1, page 24, book A, in which, no doubt at request of defendant, careful and detailed appropriation was made. Though there is this distinction between the two receipts that D5 was for a single payment and D1 was a receipt gathering together several part payments made at different dates, we think on the whole that defendant most probably made no appropriation at the time, or, if he did, made it against the account carrying 2 per cent. per mensem interest rather than against the mortgage account where the interest was only 1 per cent. As defendant has not, in our opinion, proved that he intimated appropriation against the mortgage account and has not shown that the circumstances point to such an appropriation having been intended, it follows —section 60, Indian Contract Act—that the option rested with plaintiff to make such appropriation against debts legally due as he might please. We hold, then, that of the Rs. 3,250 paid, Rs. 350 *plus* Rs. 252 interest at 2 per cent. per mensem from 8th April 1901 to 7th April 1904, total Rs. 602, falls to be liquidated first, and the remainder Rs. 2,648, and not merely Rs. 765, is available in reduction of other debts.

The next question for decision concerns the mortgage-deeds, to be found at pages 3 and 5, book A. The earlier deed, for Rs. 5,000 and dated 13th December 1898, provides for compound interest at 1 per cent. per mensem with half-yearly rests, while the later deed, for Rs. 2,500 and dated 15th September 1900, has a similar stipulation with this difference that the rests are monthly. The learned District Judge has ruled that these conditions are penal and are exorbitant, and so he has allowed only simple interest. Mr. Petman contends, and we think rightly, that the stipulation for compound interest is not by way of penalty and that section 74, Contract Act, has no application; and he fortifies his position with the help of *Janki Das* v. *Ahmad Husain Khan* (1) and *Venkatachellam Chettiar* v. *Veerappen Ambalagaran* (2). As in those cases, so here the *rate* at which compound interest was to be computed was the same as that promised for simple interest, and we have no doubt of the soundness of the view taken in them that compound interest, not at an enhanced rate, is not a penalty. No authority to the contrary is cited; and Mr. Shafi has only been able to refer us to *Kirpa Ram* v. *Samiud-Din Ahmad Khan* (3), which deals not with questions of penalty or no penalty; but lays it down that compound interest of an unconscionable amount should not be allowed.

He also tries to argue for "undue

* Section 34, Indian Evidence Act.

(1) 25 A. 159; A. W. N. (1902) 218.
(2) 14 Ind. Cas. 283; (1912) M. W. N. 512.
(3) 25 A. 284; A. W. N. (1903) 44.

influence", but we must overrule him on both points, inasmuch as the latter plea is taken too late, and as to the former point we cannot see anything unconscionable in the stipulations. We also do not agree with Mr. Shafi that the course of dealings between the parties shows that plaintiff waived his right to compound interest. If plaintiff had in his books made up accounts or struck balances on the basis of simple interest only, there would perhaps be some force in the contention; but the mere fact that payments are shown as credited to "interest" and not to "compound interest", does not seem to us to prove anything.

The next point is as to the value to be assigned to the building work done by defendant for plaintiff. In his plaint in No. Case 1200 of 1910, plaintiff put the value at Rs. 8,436-4-0*, while the Local Commissioner stated the value as low as Rs. 6,446. Mr. Petman urges that only the latter figure should be allowed to defendant, but we are of opinion that plaintiff cannot ask the Court to go behind what plaintiff admitted in his own plaint. Here we agree with the learned District Judge; and we may say at once that we decline to tamper with the small item of Rs. 165 found by the District Judge—see ground 4 (*b*), Case No. 27 of 1911, and page 47, book A.

It seems to us clear that defendant must have credit for this sum of Rs. 8,436-4 on 1st August 1907, on which date the work was first valued and found complete. The lower Court has allowed defendant interest on this sum at 2 per cent. per mensem, or rather on this sum reduced by Rs. 2,790 received by defendant from plaintiff "in cash and kind"—see page 75, lines 4 to 19, and page 77, lines 1 to 4. [It may be noted here that in the paper-book at page 77, lines 1 to 6, Rs. 4,770 seems to be a mistake for Rs. 4,700. Mr. Petman argues that defendant is not entitled on this sum of Rs. 5,646 to more than 1 per cent. per mensem at most; but, in our opinion, the proper way of adjusting the conflicting claims of the parties makes this question merely academic. We do not think any question of appropriation of payments under sections 59-61, Contract Act, arises in connection with this set-off by defendant. His work done is not a "payment", in connection with the work done he is creditor and not debtor and this was the sole debt due to him. The matter stands to be adjusted according to equity and common sense, apart from those provisions of the Contract Act.

[*Note.*— The rest of the judgment is immaterial for the purpose of this report.—*Ed.*]

Appeal allowed:
Appeal No. 27 *dismissed.*

* From this sum Rs. 2,790 falls to be deducted, see below.

CALCUTTA HIGH COURT.
FULL BENCH.

FULL BENCH REFERENCE IN APPEAL FROM APPELLATE DECREE NO. 1913 OF 1911.
April 24, 1914.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, Justice Sir Harry Stephen, KT., Mr. Justice Woodroffe, Mr. Justice Holmwood and Mr. Justice D. Chatterjee.

THE MIDNAPORE ZEMIMDARI COMPANY, LTD.,—APPELLANT
versus
HRISHIKESH GHOSH AND ANOTHER—RESPONDENTS.

Bengal Tenancy Act (*VIII of* 1885), *s.* 26—*Non-occupancy tenant — Holding heritable*—Expressio unius est exclusio alterius—*Uncertain guide.*

Apart from possible exceptions, the holding of a non-occupancy *raiyat* is heritable.

The maxim *expressio unius est exclusio alterius* is at best an uncertain guide to the true meaning of a Statute.

Full Bench reference against the decree of the Officiating Judge of Murshidabad, dated the 21st April 1911, reversing that of the Subordinate Judge of Berhampur, dated the 1st June 1910.

Babus *Joges Chandra Roy* and *Rajendra Chandra Guha*, for the Appellants.

Babus *Ram Chandra Mozumdar* and *Chandra Sekhar Banerjee*, for the Respondents.

ORDER OF REFERENCE.

MOOKERJEE AND BEACHCROFT, JJ.—(*January 8th*, 1914).—One of the question in controversy in this appeal is whether the right of a non-occupancy *raiyat* in his holding is heritable. In *Karim Chowkidar* v. *Sundar Bewa* (1), a

(1) 24 C. 207; 1 C. W. N. 88.

Division Bench of this Court held that the right of a non-occupancy *raiyat* was not heritable. In the reference to the Full Bench in the case of *Arip Mandal* v. *Ram Ratan Mandal* (2), the contrary view was indicated, and, in the reference to the Full Bench in the case of *Lakhan Narain Das* v. *Jainath Panday* (3), the referring Judges were inclined to the view that the case of *Karim Chowkidar* v. *Sundar Bewa* (1) had not been correctly decided. When the case came to be heard by the Full Bench, there was divergence of opinion among the Judges and the point was left undecided. It was further observed in the case of *Uday Chandra Das* v. *Hari Das Bairagi* (4) that the state of authorities on the question, whether the right of a non-occupancy *raiyat* is heritable, is not satisfactory. In view of this conflict of authority, we refer to a Full Bench of this Court the question, whether the right of a non-occupancy *raiyat* is heritable. As the question arises in an appeal from appellate decree, under the rules of Court the whole appeal will be referred for disposal by the Full Bench.

JUDGMENT.—The question referred for the decision of the Full Bench is whether the right of a non-occupancy *raiyat* is heritable. In *Karim Chowkidar* v. *Sundar Bewa* (1), it was held by a Division Bench that the right of a non-occupancy *raiyat* (who does not hold under any express agreement) in his holding is not heritable. In arriving at this conclusion, Mr. Justice Banerjee, J., says that "under the law as it stood before the Bengal Tenancy Act was passed, non-occupancy *raiyats* not holding under any express engagements are treated as tenants-at-will or as tenants from year to year [see Act X of 1859, section 25; see also the observations of Mr. Justice Field in his Introduction to the Bengal Regulations, page 40, and those of Mr. Justice Trevor in *Thakooranee Dossee* v. *Bisheshur Mookerjee* (5)]. Under the old law non-occupancy *raiyats* were the lowest class of *raiyats* and if the respondent's contention be correct it would follow that all *raiyati* holdings were transferable. But this would be somewhat inconsistent with certain provisions of law, such as Regulation VIII of 1819, section 11, clause 3, which speaks of hereditary *raiyats*."

Any opinion of Mr. Justice Banerjee is entitled to respect but the passage we have cited is open to question.

It is not accurate to speak of non-occupancy *raiyats* under the old law. The expression "non-occupancy *raiyat*" first appears in the Bengal Tenancy Act, and the holding of non-occupancy *raiyats* is not the exact counterpart of any holding under the old law, by which we understand the learned Judges to mean the law prior to 1859. For the present purpose it is sufficiently accurate to say that *raiyats* in early days were either *khud-kasht* or *pahi-kasht*. It is unnecessary to discuss the several kinds of these two classes of *raiyats*, but contrasting one class with the other it may be said that the position of the *khud-kasht* was unquestionably superior to that of the *pahi-kasht*.

The *khud-kasht* was, speaking generally, a man of the village in which his holding was situate, and it is, we think, conclusively established that his holding ultimately was hereditary. The *pahi-kasht* was not a man of the village where the land cultivated by him was situate: he was an immigrant. There is reason to think that originally he was a tenant-at-will, but until the demand for land exceeded the demand for cultivator, this probably was of no great moment.

But as this economic position was reversed, the inconveniences of tenancies-at-will became apparent, and so we find they gradually gave way to tenancies of a more fixed character, either from year to year or for a greater interest (Whinfield on Landlord and Tenant).

While the tenancy was at will it obviously could not be heritable, for it would of necessity be terminated by the *raiyat's* death. But with the greater fixity of later times, this would no longer be so, and on the *raiyat's* death there would be an interest that could devolve on his heir even though the tenancy was from year to year. So matters stood when Act X of 1859 was passed. That Act and the Bengal Act of 1869 and the Bengal Tenancy Act of 1885 have deprived the division of *raiyats* into *khud-kasht* and *pahi-kasht* of its importance, and under the Bengal

(2) 31 C. 757; 8 C. W. N. 479.
(3) 34 C. 516; 11 C. W. N. 626; 5 C. L. J. 457; 2 M. T. 219 (F. B.)
(4) 3 Ind. Cas. 417; 10 C. L. J. 608; 13 C. W. N. 937.
(5) 3 W. R., Act X, 29; B. L. R. Sup. 202.

Tenancy Act we find *raiyats* grouped as (*a*) *raiyats* holding at fixed rates, (*b*) occupancy *raiyats* and (*c*) non-occupancy *raiyats* (section 4). In section 20 mention is also made of "settled *raiyats*," a class largely composed of but not identical with occupancy *raiyats*, for though every settled *raiyat* has occupancy rights, some *raiyats* who have occupancy rights are not settled *raiyats*.

These several classes of *raiyats*, where the Bengal Tenancy Act governs, have taken the place of the *khud-kasht* and *pahi-kasht raiyats* with which the practical lawyer has no more concern except in order to trace the growth of *raiyati* rights. The result then is that (apart from possible exceptions with which we have no concern in this case) when these Acts were passed, a tenancy-at-will had ceased to be the measure of any *raiyati* rights and so all had interests that were capable of descent.

More than that, we think (apart from the possible exceptions to which we have referred) the holdings of *raiyats* were heritable, and this is distinctly recognized by the Bengal Tenancy Act. Thus the meaning ascribed to *raiyat* by section 5, clause (2), includes successors-in-interest: section 20, clause (3), identifies the heir of a *raiyat* with his predecessor for the purpose of acquiring the status of a settled *raiyat*: section 44 bestows on a non-occupancy *raiyat* a fixity of tenure that points to heritability: Chapter IX contemplates improvements which it would be unreasonable to expect in a tenancy not heritable, and entitles a *raiyat* to compensation for improvements made by his predecessors-in-interest (section 82): and certain rights of non-occupancy *raiyat* are protected interests under section 160.

Much has been made of section 26, on which it is sought to build up the argument referable to the maxim *expressio unius est exclusio alterius*;* but this maxim is at best an uncertain guide to the true meaning of a Statute.

Here it seems to us to have no application. Section 26 deals with the devolution of a right of occupancy, not of a holding pure and simple; and as this right of occupancy is a creature of this Statute and a doubt had been expressed as to the heritability of a right of occupancy under Act X of 1859, there was good reason for making this provision in relation to a right of occupancy which would not apply to the ordinary holding of a *raiyat* which is not a creature of the Act, though some protective provisions are applied to it which make for fixity of tenure.

It is true that in *Lakhan Narain Das* v. *Jainath Panday* (3) the question now under consideration was referred to a Full Bench of this Court. But no conclusive answer was given, for while two of the learned Judges refrained from expressing any opinion as to whether or not a non-occupancy right was heritable before the passing of the Bengal Tenancy Act, one, Mr. Justice Geidt, held that it was not, and the remaining two, Mr. Justice Brett and Mr. Justice Mitra, held that it was. It is the inconclusive result of that case that has necessitated the present reference.

It is unnecessary to recapitulate the reasons severally advanced by Mr. Justice Brett and Mr. Justice Mitra in support of their views that a non-occupancy holding is heritable, for we are in complete accord with the opinion expressed by them.

The answer then that we would give to the question referred to us is that, apart from possible exceptions with which we have no present concern, the holding of a non-occupancy *raiyat* is heritable. As the question has arisen in an appeal from appellate decree, under the rules of the Court we must dispose of the whole appeal.

The question of heritability affects only a moiety of the land in suit and the opinion we have expressed is decisive against the plaintiff's claim to that moiety.

The claim to the other moiety manifestly cannot be supported.

The result is that the decree of the lower Appellate Court must be confirmed with costs.

Appeal dismissed.

SADA KUAR *v.* BUTA SINGH.

PUNJAB CHIEF COURT.
CIVIL REVISION PETITION No. 2483 OF 1911.
April 6, 1914.
Present:—Mr. Justice Johnstone and
Mr. Justice Shadi Lal.
Musammat SADA KAUR—PLAINTIFF
—PETITIONER
versus
BUTA SINGH—DEFENDANT
—RESPONDENT.

Civil Procedure Code (Act V of 1908), O VII, r. 11 (b)—Rejection of plaint for non-payment of full Court-fee—Order appealable—Revision incompetent.

Where the Court, finding the suit to have been undervalued, required the plaintiff to pay the requisite Court-fee on the valuation made by the Commissioner appointed for the purpose, and on the plaintiff begging for four months' time within which to pay up the deficiency in Court-fee rejected the plaint under Order VII, rule 11 (*b*), Civil Procedure Code:

Held, that the order of rejection was appealable, and, therefore, a petition for revision of the order was incompetent.

Petition, under section 70 (*b*) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the order of the Subordinate Judge, second Class, Montgomery, dated the 24th August 1911, rejecting the application of the plaintiff for extension of time for making up the deficiency in Court-fee.

Mr. *Jai Gopal Sethi*, for the Petitioner.
Mr. *Obedullah*, for the Respondent.

JUDGMENT.—On 28th August 1911 the Subordinate Judge of Montgomery passed the order, revision of which is now asked for. The claim was for property valued in the plaint at Rs. 1,400. A question of valuation was raised, and the Local Commissioner, who was appointed to assess the value, put it at Rs. 3,500.

The Subordinate Judge, finding that plaintiff had paid Court-fee only to the amount of Rs. 94-8-0, ruled that he must pay Rs. 105-8-0 more. Plaintiff was not satisfied and asked that another Commissioner be appointed, but when he was directed to deposit Rs. 10 as Commissioner's fee, he refused to pay it.

No objections to the report of the Local Commissioner were put in by either party, but plaintiff begged for four months' time within which to pay up the deficiency in Court-fee, and the Court, seeing no sufficient reason for the indulgence, proceeded to reject the plaint under Order VII, rule 11 (*b*), Civil Procedure Code.

Against this order plaintiff has presented a petition on the revision side, and this petition was admitted under section 70 (1) (*a*), Punjab Courts Act, as it stood before the recent amendment.

Coming before the late Hon'ble Chief Judge the petition was heard from the point of view of the objection, based on section 115, Civil Procedure Code, that inasmuch as an appeal lay from the order under revision, revision was not competent. This question has been referred to a Division Bench by the said Judge and we have heard it argued.

The first question is whether an appeal does lie. The definition of "decree" in section 2, Civil Procedure Code, shows that an order rejecting a plaint is a decree and, of course, an appeal lies against a decree of an original Court "save where otherwise expressly provided in the body of this Code * or by any other law for the time being in force,"—see section 96 (1), Civil Procedure Code. Now there is no provision of the Code rendering inadmissible appeal from such a decree as this; and plaintiff in support of his contention that no appeal lies, can only refer us to section 12, Court Fees Act, whereby the order of a Court valuing a suit and deciding what Court-fee is required, is "final," *i. e.*, not appealable.

But the sufficient answer to this argument is that the order rejecting the plaint is not an order under section 12, Court Fees Act. No doubt no appeal would lie against an order standing by itself valuing the suit at Rs. 3,500 and directing plaintiff to pay additional Court-fee; but we can find no provision preventing appeal against the order *rejecting the plaint*.

In support of the objection that appeal was competent and, therefore, no revision lies, we have been referred by Mr. Obedullah, who appears for the respondent, to *Ajoodhya Pershad* v. *Ganga Pershad* (1), to *Prokash Chandra Sarkar* v. *Bishambhar Nath Sahi* (2) and to *Muhammad Sadik* v. *Muhammad Jan* (3), all these rulings dealt with the Civil Procedure Code of 1882; but the *ratio*

(1) 6 C. 249; 6 C. L. R. 567.
(2) 5 Ind. Cas. 18; 14 C. W. N. 343.
(3) 11 A. 91 (F. B.), A. W. N. (1888) 286.

*Civil Procedure Code.

decidendi would *mutatis mutandis* apply equally well to cases under the new Code.

In *Ajoodhya Pershad* v. *Gunga Pershad* (1) it was laid down that the finality declared by section 12, Court Fees Act, was removed by the Civil Procedure Code of 1882, inasmuch as, under the already amended definition of the word "decree," an appeal lay against an order rejecting a plaint—section 54 (*b*) and section 2 of that Code.

In *Prokash Chandra Sarkar* v. *Bishambhar Nath Sahi* (2), we may reproduce here the head-note which fully and sufficiently expresses the decision arrived at :—

"Where the Court in which a suit was instituted held that it had been undervalued and directed the plaintiff to pay additional Court-fees by a certain date, but the plaintiff having failed to do so the suit was dismissed:

"*Held*, that an appeal lay against the decree dismissing the suit, and in that appeal the decision of the first Court regarding the valuation of the suit could be questioned, section 12 of the Court Fees Act notwithstanding."

This decision was supported by reference to two rulings of the same Court, *viz*; *In the matter of Omrao Mirza* v. *Mary Jones* (4), and *Studd, H. C.* v. *Mati Mahto* (5), which appear to us exactly in point; and we do not think the applicability of the finding is in any degree lessened by the fact that it is said that the "case was dismissed" instead of the "plaint was rejected." The point is that an appeal lies notwithstanding section 12, Court Fees Act.

In *Muhammad Sadik* v. *Muhammad Jan* (3) it was unanimously decided that in a case which was virtually one of rejection of a plaint under section 54, Civil Procedure Code of 1882, the order passed was a "decree" and so appealable, appeal not being prohibited by section 12, Court Fees Act. The learned Judges followed *Ajoodhya Pershad* v. *Gunga Pershad* (1), already noted, and said:—"In our opinion the intention of the framers of the Code of Civil Procedure was that there should be an appeal in every case falling within section 54."

Mr. Jai Gopal Sethi, speaking for the petitioner, meets these rulings with *Balkaran Rai* v. *Govind Nath* (6), which he contends virtually overrules *Muhammad Sadik* v. *Muhammad Jan* (3). Perusal of the judgment of the learned Chief Judge shows that it in effect lays down the proposition that, notwithstanding that an order rejecting a plaint or dismissing a suit may be a decree and so be appealable under the Civil Procedure Code, no question as to valuation of suit in the strict sense of the term can, in the face of section 12, Court Fees Act, be agitated in the appeal against such order. There is thus a conflict of authority in connection with the point just stated; but we do not find ourselves called upon to decide between the disputants. It is enough for the purposes of the present case for us to hold that an appeal did lie against the order we are asked to revise; and we may point out that perusal, to go no further, of the first paragraph of the petition before us shows that the principal objection urged against the order under revision is not connected in any way with the valuation of the suit, but is an objection that sufficient time was not allowed for payment of additional Court-fee.

Holding that appeal did lie, we have next to see whether this finding bars revision. It seems to us that section 115, Civil Procedure Code, is clear enough; but Mr. Jai Gopal Sethi refers to *Kanaran* v. *Komappan* (7) and to *Vithal Krishna* v. *Bal Krishna* (8). The former ruling expressly refers to *Ajoodhya Pershad* v. *Gunga Pershad* (1), as laying it down "that where it is not a mere question of the amount or arithmetical calculation the section (meaning section 12, Court Fees Act) does not apply." We can find nothing like this in the Calcutta case. Further, the petition before the Madras Court was one of appeal and not of revision, and the appeal was accepted. It seems to us, therefore, that the Court did not intend to lay down that a petition for revision in the technical sense was competent in such a case; but merely that section 12, Court Fees Act, did not prevent *interference*, that is to say, on appeal. As to *Vithal Krishna* v. *Bal Krishna* (8),

(4) 12 C. L. R. 148.
(5) 28 C. 334.
(6) 12 A. 129 (F. B.); A. W. N. (1890) 39.
(7) 14 M. 169.
(8) 10 B. 610 (F. B.).

the *dictum* that the High Court could interfere on revision on a question of valuation of suit for Court-fee is expressly limited to the "particular cases pointed out in" *Shiva Nathaji* v. *Joma Kashinath* (4), reference to which ruling shows that it deals mainly with the special powers of that High Court under its Letters Patent. We do not think that ruling affords any useful guide here.

Our opinion, therefore, is that this revision does not lie, and it is too late to allow us to convert it into an appeal. The petition is dismissed with costs.

Petition dismissed.

(9) 7 B. 341.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 77 OF 1912.

July 4, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

SATYES CHANDRA SARKAR AND OTHERS —DEFENDANTS—APPELLANTS

versus

MONMOHINI DASI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VIII, r. 5 — Failure to deny allegations in plaint, effect of— Issue framed on a point not denied in written statement, competency of Appellate Court to deal with point—Amendment of plaint—Discretion of Court.

There was nothing in the Civil Procedure Code of 1882 corresponding with Order VIII, rule 5, of the present Code. Under the new Code, however, the effect of failure to deny the allegations in the plaint does not necessarily amount to a proof in the plaintiff's favour.

Where the first Court has distinctly put in issue a certain point on which the parties have gone to trial, it is open to the Appellate Court to decide that point notwithstanding anything that may appear or not appear in the written statement.

It is in the discretion of Court to allow or not to allow amendment of plaint.

Letters Patent Appeal against the following decision of Mr. Justice Richardson, dated the 9th August 1912, in Appeal from Appellate Decree No. 1880 of 1910, against the decree of the Subordinate Judge of Birbhum, dated the 11th March 1910, affirming that of the Munsif, first Court, at Bolpur, dated the 22nd March 1909.

RICHARDSON, J.—The plaintiff in the suit is the appellant. The facts are briefly as follows :—The defendants Nos. 5 and 6 were the tenants of a non-transferable *raiyati* holding under a lease, dated 4th April 1888. On the 2nd March 1901, they conveyed the holding ostensibly to the defendant No. 4 but in reality to the defendants Nos. 1 to 3. It was found by the first Court that part of the land in dispute appertains to an estate or Chauki, named, Kotalghosa, two-thirds share of which is in the possession of the plaintiff as *ijaradar* and *dar-patnidar*, and that the remainder of the land appertains to a *mouza* named Moheshwarpur of which the defendants Nos. 1 to 3 are *patnidars* and *dar-patnidars*. This finding does not seem to have been questioned in the lower Appellate Court as far as the land to the west of the Sakulyapur Road is concerned (*vide* Amin's map). The lease of 1888 was granted by the persons then in possession of the proprietary interest in Kotalghosa.

The suit was brought to recover possession of the entirety of the land on the footing that it is all included within the boundaries specified in the lease of 1888 and the conveyance of 1901 and that the defendants Nos. 1 to 4 are mere trespassers. The present plaintiff is the representative of the original plaintiff who died during the course of the proceedings below.

The Courts below have concurred in holding that the plaintiff is entitled to *khas* possession of a two-thirds share of the land in Kotalghosa. The claim has been allowed to that extent and as regards the rest of the land, has been dismissed.

As regards the plaintiff's right as lessee of the proprietary interest it is suggested that he is also entitled as lessee of the remaining one-third share of that interest under a lease to the original plaintiff dated the 26th *Kartik* 1313 (12th November 1906). But the suit was instituted on the 23rd April 1906. At that date, therefore, the original plaintiff had no title to this one-third share under the lease. No doubt the lease purports to have retrospective effect from the year 1307 and something was said about the original plaintiff having possession of the share from that year. But no such possession has been found and reading the judgments of the Courts below

I do not think the question was presented to them in that form. The title to the share is not specially set out in the plaint. In the course of the trial the original plaintiff seems to have relied, in reference to this part of her case, on some verbal arrangement afterwards carried into effect by the lease of 1313. A mere verbal arrangement unaccompanied by possession (as the Courts below have held) conferred no title which the original plaintiff could assert with success against the principal defendants in this suit and she does not appear to have founded her claim on the verbal arrangement coupled with possession from 1307. It is too late now to put forward such a claim.

The principal contention urged for the plaintiff was that the lessors of 1888 and those claiming under them have acquired a good title by estoppel or adverse possession to that part of the land in dispute which is situated in Moheshwarpur. Now the conveyance of 1901 in favour of the defendants Nos. 1 to 3 may be evidence against them that they obtained possession of the whole of the land from the defendants Nos. 5 and 6, but they are not estopped by it. In fact the plaintiff cannot succeed either on the ground of estoppel or on the ground of adverse possession, unless and until it is shown that the defendants Nos. 5 and 6 obtained possession of the whole of the land under the lease of 1888. But as I understand the judgment of the Subordinate Judge, he has found that the evidence is insufficent to establish that fact. If the defendants Nos. 5 and 6 did not obtain possession of the Maheshwarpur land under the lease of 1888, how can their lessors have acquired any title to it by adverse possession? And how can the defendants Nos. 1 to 3 be debarred from pleading that though their conveyance purports to cover that land, the defendants Nos. 5 and 6 had never been in possession of it and had no rights in it to sell? In other words, the defendants Nos. 1 to 3 cannot be compelled to rely on their conveyance. They had another defence to the suit which they were perfectly at liberty to set up and did set up.

The preceding observations apply to the land to the west of the Sakulyapur Road to which the defendants Nos. 1 to 3 did lay claim in their written statement as part of their *Mouza* of Mohsehwarpur and in regard to which, therefore, the Courts were clearly at liberty to arrive at an adjudication on the evidence on the record. In their pleadings, however, the defendants Nos. 1 to 3 put forward no similar claim to the land on the east of the road. Nevertheless not only the land on the west but a large part of the land on the east of the road has been found to belong to them, the Courts having accepted in their entirety the boundaries of the *mouza* as they are shown in the Amin's map.

An examination of the order sheet gives the following result. The suit was instituted in May 1906. It was tried for the first time in September 1907. In January 1908, it was remanded for re-trial. Very late in the day on the 20th July 1908, the defendants applied for a local inquiry. The application was rejected. It was afterwards repeated several times without success, but eventually on the 12th November 1908 a local enquiry was directed. The Amin submitted his report on the 23rd December 1908. The suit came on for hearing on the 3rd February 1909. Between these two dates, the suit had been adjourned at the plaintiff's instance from the 19th January 1909 to the 2nd February and at the defendants' instance from the 2nd to the 3rd February. By an order of the last mentioned date, the plaintiff was refused leave to amend his pleadings. Regard being had to the delay which had occurred, the refusal was, in my opinion, well justified, but it supplied an additional reason for treating the defendants also with some strictness. The trial began on the same date, but it transpired that one of the defendants had died. The necessary steps were taken and the case was further proceeded with on the 16th, 17th, 22nd, 23rd and 24th February. On the 25th February, after they had closed their case, the defendants Nos. 1 to 3 applied in their turn for leave to amend their pleadings. Leave was very properly refused, but in the result it might as well have been granted. Argument was heard on the 2nd and 3rd March and judgment was delivered on the 22nd March.

The review of the proceedings makes it abundantly clear that it was not till after the Amin's report had been received, indeed not

till after the trial had begun, that the defendants Nos. 1 to 3 ever thought of asserting that any part of the land east of the Sakulyapur Road appertained to Moheshwarpur. There is thus a broad distinction between the land on the east and the land on the west of the road which the lower Courts have altogether neglected. The mode in which the Munsif dealt with this part of the case—in connection with the fifth of the issues framed by him—was extremely unfair to the plaintiff. It is clear that objection was taken to this part of the Munsif's judgment in the lower Appellate Court, but the learned Subordinate Judge does not appear to have realized the nature of the objection.

In my opinion, regard being had to the order of the 3rd February 1909 on the plaintiff's application and to the order of the 25th February on the application of the defendants Nos. 1 to 3 and to the whole course of the suit, the defendants Nos. 1 to 3 should not have been permitted during the course of the trial to assert that the lands to the east of the Sakulyapur Road appertained to their *mouza*. They gave the plaintiff no indication of their intention to do so before the trial commenced and the plaintiff was obviously placed at a disadvantage by having to meet a new case sprung upon her at the last moment, a case which had not been suggested in the pleadings.

The result is that the appeal succeeds in regard to the land to the east of the Sakulyapur Road. The decrees of the lower Courts will be modified so as to extend the relief given to the plaintiff to a two-thirds share of that part of the land in dispute which lies to the east of the Sakulyapur Road. In other respects the decrees are confirmed. The plaintiff and the defendants Nos. 1 to 3 will receive and pay the costs throughout in proportion to their success and failure.

Babus *Joges Chunder Roy*, *Hemendra Nath Sen*, *Sachhidanand Gupta* and *Kalidas Sarkar*, for the Appellants.

Babus *Bepin Behary Ghose* and *Nogendra Nath Ghose*, for the Respondent.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent from a judgment of Mr. Justice Richardson who has reversed the decree of the Subordinate Judge and passed a limited decree in the plaintiff's favour. This has given rise to two appeals, one by the defendants who claim that the decree of the Subordinate Judge should not have been disturbed, and another by the plaintiff who claims that the learned Judge was in error inasmuch as he did not establish the petitioner's claim to an additional one-third share over and above the two-thirds decreed.

The suit is one to recover *khas* possession of land, and to understand the points in conflict between the parties, it will be convenient to refer to a rough map which has been placed before us. From that it would appear that there is a public road running substantially north and south; that to the west of that road there is a rivulet called the Kondor, that between the road and the rivulet there is a plot of land described as containing 40 *bighas*; that to the east of the road and immediately adjoining it on its eastern side there is another piece of land said to contain 39 *bighas*. The plaintiff's claim extended to these two plots of land, but in the opinion of the lower Appellate Court, the plaintiff failed to establish his title to them inasmuch as that Court was convinced, on a map and report of the Amin, that these two plots of land did not fall within Kotalghosa. Mr. Justice Richardson, before whom the case came on appeal, has varied the decree of the learned Subordinate Judge in so far as it relates to these plots of land and has held that the plaintiff is entitled to a decree in respect of them to the extent of a two-thirds share. He came to that conclusion upon the ground that the defendants by their written statement had not, in his opinion, put in issue the plaintiff's title to those two plots of land. He would seem to have treated the silence in the written statement with regard to these plots of land as amounting to an admission by the defendants that the two plots were a part of Kotalghosa which belonged to the plaintiff, and did not appertain to the defendants' *mouzah* which lies to the west, *Mouzah* Moheshwarpur. In my opinion, that decision proceeds upon a misconception. In the first place, the written statement is before the passing of the new Code of Civil Procedure and there was nothing in the Code of 1882 corresponding with Order VIII, rule 5, of the present

Code which provides that "every allegation of fact in the plaint, if not denied specially or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability," and I may here note under the new Code the effect of such failure to deny does not necessarily amount to a proof in the plaintiff's favour, because there is a proviso to the rule "that the Court may in its discretion require any facts so admitted to be proved otherwise than by such admission." There was a distinct issue raised in the Court of the Munsif which covers the ground on which the lower Appellate Court decided in favour of the defendants. The fifth issue was in these terms, "Does the entire land set forth in schedule (*gha*) of the plaint appertain to lot Kotalghosa? If not, what portion thereof? What is the extent of the plaintiff's *dar-patni* and *ijara* interest in the said *mahal*?"

That issue, then, notwithstanding anything that may appear or not appear in the written statement, distinctly puts in issue the plaintiff's title to the whole of the land claimed by his plaint, and it casts upon him, as indeed the law casts upon him, the obligation of proving his title to the whole of the land. In saying this, I do not overlook the fact that there was an unsuccessful application for amendment of the written statement. But to that and to the failure to obtain leave to amend, I am unable to attribute the consequences which in the opinion of the learned Judge follow. Any doubt is removed by the 5th issue. Therefore, I hold that the 5th issue having formulated one of the points on which the parties went to trial, it was open to the lower Appellate Court to decide, as it did, that the plaintiff had failed to make out title to the plots containing 39 and 40 *bighas*. Therefore, the appellants before us are entitled to have their appeal allowed: and it would follow from this that subject to the further point to which I will draw attention, the decree of the lower Appellate Court should be confirmed and the judgment of Mr. Justice Richardson set aside.

This further point to which I am about to allude arises out of the contention of the plaintiff that he ought to have been given leave to amend his plaint so as to allege that even if the plots of 39 *bighas* and 40 *bighas* were outside the boundaries of Kotalghosa, still the plaintiff, by adverse possession through his tenants or otherwise for the requisite statutory period, had acquired a right to that land, and that the right, if any, of the defendants in this land as owners of the adjoining *mouza* was extinguished by the provisions of the Limitation Act. There was an application to amend on those lines made as far back as the 2nd of February 1909, but it was disallowed by the Court of first instance on the following day; and I do not think that we should be justified now in saying that the Court was not within its rights or that it exceeded its powers in refusing this application—it was a matter for the exercise of its discretion; and it has exercised that discretion in a particular way. At the same time we appreciate that the case has taken a somewhat tortuous course, and that possibly the plaintiff may have been misled by the absence of a specific denial as to the 39 *bighas* plot in the written statement, and that both the plaintiff and the defendants may have found themselves confronted with a result that they did not anticipate when they saw the Amin's report and the map. All these matters appear to me to justify a course which has been suggested as a possible solution, though not necessarily a satisfactory solution, of the plaintiff's difficulties in regard to the 39 *bighas* plot. That suggestion is that the plaintiff should be entitled to abandon for the purposes of this suit so much of his claim as related to the 39 *bighas* with liberty to institute a fresh suit in respect to those 39 *bighas*. The defendants through their Vakil have left this matter in our hands, and we think that in the circumstances of the case it would be proper to allow the abandonment so that the result will be that the plaintiff will abandon his claim in the suit to the 39 *bighas* lying to the east of the public road, and we grant him permission so to do, with liberty to institute a fresh suit in respect of that subject-matter, that is the 39 *bighas*—what remedy he may seek is a matter with which we are not concerned. But this permission is only granted on the condition that the costs that will be thrown upon the plaintiff as the result of this litigation must be paid within six months of the arrival of the record in the lower Appellate Court as a condition precedent to the suit being brought.

The result then is that save as to so much of the claim as is abandoned, the decree of the Subordinate Judge will be confirmed, for we think that it would not be right in this case for us to give effect to the prayer of the plaintiff to have the title to the additional one-third established in this suit. If he has title, it is open to him to establish it in another suit brought for that purpose.

The plaintiff must pay the costs, both before Mr. Justice Richardson and this Bench, of the appeal as well as the cross-appeal.

Appeal allowed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 128 OF 1911.

July 7, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

MONI LAL KAR CHOWDHRY—

APPELLANT

versus

UMA CHARAN CHAKRAVARTY—

RESPONDENT.

Judgment based upon evidence not on record set aside in second appeal—Statement of parties in previous litigation relied on must be regularly proved.

The High Court would set aside a judgment based upon evidence which is not on the record.

If the plaintiff relies upon any statement by the defendant or his Pleader made in a previous litigation between the parties, that statement must be regularly proved.

Letters Patent Appeal from the following decision of Mr. Justice Coxe, dated the 26th May 1911, in appeal from Appellate Decree No. 2562 of 1909, against that of the District Judge of 24-Perganas, dated the 13th August 1909, reversing that of the Munsif, 3rd Court of Alipur, dated the 27th April 1909.

COXE, J.—This is a suit for recovery of certain land, on the allegation that it is included within the land bought by the plaintiff at an auction sale held in execution of a mortgage decree.

The Munsif held that the plaintiff had failed to prove his title, and dismissed the suit.

On appeal the District Judge held that land now in suit had been admitted by the defendant in previous suit to belong to the plaintiff and gave the plaintiff a decree.

The defendant appeals to this Court.

The previous suit to which I have referred was brought by the defendant; and in that case the question what land was included within the sale certificate, which is the foundation of the present case, was in controversy and was the subject of a local investigation by a Commissioner. The Pleader for the present defendant in the course of that local investigation pointed out certain land as being included in the present plaintiff's sale certificate. The judgment of the learned District Judge is certainly open to a good deal of criticism. He remarks that "in the defendant-respondent's suit there was a compromise decree and in the terms of the compromise, it was set out that the lands for which the plaintiff-appellant now sues should be handed over to the appellant-plaintiff." There was no compromise in that suit; and the learned District Judge appears to be wrong in this respect. But, inasmuch as he subsequently says: "The compromise decree is not evidence one way or another," it appears to me that I cannot, on the strength of this mistake of the learned District Judge, which cannot have influenced his decision, set aside his judgment. Apart from that error in his judgment, it seems to me that the conclusions at which he arrived are conclusions of fact, which I cannot disturb.

It is evident that the present defendant's Pleader admitted in the former suit that certain land was included within the plaintiff's sale certificate. It is argued that the defendant's Pleader cannot be regarded as being his agent, so that an admission by the Pleader would be evidence against the defendant because the admission made related to land which was not the subject of the former suit. But I think this contention cannot be maintained. The question which the Commissioner was dealing with was as to what land was included within the present plaintiff's sale certificate. That was an area of 6 *bighas*; and if the Pleader attempted to show that some of the lands which were then in suit were not included within the 6 *bighas*, because certain other land, which he pointed out to the Commissioner, was part and parcel of those 6 *bighas*, that would certainly come within the scope of the suit; as the learned

District Judge says:—"The defendant-respondent then said in that suit that the lands which the plaintiff-appellant had taken, were not the lands to which he is entitled. The lands to which he was entitled were, so said the defendant, respondent then, the lands for which the plaintiff-appellant now sues." As a matter of fact, the statement was not made by the defendant himself, but by the defendant's Pleader. But the meaning of the learned District Judge is perfectly clear, that the defendant by himself or by his Pleader endeavoured to avert certain lands then in suit being taken by the plaintiff, by pointing out other land, that is to say, the land now in suit, as being included within sale certificate. It appears to me that, apart from any question as to whether such a statement would be conclusively binding, it certainly is evidence against the defendant and I do not think that the learned District Judge has regarded it as more than evidence. For he says subsequently:—"On the strength of the defendant-respondent's own previous statement the plaintiff is entitled to a decree, unless the defendant, respondent, can show that that previous statement was wrong." So that clearly he fully understood that this admission was not conclusive and could be rebutted.

It has been argued that the learned District Judge has not considered at length the question whether the land to which the admission in former suit related is identical with that now in suit. But clearly he has found that these lands are identical; and I see no reason to suppose that he has not arrived at that conclusion on a consideration of the evidence. I do not quite see in what other way he could have arrived at it. The learned District Judge's finding, then, as it appears to me, amounts to a finding that the land now in suit is included within the plaintiff's sale certificate based on the evidence of an admission in the previous suit made by the agent of the defendant. That seems to me a decision of fact which I cannot disturb.

The appeal must be dismissed with costs.

Babu *Sasi Sekhar Bose*, for the Appellant.

Babu *Sib Chunder Palit*, for the Respondent.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent against a judgment of Mr. Justice Coxe by which he has confirmed a judgment of Mr. Roe who had reversed the decision of the Court of first instance.

The plaintiff sued to recover possession of land from the defendant. The Court of first instance found in favour of the defendant and dismissed the suit. Upon appeal the District Judge has reversed that decision and decreed the suit.

On behalf of the defendant the judgment of the District Judge was assailed before Mr. Justice Coxe on the ground that it was based on evidence not on the record. Attention was drawn particularly to two statements in the judgment. The District Judge states in one place that a previous suit between the parties was compromised. The statement is admittedly erroneous. The suit to which reference is made, was not compromised, but what is stated to have been compromised was another suit, but the parties to that suit are not before the Court. Mr. Justice Coxe, however, stated that this error was immaterial because the learned Judge in the latter portion of his judgment states that the 'compromise decree is not evidence one way or another,' though in an earlier portion he sets out the terms of the supposed compromise.

The second statement in the judgment to which exception was taken by the defendant, was that the defendant-respondent had in his own previous statement in the earlier suit admitted that the land in controversy belonged to the plaintiff. It is pointed out that the defendant did not make any such statement. It transpires, however, that the Pleader for the defendant made some statement before the Commissioner appointed in that suit. But on an examination of the present record, it is plain that that statement is not put in evidence. In fact, the previous suit related to a different property, and the allegation of the plaintiff is that before the Commissioner who made the local inquiry in that suit the Pleader for the defendant stated in regard to the land in dispute that it did not belong to his client. This statement has not been proved. But even if it was proved, the question would arise as to the weight to be attached to it, because it has been argued on behalf of the appellant that the Pleader had no authority to make an admission relating to a property not the subject-matter of that suit, and with reference to which he

presumably had no instructions. It is plain, therefore, that the judgment of Mr. Roe is based upon evidence which is not on the record. If that evidence is excepted, whether the remainder of the evidence is sufficient to support his judgment it is impossible for us to say in second appeal.

The result, therefore, is that this appeal must be allowed and the judgment of Mr. Justice Coxe as also that of Mr. Roe which was confirmed thereby set aside. The case will be remanded to the lower Appellate Court in order that it may be re-tried with some approach to regularity. If the plaintiff relies upon any statement by the defendant or his Pleader made in the previous litigation between the parties, that statement must be regularly proved. The District Judge will be at liberty to give such directions as he may think necessary for the reception of additional evidence. If such additional evidence be given on one side, it will be obviously open to the other side to give rebutting evidence.

Costs will abide the result.

Appeal allowed ; Case sent back.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2394 OF 1912.

August 11, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

MUTHUKRISHNA IYANGAR AND OTHERS —DEFENDANTS—APPELLANTS

versus

SANKARANARAYANA IYER AND ANOTHER —PLAINTIFFS—RESPONDENTS.

Adverse possession—Hindu co-parcener's possession when adverse—Transferee of such co-parcener, title of.

Possession, which can be referred to a lawful title, cannot be adverse.

A Hindu co-parcener's possession is not adverse to other co-parceners unless they have notice of his purporting so to hold the property. A person holding property with limitations cannot pass to a transferee a title free from those limitations.

Peria Aiya Ambalam v. *Shanmugasundaram*, 22 Ind. Cas. 615; 1 L. W. 119; 15 M. L. T. 112; 26 M. L. J. 140; *Corea* v. *Appuhamy*, (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 836, followed.

The transferee of a Hindu co-parcener's interest does not stand on a higher footing than the co-parcener himself and cannot claim title by adverse possession without setting up an adverse title to the knowledge of the other co-parceners.

Second appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura, in Appeal Suit No. 933 of 1911, preferred against that of the Court of the District Munsif of Manamadura in Original Suit No. 536 of 1910.

FACTS.—The suit was for redemption of certain immoveable properties belonging to the joint Hindu family consisting of plaintiffs and defendants Nos. 1 and 2, all of whom usufructuarily mortgaged the entire property to 3rd and 4th defendants. Defendants Nos. 1 and 2 sold the property to defendants Nos. 5 to 7 without the knowledge of plaintiffs who were living in Travancore, asking them to redeem the mortgage to defendants Nos. 3 and 4. The defendants Nos. 5 to 7 accordingly redeemed the mortgage and remained in possession. The properties were admittedly in possession of the 1st and 2nd defendants at the time of the sale. Defendants Nos. 5 to 7 who were in possession contested the suit on the grounds that the whole property including the interest of the plaintiffs, was sold to them by defendants Nos. 1 and 2, that since the purchase they were in possession thereof for over twelve years and had perfected their title by adverse possession, and that the suit was, therefore, barred. The lower Courts held that the suit was not barred and decreed the suit in favour of the plaintiffs. Defendants Nos. 5 to 7 thereupon appealed to the High Court.

Mr. *C. S. Venkatachariar*, for the Appellants :—The appellants have derived title to the whole property under the purchase, and not merely to the interests of the defendants Nos. 1 and 2. They have been in possession for over twelve years and have perfected their title by adverse possession. The defendants Nos. 5 to 7 were perfect strangers to the family and their rights as *bona fide* purchasers will certainly stand on a higher footing than those of defendants Nos. 1 and 2. Though the possession of the latter cannot be adverse to the other co-parceners unless they had notice of it, this principle does not apply to their transferees.

Mr. *N. Rajagopalachariar*, for the Repondents :—The defendants Nos. 5 to 7 cannot have higher rights than their vendors, defendants Nos. 1 and 2, and as the latter cannot have adverse possession against their co-owners, the plaintiffs, unless they prove exclusion to their knowledge, which proof the lower Court find in this case to be absolutely wanting as the plaintiffs were living in Travancore for a long time, the defendants Nos. 5 to 7 cannot claim a right by adverse possession. See *Ittappan* v. *Manavikrama* (1). Moreover the sale-deed under which defendants Nos. 5 to 7 purchased mentions the usufructuary mortgage. The defendants Nos. 5 to 7 having obtained possession only by virtue of their having redeemed the said mortgage, they stand in respect of plaintiff only as mortgagees and no mortgagee can set up adverse possession, as his title to possession arose under the mortgage. *Dalton* v. *Fitzgerald* (2). See also the recent Full Bench judgment in *Periu Aiya Ambalam* v. *Shunmugasundaram* (3) which shows that a mortgagee cannot have a title by adverse possession unless it is claimed to have been with the knowledge of the mortgagor.

JUDGMENT.

TYABJI, J.—The question involved in this appeal is whether plaintiffs' right as against the defendants Nos. 5 to 7 to redeem certain mortgaged properties, is barred by limitation.

The plaintiffs and the defendants Nos. 1 and 2 were co-parceners, jointly interested in the property referred to in the plaint. The defendants Nos. 1 and 2 were in possession of the property. Their possession, it is admitted, must in law be considered as the possession of all the co-parceners, as it is not alleged that to the knowledge of the plaintiffs, the defendants Nos. 1 and 2 asserted a title adverse to their co-parceners. The defendants Nos. 1 and 2 sold the property—they could alienate only their own interest in it—to the 5th defendant. The 6th and 7th defendants are the undivded sons of the 5th defendant. The 5th to 7th defendants, who are the appellants before us, claim to have derived title to the whole property from the defendants Nos. 1 and 2 contending that the whole of it, and not merely the rights therein of the defendants Nos. 1 and 2, was purported to be sold to the 5th defendant by the defendants Nos. 1 and 2 in 1890, that the 5th defendant was put into possession of the property and asserted a title in himself adverse to the plaintiffs since 1890, and that when the suit was instituted, the plaintiffs were barred, inasmuch as the title of the 5th defendant had then become perfected by twelve years' adverse possession. It is not alleged that the plaintiffs had knowledge of the fact—if it be a fact—that the 5th defendant was asserting title in himself adverse to the plaintiffs. It is alleged, however, that the rights of the 5th defendant, as a stranger who had purchased the property, stood on a higher footing than those of his vendors, the defendants Nos. 1 and 2, that though, if the defendants Nos. 1 and 2 had themselves continued to be in possession, they could not have effectually set up a title adverse to their co-parceners, the plaintiffs, without notice of that claim to the plaintiffs, yet that the defendants Nos. 1 and 2 could transfer rights in favour of a stranger (*viz.*, the 5th defendant) free from this imperfection—so that the possession of the 5th defendant would be adverse to the plaintiffs without such notice. In other words, the argument is that though one co-parcener's possession cannot be considered adverse to the other co-parceners, unless those other co-porceners have knowledge that such possession is being held adversely, yet if the co-parcener in possession purports to transfer the whole of the co-parcenary property to a third party, then that third party's rights are higher and his possession may be adverse to those other co-parceners without such knowledge.

This argument is opposed to principle. A co-parcener holds property under conditions, one of which, for the present purposes, may be described as the disability to claim that his possession is adverse to that of the other co-parceners, unless they have notice of his purporting so to hold the property. It is difficult to understand how a person holding a property with limitations can pass to a

(1) 21 M. 153 at p. 166; 8 M. L. J. 92.
(2) (1897) 2 Ch. D. 86 at p. 93; 66 L. J. Ch. 604; 76 L. T. 700; 45 W. R. 685.
(3) 22 Ind. Cas. 615; 26 M. L. J. 140; 1 L. W. 119; 15 M. L. T. 112.

transferee a title free from those limitations. If any authority is needed for the proposition that the conditions under which the transferee holds the property must be the same as those under which the transferring co-parcener held it, it seems to me to be furnished by the following words of Sankaran Nair, J., in *Peria Aiya Ambalam* v. *Shunmugasundaram* (3) :—

" These decisions also seem to be consistent with principle. When the owner of the property in possession is dispossessed, the trespasser's possession is clearly adverse to him from its inception, as, to his knowledge, the property is held against his will, and he must assert his right within twelve years of his dispossession. But if his mortgagee, who has been placed in possession by him, is followed by another person, there is no presumption in law that such possession was taken without any right. He may be an assignee of the mortgagee, or one who purchases the mortgage as a mortgage; or he may be an adverse claimant to the mortgage right. Where more than one inference may be drawn, that inference should not be drawn which imputes a wrongful act to a person. The defendant has, therefore, to show that he took possession of this property as absolute property in contradistinction to mortgage property. Nor is this sufficient; as his possession may be consistent with the mortgagor's title, the mortgagor must obviously have notice that he is holding it as absolute property in denial of any right in him. Otherwise no laches can be imputed to him and the possession cannot be said to be adverse."

The judgment of Sankaran Nair, J., was delivered when he was sitting in the Full Bench. It was concurred in by the other members forming the Bench and thus deserves special weight. It is true that he was dealing with the case of a person holding possession when a mortgagee was entitled to be in possession, and here we have the case of a person deriving title from a co-parcener. But the principle of the decision is applicable. The principle is alluded to by Sankaran Nair, J., in the passage cited and it is stated in the following striking words by Lord Macnaghten in a case where the assignee of the co-parceners who were out of possession were suing the co-parcener in possession for partition.—It is clear from what Lord Macnaghten says that the principle underlying these rules of law is not based on any narrow reason specifically applicable only to co-parceners and inapplicable to transferees from co-parceners. He says in *Corea* v. *Appuhamy* (4) :—

"Assuming that the possession of Iseris has been undisturbed and uninterrupted since the date of his entry, the question remains, Has he given proof, as he was bound to do, of adverse or independent title? His title certainly was not independent. The title was common to Iseris and to his three sisters. On the death of Elias, his heirs had unity of title as well as unity of possession. Then comes the question, Was the possession of Iseris adverse ? The District Judge held that Iseris 'entered in the character of sole heir or plunderer'. 'Whichever it was', says the learned Judge, 'so he continued, and acknowledged no title in any one else. He has acquired a good prescriptive title'. It is difficult to understand why it should be suggested that Iseris may have entered as 'plunderer'. He was not without his faults. He is described by the learned Judge, who decided in his favour, as 'a convicted forger and thief' and 'expert not only in crime and incarceration but also in perjury'. But it is perhaps going too far to hold that he was so fond of crooked ways and so bent on doing wrong that he may have scorned to take advantage of a good legal title and may have preferred to masquerade as a robber or a bandit and to drive away the officers of the Court in that character. It is not a likely story. But would such conduct, were it conceivable, have profited him ? Entering into possession and having a lawful title to enter, he could not divest himself of that title by pretending that he had no title at all. His title must have enured for the benefit of his co-proprietors. The principle recognised by Wood, V. C., in *Thomas* v. *Thomas* (5) holds good. 'Possession is never considered adverse if it can be referred to a lawful title.'"

(4) (1912) A. C. 230 at pp. 235, 236; 81 L. J. P. C. 151; 105 L. T 836.

(5) 2 K. and J. 79 at p. 83; 25 L. J. Ch. 159; 1 Jur. (N. S.) 1160; 4 W. R. 135; 69 E. R. 701; 110 R. R. 107.

Applying these principles there is no reason why the possession of the 5th defendant should be held to have been adverse: his possession can, and ought, it seems to me, to be referred to a lawful title derived from the defendants Nos. 1 and 2. That title was not adverse to the plaintiffs.

The second appeal should, therefore, in my opinion, be dismissed with costs.

AYLING, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1557 OF 1912.

July 27, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

BIR MAHAMED ROWTHER—DEFENDANT—APPELLANT

versus

NAGOOR ROWTHER AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Mortgage—Redemption—Mortgagor, whether can redeem before expiry of term fixed.

A mortgagor cannot redeem his mortgage before the expiry of the term mentioned in the mortgage-deed unless there is a contract to the contrary in his favour.

Bakhtawar Begam v. *Husaini Khanum*, 23 Ind. Cas. 355; 18 C. W. N. 586; 26 M. L. J. 474; 12 A. L. J. 473; 19 C. L. J. 477; (1914) M. W. N. 411; 15 M. L. T. 389; 16 Bom. L. R. 344; 1 L. W. 813; 36 A. 195 (P. C.), followed.

Bose Ammal v. *Rajarathnam Ammal*, 23 M. 33, overruled.

Second appeal against the decree of the Court of the Subordinate Judge of Trichinopoly, in Appeal Suit No. 306 of 1911, preferred against that of the District Munsif of Srirangam in Original Suit No. 177 of 1910.

Mr. *N. Rajagopalachariar*, for the Appellant.

Mr. *K. V. Krishnaswami Aiyar*, for the Respondents.

JUDGMENT.—We must follow the Privy Council ruling in *Bakhtawar Begam* v. *Husaini Khanum* (1) and if there are some observations in *Rose Ammal* v. *Rajarathnam Ammal* (2) which cannot be reconciled with that ruling, those observations must be held to be overruled. The effect of the Privy Council ruling is that the mortgagor cannot be allowed to redeem the mortgage before the expiry of the term mentioned in the mortgage-deed unless there is a contract to the contrary in favour of the mortgagor. There is no evidence of any such contract in this case. The usufructuary mortgagees (plaintiffs) are, therefore, entitled to remain in possession for the seven years' term agreed upon between themselves and the mortgagors and hence they cannot be redeemed by the appellant (3rd defendant who is a purchaser of the mortgagor's right) in this suit which was brought before the term of seven years expired.

This is the only arguable point in this second appeal and as that has failed, we dismiss the second appeal with costs.

Appeal dismissed.

(1) 23 Ind. Cas. 355; 18 C. W. N. 586; 26 M. L. J. 474; 12 A. L. J. 473; 19 C. L. J. 477; (1914) M. W N. 411; 15 M. L. T. 389; 16 B. L. R. 344; 1 L. W. 813; 36 A. 195 (P. C.).

(2) 23 M. 33.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL NO. 63 OF 1912.

July 9, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

DEVENDRA NATH CHOWDHRY—APPELLANT

versus

ANNADA HADI—RESPONDENT.

Judgment—Meaning uncertain—Set aside for uncertainty.

Where the first Court formulated the question for trial in a compound sentence eminently calculated to lead to an uncertainty in the judgment, as to what the view of the Court was on each of the parts of which that compound was made up, the High Court set aside the judgment on the ground that it did not know what the judgment meant.

Letters Patent Appeal against the following decision of Mr. Justice Richardson, dated the 8th July 1912, in Appeal from Appellate Decree No. 1805 of 1910, against the decision of the Officiating Subordinate Judge, second Court of Mymen-

singh, dated the 21st February 1910, reversing that of the Munsif, second Court, Mymensingh, dated the 27th July 1909.

RICHARDSON, J.—This appeal is preferred by the plaintiff in a suit which he brought to eject the defendant from certain land on the ground that the defendant held the land under the plaintiff upon a service tenure and has refused to perform services which were properly required from him. The relationship of landlord and tenant between the parties is not disputed. The question at issue is thus stated by the Subordinate Judge, "whether the land in suit was the *mujurai* land of the defendant and whether he is liable to be ejected from it?" Having stated that question in these terms the Subordinate Judge observed in the first place that the plaint does not disclose exactly what services the defendant was required to render to the plaintiff for holding the land in suit. The plaint is very vague on this point. Then the Subordinate Judge referred to the suggestion made on the plaintiff's side that the defendant had refused to carry a *palanquin* for the plaintiff. As to that he finds that the refusal occurred many years before and that it was not an imporper refusal or a refusal of service which the plaintiff was entitled to demand. After referring to the various witnesses called for the plaintiff, to whose evidence he does not appear to attach great weight, the Subordinate Judge observed that the plaintiff had been present in the Court but had not ventured to go into the witness-box. He then says, "from the evidence adduced I do not find what was the *cause* of action in this case." That may be taken as his first conclusion. A little later he states what may be described as his second conclusion in these terms: "From the evidence adduced, I am not satisfied that the defendant is a *mujurai* tenant and that he was unwilling to render any service excepting that of *palki*-bearer to plaintiff." In the result the Subordinate Judge differing from the first Court set aside the decree of that Court and dismissed the suit. What is contended here on the plaintiff's behalf is that the Subordinate Judge's conclusions or rather that the second of his two conclusions is insufficient to support a decree of dismissal. In my opinion, if his judgment be read as a whole and if the conclusions arrived at be read with the question propounded for trial, it is clear that what the Subordinate Judge intended to convey, was that he was not satisfied that the plaintiff had succeeded in proving that the defendant was a *mujurai* tenant, or a tenant holding upon a service-tenure and that he was not satisfied that the plaintiff had succeeded in proving that the defendant was unwilling to render any services proper which might lawfully be demanded from him. In my view the two propositions of which the second conclusion is composed, are diffierent ways of stating the same thing. The learned Vakil for the plaintiff argues that the two propositions are to be read together as meaning that the learned Subordinate Judge was not satisfied that the defendant was a *mujurai* tenant, unwilling to render services to the plaintiff. So reading the conclusion, the learned Pleader argues that it was insufficient inasmuch as in his written statement the defendant denied having ever performed any *mujurai* services and his liability to perform such services. In my opinion the second conclusion is capable of the construction which I have put upon it and that construction is more consistent with the judgment, if read as a whole. No doubt the Subordinate Judge has not found expressly that the defendant holds his land at a money rent but as I conceive, he has sufficiently found that the plaintiff has failed to establish his right to eject the defendant upon the ground which he put forward. That being so, the suit was properly dismissed by him.

In that view the appeal is dismissed with costs.

Babus *Dwarka Nath Chuckerbutty*, *Sasadhar Roy* and *Kali Kinkar Chuckerbutty*, for the Appellant.

Babu *Nares Chandra Sinha*, for the Respondent.

JUDGMENT.—This is a suit to recover *khas* possession of land on the ground that it was held by the defendant on a service tenure, and that the defendant having refused to perform the service the plaintiff is now entitled to recover the land.

The Munsif decided in the plaintiff's favour. This decree was reversed by the lower Appellate Court, and the decree of

reversal has been confirmed by Mr. Justice Richardson on appeal to this Court: From Mr. Justice Richardson's judgment the present appeal has been preferred.

The plaintiff complains that the judgment of the lower Appellate Court leaves it uncertain whether the land has been held as a service tenure or not, and after the best consideration I have been able to give to this case, I think that is made out. There are expressions in the judgment which may go to show that in the opinion of the learned Subordinate Judge the refusal of the services has not been made out, and so no cause of action is established. On the other hand, there is a somewhat uncertain expression to the effect that the Judge was not satisfied that the defendant was a *mujurai* tenant and that he was unwilling to render any service except that of a *palki*-bearer to the plaintiff. There is a source of error lurking in that sentence —I am unable to say with anything like confidence what it means, whether it is that the Judge negatives the proposition as a whole or whether he negatives each part of it. This is the result of the unhappy way in which he formulated the question for trial; for these two, we have a compound sentence eminently calculated to lead to an uncertainty as to what the view of the Court was on each of the parts of which that compound is made up. Therefore, in my opinion, the decree of the lower Appellate Court must be set aside, not on the ground that we have now come to the conclusion that it was erroneous, but on the ground that we do not know what it means. The issues by which this case must be determined are these: (1) Is the land in suit the *mujurai* land of the defendant ? (2) If so, what were the services to be rendered by the defendant in respect of that land ? (3) Has the defendant refused to perform those services ? (4) Is the defendant liable to be ejected, if he has so refused ? And (5), if the defendant is liable to be ejected, then on what terms ?

We must accordingly reverse the judgment of Mr. Justice Richardson as well as the decree of the lower Appellate Court and send back the case to the lower Appellate Court for fresh determination in the light of these remarks.

The costs hitherto incurred in this litigation will abide the result.

Judgment reversed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 727 OF 1912.

July 16, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

PULINHOLIYIL MURIKOLI RAMAN NAMBIAR—PLAINTIFF—APPELLANT

versus

PUTHALATH KAKKOTAN RAMAN NAMBIAR—DEFENDANT—RESPONDENT.

Malabar Law—Melcharth—*Validity—Adequate necessity.*

A *melcharth* cannot be upheld unless there was adequate necessity or unless the grant of it was beneficial to the *tarwad*.

Karyan Kandy Pattupurail Cheria Chirikandan v. *Aylliath Kushitath Krishnan Nambiar*, 16 Ind. Cas 391; 12 M. L. T. 600, and Second Appeal No. 877 of 1911, followed.

Second appeal against the decree of the District Court of North Malabar, in Appeal Suit No. 359 of 1910, preferred against that of the Court of the District Munsif of Tellicherry, in Original Suit No. 449 of 1908.

FACTS.—The suit was by the present *karnavan* of a Malabar *tarwad* for a declaration that a *melcharth* given by a deceased *karnavan* before the expiry of the term in the original demise (*kanom*) was not valid and binding on the *tarwad*. The lower Court held that the granting of a *melcharth* was an ordinary incident of a *karnavan's* management of a *tarwad* and that the grant was binding on the *tarwad* unless it was shown that it was made to benefit the *karnavan* or his sons at the expense of the *tarwad* and to defraud the same, or that it was made for purposes other than legitimate and so not binding on the *tarwad*. It, therefore, dismissed the suit. The plaintiff appealed to the High Court.

Mr. *K. Govinda Marar*, for the Appellant:—The view taken by the learned District Judge is opposed to the ruling of this Court in *Karyan Kandy Pattupurail Cheria Chirikandan* v. *Aylliath Kushitath Krishnan Nambiar* (1) and Second Appeal No. 877 of 1911. The whole judgment of the lower Appellate Court is vitiated by this erroneous view of the law. If the alienee wants the alienation to be upheld he must show either the existence of necessity or that the alienation was beneficial to the *tarwad*.

Mr. *C. V. Anantakrishna Aiyer*, for the Respondent, argued *contra*.

(1) 16 Ind. Cas. 391; 12 M. L. T. 600.

JUDGMENT.—The learned District Judge's view seems to be that the alienee from a *karnavan* under a *malcharth* granted before the expiry of the terms mentioned in previous *kanom*-deeds need not prove adequate necessity for the grant of such a *melcharth* and that even if the *melcharth* was not "a wise" transaction, it cannot be set aside at the instance of the succeeding *karnavan* unless it is proved that it was a transaction intended to benefit the *karnavan* or his sons at the expense of his family or to defraud the *tarwad*. This view is opposed to the decision of this Court in *Karyan Kandy Pattupurial Cheria Chirikandan* v. *Aylliath Kushitath Krishnan Nambiar* (1) and Second Appeal No. 877 of 1911. The *melcharth* cannot be upheld unless there was adequate necessity or unless the grant of it was beneficial to the *tarwad*. The learned Judge's decision is vitiated by his having misdirected himself on the law governing the consideration of the question involved. We set it aside and remand the case for the decision of the appeal before him *de novo*. The costs in this Court will abide and follow the result.

Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1643 OF 1912.

August 26, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

JAGATHAMBA AMMAL—DEPENDANT No. 1—APPELLANT

versus

RAMASWAMI IYENGAR—PLAINTIFF AND ANOTHER—DEFENDANT No. 3—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 17, O II, r. 2, cl. 3—Two different trespasses—Bar of second suit—Test—Cause of action, significance of.

Where the title of the plaintiff is the same and the trespasser-defendant is the same defendant in both suits, the question whether the second suit is barred by the first, under Order II, rule 2, clause 3, Civil Procedure Code, depends upon the answer to the following question, namely, "Did the two trespasses take place in or about the same time and as part of the same transaction so that the two trespasses might be considered (taking a commonsense view of the facts) as a single transaction forming one and the same cause of action?"

If both trespasses had taken place before the first suit had been brought, Order II, rule 2, clause 3, might be a bar to the second suit but not otherwise.

The High Court rulings on the point discussed.

The phrase "cause of action" in Order II, rule 2, clause 3, is used in a more comprehensive sense than it is used in section 17.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Trichinopoly, in Appeal Suit No. 395 of 1911, preferred against that of the Court of the District Munsif of Namakal, in Original Suit No. 198 of 1910.

Mr. *G. S. Ramachandra Aiyer*, for the Appellant.

Mr. *C. Krishnamachariar*, for the Respondents.

This second appeal coming on for hearing on 19th January 1914, and having stood over for consideration till the 26th January 1914, the Court delivered the following

JUDGMENT.—We cannot go in second appeal behind the findings of fact in the lower Appellate Court's judgment. On those findings no question of limitation arises. As regards the contention that the purchase in Court auction by the decree-holder's agent was without obtaining the permission of the Court under section 294 of the Civil Procedure Code and cannot, therefore, be recognised as conferring any title on the Court auction-purchaser or his principal, this question was argued before this Court in Second Appeal No. 1263 of 1911 and the above contention was overruled with the remark that "this was an objection that could be raised only by the parties to the suit and not by a stranger like the 1st defendant" (who was the appellant in Second Appeal No. 1263 of 1911 and is also the appellant in the escond appeal before us).

The only other question of law remaining to be considered in this second appeal is whether Order II, rule 2, clause 3, Civil Procedure Code, (section 43 of the old Code) bars the plaintiff from bringing the present suit in respect of the plots (*c*), (*e*), (*f*), (*g*) and (*h*). The plaintiff's right to possession arose on the death of one Ammani Ammal in January 1905. The 1st defendant trespassed on a land which might be called item 1 and also on the plaint plots (*c*), (*e*), (*f*), (*g*) and (*h*) after January 1905. There is nothing to show that the trespass on item 1 was on the very same date as the trespass on plaint plots (*c*), (*e*),

(*f*), (*g*) and (*h*). Nor is there anything to show that that trespass was on a different date or on a different occasion. The learned District Munsif evidently thought that the question whether the trespass on item 1 by the 1st defendant was part of the same transaction as the trespass on plaint plots (*c*), (*e*), (*f*), (*g*) and (*h*), had little bearing on the decision of the question whether the present suit is barred by the plaintiff's failure to include these plots along with item 1 when the plaintiff brought a previous suit, Original Suit No. 100 of 1908, against this same 1st defendant for recovery of item 1 alone. In paragraph 10 of his judgment the learned District Munsif has argued that the mere fact that item 1 and the lands now in dispute passed to the plaintiff under the same title, did not make the cause of action in Suit No. 100 of 1908 and the cause of action in the present Suit No. 198 of 1910 the same and that that fact by itself did not oblige the plaintiff to file a single action for the recovery of both item 1 and the disputed plots. The District Munsif held that because the evidence relating to the possession and enjoyment of the plaint lands and the title set up thereto by the defendants should necessarily be different from the evidence and title relating to land item 1, that because the defendants Nos. 2 and 3 in this suit are strangers to Original Suit No. 100 of 1908 and that because the 3rd defendant in this suit claimed plots (*b*) and (*d*) on an independent title, Order II, rule 2, did not bar the present suit. It has been held in *Manonmani Ammal* v. *Vythialinga Naicker* (1) that though the bundle of facts which have to be proved by the plaintiff in one suit to establish his claim in that suit may not be identical in all respects with the bundle of facts which have to be proved by him in a later suit, the cause of action for the two suits within the meaning of that expression in Order II, rule 2, clause 3, may be the same for both suits. As said in that same case, "each case must depend upon its own facts, and it is often a difficult matter to decide what facts form par of a particular cause of action". "It not always easy to decide whether a particular fact is of such importance as to require it to be considered as a part of the cause of action or is such that it must be relegated into the category of the evidence by which the facts making up the cause of action are to be established." The illustration to Order II, rule 2, also shows that the phrase "cause of action" is used in clause 3, Order II, rule 2, in a more comprehensive sense than it is used in section 17. In the above case in *Manonmani Ammal* v. *Vythialinga Naicker* (1) Miller and Tyabji, JJ., held that where a person by two separate transactions, one after the other, acquired the shares of two out of five members of an undivided Hindu family, he had but one cause of action (after the date of the second purchase, we think, should be added) against the family to have his 2/5th share marked out and put in his possession and that the first suit brought to recover 1/5th share acquired from one brother barred his subsequent suit to recover the other brother's share. Miller, J., in his judgment distinguished the case, *Kuppuswamy Aiyer* v. *Subramania Aiyer* (2) on the ground that "different and separate parcels of land were in question" in the two suits referred to in that case. We think that that case might be distinguished also on the ground that the two suits in that case were brought, not against a joint Hindu family for partition of the same block of land [as in *Manonmani Ammal* v. *Vythialinga Naicker* (1)], but by an ordinary co-sharer against his other co-sharers for partition of different plots of land held in common. In *Gangi* v. *Ramaswami* (3) it was held that if the defendants are different and the properties in the suits are different, Order II, rule 2, is no bar to the second suit, though the plaintiff and the title relied on by the plaintiff be the same in the two suits. In the present case, the 1st defendant is the principal defendant in both the suits so far as the properties item 1 and items (*c*), (*e*), (*f*), (*g*) and (*h*) are concerned and the mere fact that the tenants of the two sets of properties holding under the 1st defendant are different or that the present suit includes properties which are not claimed by the 1st defendant, cannot prevent the

(1) 21 Ind. Cas. 402; 14 M. L. T. 341; (1913) M. W. N. 881; 25 M. L. J. 481.

(2) 7 M. L. J. 73.

(3) 12 M. L. J. 103.

bar under Order II, rule 2, clause 3, from having its effect so far as plots (*c*) and (*e*) to (*h*) are concerned. In *Shanmugam Pillai* v. *Syed Gulam Ghose* (4) it was held that though the landholder had obtained two separate *muchilikas* for *faslis* 1305 and 1306 from the same tenant for the same holding, his first suit for the rent of *fasli* 1306, based on the separate *muchilka* of 1306, barred his subsequent suit for the rent of *fasli* 1305 based on the different *muchilika* of 1305. In *Hari Narain Banerjee* v. (*Shama Sundari Dassi*) *Kusum Kumari Dasi* (5) it was held that a subsequent mortgagee who had paid up a prior mortgage-debt under section 74 of the Transfer of Property Act, could not bring a separate suit for the money so paid by him to the prior mortgagee after he had brought a suit on his own mortgage for the mortgage money due to himself, as he ought to have added the amount he paid under section 74 of the Transfer of Property Act to his claim on his own mortgage-bond in the first suit. In *Riayatullah Khan* v. *Nasir Khan* (6) the facts were as follows: *R* purchased two houses under the same sale-deed in 1876. In 1880 he sued for possession of one of the houses alleging that he had been dispossessed by the ancester of the defendant. Subsequently, he brought a second suit for possession of the other house against the same defendant alleging that at the time when he instituted the former suit, he had already been dispossessed of the house now in question and by the same person. It was held that though the plaintiff's title to both the houses rested on the title acquired by him under the same title-deed, yet the cause of action, *viz.*, his ouster from the two houses on different occasions, gave rise to two separate causes of action, which he was not bound to join in the first suit and that sections 42 and 43 of the Civil Procedure Code did not bar his second suit. It seems to us that where the title of plaintiff is the same and the trespasser defendant is the same defendant in both suits, the question whether the second suit is barred by the first depends upon the answer to the following question, namely, "Did the two trespasses take place on or about the same time and as part of the same transaction so that the two trespasses might be considered (taking a commonsense view of the facts) as a single transaction forming one and the same cause of action?" This aspect of the question was not considered by the District Munsif. The lower Appellate Court merely says that the trespass on item 1 by the 1st defendant "*might have been* on a different date" from the trespass on the plots now in dispute. If the trespass on the plaint plots took place after the first Suit No. 100 of 1908 had been brought, Order II, rule 2, clause 3, can, of course, be no bar to the present suit. The finding in the present suit is vaguely to the effect that the 1st defendant's possession began after the death of Ammani Ammal, 1st defendant's mother-in-law (See paragraph 12 of the Subordinate Judge's judgment). As Ammani Ammal's death admittedly took place in January 1905, this finding leaves us in doubt whether the trespass took place after or before Original Suit No. 100 of 1908 was brought. The lower Courts, however, have both proceeded on the ground that it took place before Original Suit No. 100 of 1908 was brought and have yet held that Order II, rule 2, clause 3, does not bar the present suit. The question whether the trespass of the 1st defendant on item 1 (which was one of the bundle of facts to be considered by the Court in Original Suit No. 100 of 1908) formed part of the same transaction as the trespass on the disputed plots and whether the trespass took place on or about the same date and in the same cultivation season so that they might be considered as constituting the same cause of action, was not considered properly by either Court. The importance of this question on the applicability of Order II, rule 2, clause 3, seems to have been ignored in the trial of the suit (and it is not surprising that it was so ignored as the question of law is by no means free from doubt and difficulty) and we consider it proper to allow both parties to adduce fresh evidence on the above question and we remand the case to the lower Appellate Court for a finding on the following issue: —

Whether the 1st defendant's taking wrongful possession of item 1 (which was in dispute in the former suit Original Suit No. 100 of 1908) formed part of the same transaction with her taking wrongful possession of the

(4) 27 M. 116.
(5) 6 Ind. Cas. 159; 37 C. 589; 11 C. L. J. 551.
(6) 6 A. 616; A. W. N. (1884) 185.

plots (*c*), (*e*), (*f*), (*g*) and (*h*) in the present suit, and when and on what date or dates did the said acts take place ?

The time for the return of the finding will be eight weeks from the receipt of the records, and 10 days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the temporary Subordinate Judge of Trichinopoly submitted the following

FINDING.— * * * * *

The 1st defendant's taking wrongful possession of item 1 (which was in dispute in the former suit, Original Suit No. 100 of 1908) did not form part of the same transaction with her taking wrongful possession of the plots (*c*), (*e*), (*f*), (*g*) and (*h*) in the present suit, that the former act took place in or about January 1905 and that the latter act took place in or about the year 1900.

This second appeal coming on this day for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding and dissmis the second appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 707 OF 1913.

September 8, 1914.

Present:—Mr. Justice Spencer and Mr Justice Hannay.

GOVINDAMMAL—PLAINTIFF—APPELLANT

versus

MARIMUTHU PILLAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law— Widow—Land granted as maintenance to widow, whether resumable on her death—Succession—Reversioner's widow's right to claim share in deceased member's estate.

The property given to a widow for maintenance is resumable at her death. A widow of a reversioner can succeed only to the property which was actually vested in her husband at the time of his death. No fresh right can accrue to her as widow in consequence of the subsequent death of a person to whom he would have been heir, if he had lived.

Balamma v. *Pullayya*, 18 M. 168 ; 5 M. L. J. 22, followed.

Rewan Persad v. *Mussammat Radha Beeby*, 4 M.I. A. 137; 7 W. R. 35 (P. C.); 1 Suth. P. C. J. 172; 1 Sar. P. C. J. 327; 18 Eng. Rep. 651, *Appovier* v. *Rama Subba Aiyan*, 11 M. I. A. 75; 8 W. R. (P. C.) 1; 1 Suth. P. C. J. 657; 2 Sar. P. C. J. 218; 20 Eng. Rep. 30, distinguished.

Second appeal against the decree of the Court of the Subordinate Judge of Kumbakonam, in Appeal Suits Nos. 729 and 765 of 1912 preferred against that of the District Munsif of Mannargudi, in Original Suit No. 305 of 1911.

Mr. *N. Rajagopalachariar*, for the Appellant.

Mr. *G. S. Ramachandra Aiyar* (with him Mr. *P. S. Narayanaswamy Aiyer* for Mr. *C. V. Ananthakrishna Aiyar*), for the Respondents.

JUDGMENT.

SPENCER, J.—The plaintiff-appellant is the widow of one of four brothers, who, when all were alive, formed a joint Hindu family. One of the brothers, on his death without issue, left a widow named Alamelu, to whom the other brothers assigned certain lands to be enjoyed for her maintenance. Alamelu has since died, and the plaintiff has brought this suit for a third share of the said immoveable properties. All the four brothers being now dead, one branch is extinct, two branches are represented by sons who are 1st and 2nd defendants, and the 4th branch is represented by the plaintiff. The plaintiff obtained a decree in the District Munsif's Court, but on appeal the District Munsif's decision was reversed and her suit was dismissed with costs.

After the death of Alamelu's husband, the three remaining brothers are alleged to have become divided, and Exhibit A is evidence of a partition affecting the plaintiff's husband, the 2nd defendant and his father. It has not been made out whether the allotment made to Alamelu was prior to, simultaneous with or subsequent to that partition, and whether it constituted the grant of a widow's estate, a life-estate or a full estate, although *prima facie* being for her maintenance it was resumable at the death of the grantee (Mayne's Hindu Law, paragraph 395).

Plaintiff's husband, however, having admittedly predeceased Alamelu, the plaintiff, being a widow, can only succeed to the property which was actually vested in her husband at the time of his death. No fresh right can accrue to her as widow in con-

sequence of the subsequent death of a person to whom he would have been heir if he had lived. Mayne, paragraph 529, and *Balamma* v. *Pullayya* (1).

It is contended that the plaintiff's husband had a vested interest in those properties which were left undivided at the partition as being incapable of division during Alamelu's lifetime, and reliance is placed upon Exhibits A and I as showing that there was a complete division among the brothers and that a divided status attached to the items allotted for Alamelu's maintenance, as it was declared in Exhibit A, the judgment in Original Suit No. 61 of 1898, that 2nd defendant's father was entitled to take a 1/6th share in them when they fell in reversion at Alamelu's death.

Now the plaintiff could only succeed in this suit by establishing either that there was an agreement binding all the members of the family to give her a share in these items at Alamelu's death, or that her husband had a vested interest in them. In the Court of first instance the arrangement set up in the plaint was abandoned by plaintiff's Pleader and the District Munsif found it not proved. It is urged before us that the Pleader who represented the plaintiff at the trial was wrong in giving up this point; but it is clear that even if we were to permit the plaintiff to reopen the matter at this stage, there is no evidence on record to establish the truth of plaintiff's allegation, and this would certainly not be a case where we could allow fresh evidence to be admitted.

Neither is there anything on the record to show that any vested interest in favour of plaintiff's husband was created within the meaning of section 19 of the Transfer of Property Act. Exhibit A contains merely a declaration, to which the 1st defendant and his father were not parties, of 2nd defendant's father's reversionary right in the suit items. The cases of *Rewan Persad* v. *Mussummat Radha Beeby* (2) and of *Appovier* v. *Rama Subba Aiyan* (3) cited at the hearing were cases in which there was a divided interest vested in the claimant, in the first case by a Will, and the latter by an agreement.

The second appeal fails and is dismissed with costs.

HANNAY, J.—I concur.

Appeal dismissed.

(1) 18 M. 163; 5 M. L. J. 22.

(2) 4 M. I. A. 137, 7 W. R. 35 (P. C.); 1 Suth. P. C. J. 172; 1 Sar. P. C. J. 327; 18 E. R. 651.

(3) 11 M. I. A. 75, 8 W. R. (P. C.) 1; 1 Suth. P. C. J. 657; 2 Sar. P. C. J. 218; 20 E. R. 30.

MADRAS HIGH COURT,

CIVIL REVISION PETITIONS NOS. 595 AND 596 OF 1913.

August 18, 1914.

Present:—Mr. Justice Oldfield.

NIDAMURTHI KRISHNAMURTHY AND ANOTHER—DEFENDANTS—PETITIONERS

versus

GARGIPARTHI GANAPATHILINGAM —PLAINTIFF—RESPONDENT

Civil Procedure Code (Act V of 1908), Sch. II, r. 16 (a)—Arbitrator appointed without agreement of parties—Decree based on award—Appeal—Revision.

The rule that no appeal lies against a decree based upon an arbitration award applies equally whether the decree is impugned on the ground that the award was given by an arbitrator not properly appointed or that the award was invalid because of irregularities in the proceedings of the arbitrator. In both cases the award is impugned as one made by a tribunal not constituted by the agreement of parties. The principle is that the decreeing Court is made the sole Judge of the propriety of the decree. The decree in both cases is one passed under rule 16 (2) of second Schedule of the Code of Civil Procedure and is not appealable.

Ghulam Khan v. *Muhammad Hussan*, 29 C. 167; 6 C. W. N. 226; 29 I. A. 51; 25 P. R. 1902; 4 Bom. L. R. 161; 12 M. L. J. 77 (P. C.); *Kanakka Nagalinga Naick* v. *Nagalinga Naick*, 4 Ind. Cas. 871; 32 M. 510; 6 M. L. T. 176; 19 M. L. J. 480; *Tallapragada Suryanarayana Rao* v. *Tallapragada Sarabayya*, 9 Ind. Cas. 173, (1911) 1 M. W. N. 151; 9 M. L. T. 231; 21 M. L. J. 263; and *Butcha Sahib* v. *Abdul Gunny*, 21 Ind. Cas. 308; (1914) M. W. N. 142; 14 M. L. T. 314; 25 M. L. J. 507, followed.

Pragdas v. *Girdhardas*, 26 B. 76; 3 Bom. L. R. 431, *Goculdas Bulabdas Manufacturing Co. Ltd.* v. *James Scott*, 16 B. 202, referred to.

A High Court will not ordinarily interfere in revision in such cases.

Ghulam Khan v. *Muhammad Hussan*, 29 C. 167; 6 C. W. N. 226; 29 I. A. 51; 25 P. R. 1902; 4 Bom. L. R. 161; 12 M. L. J. 77 (P. C.) and *Butcha Sahib* v. *Abdul Gunny*, 21 Ind. Cas. 308; (1914) M. W. N. 142; 14 M. L. T. 314; 25 M. L. J. 507, followed.

NIDAMURTHI KRISHNAMURTHY *v.* GARGIPARTHI GANAPATHILINGAM.

Petitions, under section 115 of Act V of 1908, praying the High Court to revise the decree of the District Court of Godaveri at Rajahmundry, in Appeal Suit No. 52 of 1912, preferred against the decree of the Court of the Temporary Subordinate Judge of Rajahmundry, in Original Suit No. 50 of 1911, and to revise the decree of the Temporary Subordinate Judge of Rajahmundry, in Original Suit No. 50 of 1911, respectively.

Messrs. *T. Prakasam* and *M. Narasimham*, for the Petitioner.

Messrs. *P. Narayanamurthi* and *P. Somasundaram*, for the Respondents.

JUDGMENT.—The plaintiff in this suit moved the District Court, where it was pending, by Interlocutory Application No. 24 of 1911 for an adjournment on the ground that the parties had already appointed an arbitrator, whose award was awaited. The application was transferred with the suit to the Subordinate Judge's Court and was, in circumstances which are not clear, disposed of by an order appointing as arbitrator the person named in it and fixing a date for the submission of his award. That award was afterwards, in spite of the objection of the 1st defendant, the present petitioner, embodied in a decree. An appeal against this decree to the District Court was afterwards dismissed on the ground that no appeal lay with reference to section 16 (2), of Schedule II, of the Code of Civil Procedure. In Civil Revision Petition No. 595 of 1913 this Court is asked to revise that order of dismissal and in Civil Revision Petition No. 596 to revise the Subordinate Judge's Court's decree.

The learned District Judge in appeal assumed that, as the first defendant contends, the application already referred to was only for an adjournment pending the award of the arbitrator privately appointed, that the Court's order of appointment, to which the defendants were not parties, was, therefore, passed without jurisdiction and that the award, therefore, might, if consideration on the merits had been possible, have been treated as invalid. He then held that even on those assumptions he was unable to entertain an appeal against the resulting decree with reference to *Ghulam Khan* v. *Muhammad Hussan* (1), *Kanakku Nagalinga Naick* v. *Nagalinga Naick* (2) and *Tallapragada Suryanaraina Row* v. *Tallapragada Sarabaya* (3), and these cases, in my opinion, justify his decision.

Here an attempt has been made to distinguish them on the ground that they dealt with awards, the validity of which was questioned owing to what happened after the reference to arbitration and appointment of an arbitrator which were originally valid, whilst here on the assumptions made there was never a valid reference or appointment at all. No doubt this describes the direct effect of the cases correctly; but it takes no account of the principle on which they were decided. In *Ghulam Khan* v. *Muhammad Hussan* (1), there is a statement that "no question can arise as to the regularity of arbitration proceedings in pending litigation, because the agreement to refer and the application to the Court must have the concurrence of all parties and the actual reference is the order of the Court." But the case there under disposal was not one in which the fulfilment of those conditions was disputed, as it is here; and there is nothing to impair the generality of the principle, approved elswhere in the judgment, that no appeal on the ground that the award was void *ab initio* would lie. This principle was referred to and relied on in *Kanakku Nagalinga Naick* v. *Nagalinga Naick* (2), though the objection there was to irregular procedure after the appointment of the arbitrators. In *Tallapragada Suryanaraina Row* v. *Tallapragada Sarabaya* (3) the objection again related to what happened after the first appointment was made; but it resembled the objection in the present case, because it was to the way in which vacancies arising in the body of arbitrators before the award were filed. In both cases the award is impugned on the same ground, as not made by a tribunal constituted by the agreement of the parties; and then it cannot matter whether (as here) the defect in the tribunal was due to the absence at the earlier stage of an agreement which would have given it jurisdiction as a whole, or the absence of one at the later which would have given jurisdiction to its

(1) 29 C. 167; 29 I. A. 51 (P. C.); 6 C. W. N. 226; 25 P. R 1902; 4 Bom. L. R. 161; 12 M. L. J. 77.

(2) 4 Ind. Cas. 871; 32 M. 510; 6 M. L. T. 176; 19 M. L. J. 480.

(3) 9 Ind. Cas. 173; (1911) 1 M. W. N. 151; 9 M. L. T. 251; 21 M. L. J. 263.

individual members. There is accordingly no reason for different rules as to the right of appeal in the two cases. In the present case also the law must be taken to be that where a decree based on an award is in question, the decreeing Court is made the sole Judge of its propriety, and that no appeal lies.

It has also been argued with reference to *Pragdas* v. *Girdhardas* (4) that the decree, though passed on an award, can and should be taken to have been passed with reference to Order XXIII, rule 3, of the Code of Civil Procedure, as giving effect to a compromise and that it is, therefore, open to the 1st defendant to appeal on the ground that no compromise was really agreed on, *Goculdas Bulabdas Manufacturing Co. Ltd.* v. *James Scott* (5). The first answer to this is that the proceedings never have been conducted, as they statedly were in the first case cited, with reference to Order XXIII. The second is that in that case there was no question of the right of appeal and the Court, therefore, cannot be taken to have decided that the whole arbitration procedure was superseded or that it is open to an appellant to describe the proceedings in the way which best suits his advantage. The argument does not call for separate discussion on its merits and must be rejected.

As I hold that no appeal lay against the order of the Subordinate Judge, Civil Revision Petition No. 595 must be dismissed with costs. This Court will not ordinarily interfere in revision with such an order, vide *Ghulam Khan* v. *Mahomed Hussain* (1) and *Batcha Sahib* v. *Abdul Gunny* (6), and here the decision being based on a finding of fact that defendants were parties to, and consented to, the order of reference, the case is not one for interference. Civil Revision Petition No. 596 is, therefore, dismissed with costs.

Petitions dismissed.

(4) 26 B. 76; 3 Bom. L. R. 431.
(5) 16 B. 202.
(6) 21 Ind. Cas. 303; (1914) M. W. N. 142; 14 M. L. T. 314; 25 M. L. J. 507.

MADRAS HIGH COURT.

CIVIL APPEAL No. 177 OF 1910.

July 21, 1914.

Present:—Sir John Edward Power Wallis, Offg. Chief Justice, and Mr. Justice Kumarasawmy Sastri.

Maharaja RAJA SAHIB *Maherban Dostan* SRI RAJA *Maharaja* SREE ROW SIR VENKATESWATHA CHALAPATHY RANGA ROW BAHADUR, K. C. I. E., *Maharaja* OF BOBBILI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

W. S. VENKATARAMANJULU NAIDU AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Purchaser of co-parcener's interest, whether entitled to mesne profits from other members.

A purchaser of a co-parcener's interest in a joint undivided Hindu family has no right to claim past mesne profits from the other members of the family from the date of purchase to the date of suit, as he cannot be in a higher position than his alienor who can claim no account of past profits. His remedy is a suit for partition immediately after such purchase.

Such alienee does not obtain a vested interest in the properties purchased by him; his right is only an equity to compel his alienor to sue for partition.

Narayan bin *Babaji* v. *Nathaji Durgaji*, 28 B. 201, 5 Bom. L. R. 945; *Ayyagari Venkataramayya* v. *Ayyagari Ramayya*, 25 M. 690 at pp. 716, 717; *Chinnu Pillai* v. *Kalimuthu Chetti*, 9 Ind. Cas 596; (1911) 1 M. W. N. 238; 9 M. L. T. 389; 21 M. L. J. 246; 35 M. 47; *Subba Row* v. *Ananthanarayana Iyer*, 14 Ind. Cas. 524; 11 M. L. J. 395; 23 M. L. J. 64, distinguished.

Nanjaya Mudali v. *Shanmuga Mudali*, 22 Ind. Cas. 555; 15 M. L. T. 186; 26 M. L. J. 576; (1914) M. W. N. 356, followed.

Suraj Bunsi Koer v. *Sheo Persad Singh*, 5 C. 148; 4 C. L. R. 226; 6 I.A. 88 (P.C.), *Hardi Narain* v. *Ruder Perkash*, 10 C. 626; 11 I. A. 26 (P. C.); *Ramkishore* v. *Jainarayana*, 20 Ind. Cas. 958; 40 C. 966; (1913) M. W. N. 661; 14 M. L. T. 163; 17 C. W. N. 1189; 18 C. L. J. 237; 15 Bom. L. R. 867; 11 A. L. J. 865; 25 M. L. J. 512, 40 I. A. 213; 10 N. L. R. 1 (P. C.), referred to.

Appeal against the decree of the District Court of Chengleput in Original Suit No. 3 of 1908.

Mr. *P. Narayanamurthy*, for the Appellants.

Mr. *T. Rangachariar* (with him Messrs. *T. V. Muthu Krishna Iyer* and *B. Somayya*), for the Respondents.

JUDGMENT.—This is an appeal by an auction-purchaser of an undivided share belonging to a co-parcener against the decree of the District Judge of Chengleput disallowing his claim for mesne profits in the suit filed by him for partition and delivery of the share purchased.

The appellant rests his case on two grounds. The *first* is that the members of the family of the co-parcener whose share he purchased were divided in status and that consequently he is entitled to mesne profits, and *secondly* that in any event he is entitled as a tenant-in-common with the other co-parceners to mesne profits in respect of the share which he purchased.

As regards the first contention there is no oral evidence on record. The appellant relies on Exhibits A and B showing that the person whose share he purchased was divided in status from the other members of his family. Exhibit A is an affidavit filed by one of the members in a previous suit. The inference required to be drawn from Exhibit A is that the parties were divided in status, but reading the affidavit as a whole it seems to us that the dispute was about the management of the properties. It does not appear that there was any decision in the suit in which Exhibit A was filed that the members were divided in status, and we do not see how the allegation of one member in a previous suit could be taken to be conclusive in the matter. Exhibit B does not help the appellant as it specifically recites that the incumbents "are undivided members and that they are entitled to the *shrotriem* village" and we are, therefore, of opinion that it has not been shown that the appellant's predecessor-in-title was divided in status from the other co-parceners.

The real question is whether a purchaser of an undivided share is entitled to mesne profits as against the co-parceners from the date of his purchase up to the date of the plaint. So far as we are aware there is no authority of any High Court in which the matter has been discussed and decided. Nor has it ever been the practice to allow mesne profits in such cases. Such authorities, as there are, seem to be the other way. In *Narayan* bin *Babaji* v. *Nathaji Durgaji* (1) it was assumed that in a suit by a purchaser from an undivided co-parcener for recovery of the share of his vendor, mesne profits should not be granted and their Lordships reversed the decision of the District Judge awarding mesne profits in the suit.

The ground on which the appellant claims mesne profits is that the transfer to him effects a severance of the co-parcenery as regards that share and makes him a tenant-in-common of the share which his vendor had at the date of the alienation and that the right to mesne profits is a necessary incident to the right of property in which a person is interested as tenant-in-common. Reference has been made to *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya* (2); *Chinnu Pillai* v. *Kalimuthu Chetti* (3) and *Subba Row* v. *Ananthanarayana Iyer* (4).

There are no doubt *dicta* in these cases that where a co-parcener makes an alienation of the whole or portion of his share "the estate that is transferred to and vested in the alienee is not an equitable interest as understood in English Law but a legal estate which has to be reduced to possession by the alienee standing in the shoes of the transferor and effecting a partition on the footing on which the family and the property both stood at the time of the transfer." This view has been dissented from in *Nanjayya Mudali* v. *Shanmuga Mudali* (5) where Justices Sankaran Nair and Bakewell held that an alienation of an undivided share by a member of a joint family does not put an end to the joint tenancy and that the alienee does not become a tenant-in-common with the other co-parceners but he is only entitled in equity to enforce his rights in a suit for partition.

We are inclined to the view taken in *Nanjayya Mudali* v. *Shanmuga Mudali* (5). The right of the alienee to enforce partition does not rest on any text of the Hindu Law but on the equitable doctrine that a purchaser for value should be allowed to stand in his vendor's shoes and work out his rights by a partition, and it seems to us that the doctrine need not be extended beyond what is absolutely necessary to enable the vendee to work out his

(1) 28 B. 201; 5 Bom. L. R. 945.

(2) 25 M. 690 at pp. 716, 717.

(3) 9 Ind. Cas. 596; (1911) 1 M. W. N. 238; 9 M. L. T. 389; 21 M. L. J. 246; 35 M. 47.

(4) 14 Ind. Cas. 524, 11 M. L. T. 395, 23 M. L. J. 64.

(5) 22 Ind. Cas. 555; 15 M. L. T. 186; 26 M. L. J. 576; (1914) M. W. N. 350.

rights. In the suit for partition which may be filed by the alienee it may be that the property conveyed to him falls to some other co-parcener and it is difficult to see how this fact could be reconciled with the theory that by purchase he becomes entitled to a vested interest in the share of his co-parcener in the property alienated as from the date of the alienation.

There are also clear authorities that the mere fact that a co-parcener makes an alienation does not put an end to the status of the co-parcenary as between himself and the other members of his family and if this be so, it would be unfair that the other members of the family should be required to bear the expenses of the alienating co-parcener and the members of his family and also to set apart a portion of the income of the properties for meeting the claim of the alienee.

It is argued that the purchaser who paid consideration would be kept out of the fruits of his purchase should mesne profits be not given to him; but the remedy is obviously in the purchaser's hands as it is open to him to file a suit for partition immediately after the purchase.

Viewing the case from the mere standpoint of hardship we think that the balance is in favour of the members of the joint family. The observations of the learned Judges who took part in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramaya* (2); *Chinnu Pillai* v. *Kalimuthu Chetti* (3); *Subba Row* v. *Ananthanarayana Iyer* (4) as regards the alienee being a tenant-in-common and not merely entitled to an equity are *obiter dicta*, and we are of opinion that the broad proposition enunciated in those cases is not supported by any text in Hindu Law and we are not prepared to follow it. It is difficult to reconcile it with the decision of the Privy Council in *Suraj Bunsi Koer* v. *Sheo Persad Singh* (6); *Hardi Narain* v. *Ruder Perkash* (7) and *Ramkishore* v. *Jainarayan* (8).

(6) 5 C. 148; 4 C. L. R. 226; 6 I. A. 88 (P. C).
(7) 10 C. 626; 11 I. A. 26 (P.C.).
(8) 20 Ind. Cas. 958; 40 C. 966; (1913) M. W. N. 661; 14 M. L. T. 163; 17 C. W. N. 1 89; 18 C. L. J. 237; 15 Bom. L. R. 867; 11 A. L. J. 865; 25 M. L. J. 512; 40 I. A. 213; 10 N. L. R. 1 (P. C).

The Privy Council has decided that the alienee in possession is liable to be ejected at the instance of the co-parceners who are not bound by the alienation.

We are of opinion that the mere fact of a person purchasing a share of a co-parcener in joint family properties would not entitle him to mesne profits as against such other members of the family and that the purchaser would be in no higher position than his alienor who under Hindu Law would not under ordinary circumstances be entitled to demand an account of the past profits.

The appeal fails and is dismissed with costs.

The memorandum of objections has not been argued and has been dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 47 OF 1913.

September 3, 1914.

Present:—Mr. Justice Spencer and Mr. Justice Hannay.

ARASAPPA PILLAI—PLAINTIFF—APPELLANT

versus

MANIKA MUDALIAR—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27 (b)—Appellate Court's power to call for fresh evidence.

An Appellate Court has no power to call for fresh evidence under rule 27 (*b*) of Order XLI, when a party has deliberately declared in the Court of first instance that he has no witnesses at all.

Kessowji Issur v. *Great Indian Peninsula Railway Company Limited*, 31 B. 381; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 Bom. L. R. 671; 17 M. L. J. 347 (P.C.); 34 I. A. 115 and *Andiappa Pillay* v. *Muthukumara Thevan*, 14 Ind. Cas. 140; (1912) M. W. N. 450; 11 M. L. T. 241; 36 M. 477, followed.

Second appeal against the decree of the District Court, Coimbatore, in Appeal Suit No. 9 of 1912 preferred against that of the Subordinate Judge of Coimbatore, in Original Suit No. 65 of 1910.

Mr. *K. V. L. Narasimham*, for Mr. *K. N. Gopal*, for the Appellant.

Mr. *T. R. Ramachandra Aiyar*, for Mr. *T. R. Krishnaswamy Aiyar*, for the Respondent.

JUDGMENT.—The plaintiff sued for a declaration of title in respect of certain lands bought by him (from one Venkatachallam Pillai) under a registered sale-deed and for cancellation of an attachment order which had been passed against the properties. The defence was that the sale was a colourable transaction to defeat creditors and that it was for an inadequate consideration. In the Court of first instance, the plaintiff succeeded in obtaining a decree. The defendant examined no witnesses and filed no documents to prove his case. When the case came up in appeal, the District Judge, apparently *suo motu*, made an order remanding the case for fresh evidence to be taken and calling for a finding upon the issue whether the sale was for grossly inadequate consideration. The finding was in favour of the plaintiff, but the lower Appellate Court took the contrary view on the evidence and dismissed the plaintiff's suit.

It is contended for the appellant that the District Judge was wrong in remanding the suit for fresh evidence when the defendant had deliberately stated in the lower Court that he had no witnesses at all. We think the contention must be upheld. The District Judge does not state under what provision of law he purported to act in making his order. Both sides refer to Order XLI, rule 27 (*b*), of the Civil Procedure Code, as the provision of law under which the District Judge called for fresh evidence, and we must take it that it was under that rule that the District Judge acted. It has been laid down by the Privy Council in the case of *Kessowji Issur* v. *Great Indian Peninsula Railway Company* (1) that "the legitimate occasion for section 568" (now Order XLI, rule 27, of the Code of Civil Procedure) "is when on examining the evidence as it stands some inherent *lacuna* or defect becomes apparent, and not where a discovery is made outside the Court of fresh evidence and the application is made to import it." Here, there was no such inherent *lacuna* or defect on the evidence as it stood, for so far as the defendant was concerned it was a case of no evidence at all. For the defendant (respondent), reliance is placed upon the words "or for any other substantial cause" which occur in Order XLI, rule 27 (*b*). The case *Andiappa Pillay* v. *Muthukumara Thevan* (2) is cited as authority for the view that these words should not be construed in the narrow sense suggested by the doctrine of *ejusdem generis*. It was contended that the Appellate Court had by virtue of these words as wide powers as the original Court to admit fresh evidence in order to do justice, subject to restrictions in the interests both of discipline and of preventing concoction of evidence. (See the judgment of the High Court in Second Appeal No. 819 of 1911, unreported). We are, however, not prepared to go so far as to say that when a party has declared that he has no witnesses in the Court of first instance, the Appellate Court has power under the order and rule quoted to call for fresh evidence which admittedly was not forthcoming at the trial on behalf of that party. To do so would, in our opinion, open the door to concoction, a possibility against which Sundara Aiyar, J., was careful to guard in his judgment in Second Appeal No. 819 of 1911 above quoted.

We must, therefore, set aside the decree of the District Judge and remand the appeal to the District Court for disposal according to law upon the evidence as it stood before the Court of first instance at the original trial.

Costs will abide and follow the result.

Order set aside.

(1) 31 B. 381; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 Bom. L. R. 671; 17 M. L. J. 347; 34 I. A. 115.

(2) 14 Ind. Cas. 140; (1912) M. W. N. 450; 11 M. L. T. 241; 36 M. 477.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL NO. 131 OF 1911.

July 14, 1911.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

RADHA KRISTO SAHA AND OTHERS—APPELLANTS

versus

UMES CHUNDER CHUCKERBUTTY—RESPONDENT.

Ownership—Muhammadan—Near relations living together—Not necessarily indicative of joint ownership.

The mere fact that two Muhammadan cousins

lived together on a certain property would not indicate that they were joint owners thereof.

Letters Patent Appeal against the following dicision of Mr. Justice Coxe, dated the 24th May 1911, in Appeal from Appellate Decree No. 2491 of 1909, against that of the District Judge of Jessore, dated the 21st June 1909, reversing that of the Munsif, 2nd Court, Jhenidah, dated the 19th September 1908.

COXE, J.—It appears to me that this appeal is concluded by the findings of fact, and must be dismissed with costs.

Babu *Monmotho Nath Mookerjee*, for the Appellants.

Babu *Bejoy Kumar Bhattacharjee* (for Babu *Dwarka Nath Mitter*), for the Respondent.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent against a judgment of Mr. Justice Coxe in a suit for declaration of title to immoveable property and for recovery of possession thereof.

The defendants, who are the appellants before us, purchased the disputed land on the 16th November 1896 in execution of a money decree against one Basiruddi. On the 12th of December 1896 the predecessor of the plaintiffs-respondents purchased a half-share of the said property from one Gadu who claimed to be co-sharer of Basiruddi. The question in controversy between the parties is whether Gadu had any interest in the property.

The Court of first instance found against the plaintiff and dismissed the suit. Upon appeal that decision was reversed by the District Judge. The decree of the District Judge has been confirmed by Mr. Justice Coxe on the ground that no question of law is involved in the appeal.

On behalf of the appellants, it has been contended that the District Judge has not properly considered the question of the alleged ownership of Gadu in the disputed land, and this question of ownership is not a question of fact but is a mixed question of fact and law.

The District Judge has found two facts, namely, *first*, that Gadu and Basiruddi lived together, and *secondly*, that rent receipts have been produced to show that Gadu and Basiruddi were registered in the books of the landlord as tenants in respect of the disputed land.

In so far as the first point is concerned, it is clear that it is by no means conclusive. Gadu and Basiruddi were not members of a joint Hindu family. They were Muhammadans, they were cousins and the mere fact that they lived together on this land would not indicate that they were joint owners thereof. In so far as the second point is concerned, what have been produced are not rent receipts but counterfoils of rent receipts alleged to have been granted by the landlord to the person or persons who paid rent. These conterfoils are not conclusive by themselves. In some of the counterfoils against the tenant's name is entered **** (*pa, Gadu Basiruddi*), which the respondents contend means, land of which the tenants were Gadu and Basiruddi. On the other hand in other counterfoils the entry is **** (*tha Gadu Basiruddi*) which indicates that the land was on account of Gadu and Basiruddi. It is clear that the counterfoils produced do not show that Gadu and Basiruddi were the registered tenants in respect of this land. The plaintiffs have not been able to produce the register kept by the landlord, although it is plain from the proceedings that the landlord is on their side. It has not been also shown that the receipts granted to the persons who paid the rents contained entries of the same description as are found in the counterfoils produced.

The position, therefore, is that the two circumstances upon which the District Judge has relied are not conclusive. On the other hand, the Court of first instance referred to circumstances which in the opinion of that Court negatived the claim of the plaintiffs. In a case of this description, it is necessary to consider whether Gadu was in possession of the disputed land. If so, what was the nature of that possession? Was he in possession in his own right or by sufferance? Did he ever cultivate the land? Did he ever pay rent in respect thereof? These are elements which have to be considered. The Court of first instance pointed out, in the view it took of the evidence on the record, that Gadu was not in possession of the disputed land for a long series of years. If the District Judge takes the same view on the evidence, it will obviously be a very material point for consideration. We express no opinion upon the merits of the case; but we are unable to hold that the reasons given

by the District Judge support the decree which was made in favour of the plaintiffs.

The result is that this appeal is allowed, the decree of Mr. Justice Coxe and that of the District Judge set aside and the case sent back to the District Judge in order that it may be re-heard on the merits upon the evidence on the record.

Costs will abide the result.

Appeal allowed; Case remanded.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 135 OF 1913.

August 11, 1914.

Present:—Mr. Justice Hannay.

TUNUGUNTLA BRAHMAYYA—PLAINTIFF—PETITIONER

versus

SANGAM RAMI REDDI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Promissory note—Execution admitted—Plea of material alteration, whether proper.

Where one of two joint promisors admits execution of a promissory note and receipt of consideration it is not open to him to plead that the promissory note was not executed on the date it bears, or that the other promisor did not join in execution.

Amirtham Pillai v. *Nanjah Gounden*, 23 Ind. Cas. 464; 26 M. L. J. 257; 15 M. L. T. 205; (1914) M. W. N. 250; 1 L. W. 243, distinguished.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree and judgment of the District Munsif of Guntur, in Small Cause Suit No. 1317 of 1912.

Mr. *P. Nagabhushanam*, for the Petitioner.

Mr. *S. Satyamurthi*, for the Respondents.

JUDGMENT.—The District Munsif has found that the suit document, a promissory note, was not executed on the date it bears and that it was not executed by the 2nd defendant or with her consent. He has, therefore, dismissed the suits, holding that the plaintiff cannot get a decree against the 1st defendant either. The 1st defendant was examined as plaintiff's 6th witness in the case and made the admission that he and the 2nd defendant executed the note to plaintiff and that he received the amount. It is contended in these circumstances that the lower Court ought to have passed a decree against the 1st defendant upon his admission. For the respondent the case of *Amirtham Pillai* v. *Nanjah Gounden* (1) and the decision of Miller, J., in Civil Revision Petition No. 601 of 1912 therein referred to are specifically relied upon. I think these cases must be distinguished from the present on the ground that it appears from the judgment of Sadasiva Aiyar, J., in the former case that the defendant sought to be made liable had agreed to be liable only if the other defendant was also jointly made liable (a condition which does not appear to exist in this case) and also on the ground that in neither of the cases referred to was there any such admission of execution by both defendants and receipt of consideration as there is in this case by the 1st defendant. In face of that admission I do not see how the 1st defendant can now be heard to say that there has been a material alteration of the suit note so as to relieve him from his liability thereunder. I shall, therefore, modify the decree of the lower Court by giving the plaintiff a decree as against the 1st defendant with interest at 6 per cent. up to the date of payment and with costs here and in the lower Court. Petitioner will pay 2nd respondent's costs, the petition being dismissed as against her.

Decree modified.

(1) 23 Ind. Cas. 464; 26 M. L. J. 257; 15 M. L. T. 205; (1914) M. W. N. 250; 1 L. W. 243.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1414 OF 1913.

July 13, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

UNDE RAJAH RAJA SRI RAJA VELUGOTI SRIRAJAGOPALA KRISHNA YACHENDRA BAHADUR, K. C. I. E., PANCHAHAZAR MUNSUBDAR THE *Mahrajah* OF VENKATAGIRI—PLAINTIFF—APPELLANT

versus

Sheikh MOHADEEN SAHIB AND OTHERS—DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (I of 1908), ss. 13 (3), 27—Improvement made at tenant's expense—Digging well—Raising second crop—Landlord, whether entitled.

MAHARAJA OF VENKATAGIRI *v.* MOHADEEN SAHIB.

The provisions of section 13 (3) of the Estates Land Act apply whether the increase of rent demanded by the landlord takes the form of a condition that the rent for the *Fasli* shall be larger than that first provided for in the *muchilika* in case two crops are *raised* instead of *one*, or that a separate or independent amount shall be paid as additional rent for the second crop besides the rent charged for the first crop. The presumption contained in section 27 of the Estates Land Act does not apply when no second crop was raised for the previous *Faslis* and no additional rent is claimed in consequence.

Where a tenant improves his holding by digging a well therein at his own cost and uses the water of the well so dug for raising either a second crop alone or both the first and second crops, thereby increasing the grain yield of the land, such increase is a consequence of the said improvement and under section 13 (3) of the Madras Estates Land Act, I of 1908, the tenant is not liable to pay any higher rent to the landlord for the second crop

Second appeal against the decree of the District Court of Nellore, in Appeal Suit No. 94 of 1912, preferred against that of the Deputy Collector of Kandukur, in Summary Suit No. 112 of 1911.

FACTS.— Suit was under section 56 of the Madras Estates Land Act to enforce acceptance of *patta* for *Fasli* 1319. The defendants contended *inter alia* that the *patta* tendered was not proper, as containing a term obliging them to pay rent for a second crop raised by them with the aid of water from a well dug by them at their expense. As against this contention the plaintiff relied upon usage and upon a term in the *patta* and *muchilika* that the tenant should pay double crop assessment in case he raised a second crop on his holding. Both the lower Courts upheld the contention of tenants. The plaintiff thereupon preferred this second appeal.

Mr. *S. Subramania Iyer*, for the Appellant:—Clause (3) in the *patta* is intended to provide for rent being calculated on the number of crops that may be raised. Under section 27 of the Madras Estates Land Act, it ought to be presumed that the lands were held on the same rates and subject to the same conditions as in *Fasli* 1318. The term relating to the payment for the second crop having existed in previous years, such a term should be presumed to operate until set aside.

Mr. *T. Prakasam*, for the Respondents:—The custom hitherto had been to pay the rent in respect of the land as such and not with reference to the number of crops raised. The second crop having been raised with the aid of water of a well dug by the tenant at his expense, section 13 (3) of the Madras Estates Land Act bars the plaintiff's claim for rent for that crop. Further no second crop had been raised till about three years prior to suit and no rent, therefore, had been previously claimed or paid.

JUDGMENT.

SADASIVA AIYAR, J.—Whether the second crop alone was raised with the help of the tenant's improvement (the well excavated by him at his own expense) or both the first and the second crops were due to the help of the irrigation from that well, I think that "the increase of production" in the holding by the quantity of grain raised in the second crop is "a consequence of the improvement." If so, the tenant is, under section 13, clause (3), not liable to pay "a higher rate of rent," that is a rate higher than he would have had to pay if the increase of production had not taken place. The rate of rent is, in my opinion, higher for the *Fasli* in question whether the increase which makes it higher is brought about by the condition that the rent for the *Fasli* shall be larger than that first provided for in the *muchilika* in case two crops are raised instead of one, or whether such increase is brought about by the condition that a separate or independent amount shall be paid as additional rent for the second crop besides the rent charged for the first crop.

The lower Courts have, therefore, rightly deleted the condition in the *patta* requiring the tenant to pay an additional rent if a second crop is raised and I would dismiss the second appeal with costs.

TYABJI, J.—The parties are at issue as to the terms in which the clause in the *muchilika* dealing with the rent payable by the tenants to the appellant should be framed. The appellant contends that the clause should be so framed as to provide that the rent should be calculated on the basis of the number of crops raised, so that if the second crop is raised on the lands, additional rent should be payable in respect of the second crop. The tenants contend that the rent so far payable has been in respect of the land as such and has no reference to the number of crops, that a term to the effect claimed by the landlord

would cause an enhancement of the rent, and should, therefore, be disallowed.

Each party relies in the first instance on section 27 of the Madras Estates Land Act. The appellant claims that the question having arisen as to the amount of rent payable or the conditions on which he holds the land in any particular year, *viz.*, for *Fasli* 1319, it ought to be presumed to be held on the same rate and on the same conditions as in *Fasli* 1318; and that when the rate and conditions for *Fasli* 1318 are examined in the light of the evidence in the case it is found that there is a term in the *pattas* and *muchilikas* for *Fasli* 1310-1318 that a second crop if raised shall be paid for separately. To this the tenants' reply is that, as a matter of fact, a second crop was not raised till three years before suit, but on no previous occasion was a separate rent for the second crop claimed or paid.

Section 27 does not, under these circumstances, seem to me to help either party, and it has been contended that the question must primarily be decided in accordance with the terms of section 13 (3) of the Act.

Both the lower Courts have proceeded on the basis that section 13 (3) requires a decision in favour of the tenants. The fact which is alleged by the tenants to bring about this result is that the well which makes it possible for the second crop being raised (equally, it may be, with the first crop) was dug by the tenants or their ancestors, that this was an improvement at the sole expense of the *ryots* and that in consequence of such improvement there has been an increase of production for which a higher rent ought not to become payable. I confess to a certain amount of doubt whether this argument is capable of being based on the wording of section 13 (3) without some strain on the section. But after giving the matter my best consideration I am of opinion that the lower Courts were justified in coming to the conclusion at which they arrived, and in holding that the second crop is an increase of production consequent upon the improvement made by the tenants at their own expense.

I, therefore, agree that this appeal should be dismissed.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 690 OF 1913.

September 1, 1914.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

V. E. N. K. R. M. V. R. M. SOMASUNDARAM CHETTY—DECREE-HOLDER—PETITIONER

versus

TIRUNARAYANA PILLAI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115—Error of law, whether High Court competent to interfere—Remedy by suit open—Revision.

Where there has been an error of law and not of procedure, it is not open to the High Court to interfere in revision.

Sheo Prosad Bungshidhar v. *Ram Chunder Haribux*, 23 Ind. Cas. 977; 41 C. 323, approved of.

Tiruchittambala Chetti v. *Seshayyangur*, 4 M. 383; *Viraraghava* v. *Parasurama*, 15 M. 372, *Sri Krishna Doss* v. *Chandook Chand*, 4 Ind. Cas. 509; 5 M. L. T. 124; 19 M. L. J. 307; 32 M. 334; *Sheo Prosad Bungshidhar* v *Ram Chunder Haribux*, 23 Ind. Cas. 977; 41 C. 323 and *Subramanya Chettiar* v. *Arunachellam Chettyar*, 16 Ind. Cas. 692, (1912) M. W. N. 956, followed.

Where the remedy by suit is open to a party, a petition under section 115 of the Code of Civil Procedure is not the best way of settling questions arising under section 73, especially where there has been payment subsequent to the application to third parties and they are not made parties to the application.

A High Court will not decline to interfere in revision in all cases where there is a remedy by way of suit. But where a more efficatious remedy can be had by regular suit and where the result of interference by the High Court will affect the rights of parties not before the Court *eo nomine*, the High Court will not be justified in interfering in revision.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Ramnad at Madura, in Execution Appeal No. 514 of 1913, in Original Suit No. 47 of 1912, on the file of the Subordinate Judge's Court, Mayavaram.

Mr. *K. Srinivasa Aiyangar* (with him Mr. *S. Varadacharar*), for the Petitioner.

Messrs. *S. Muthia Mudaliar* and *K. V. Krishnaswami Aiyar*, for the Respondent.

JUDGMENT.—The petitioner in this case applied for rateable distribution. It was objected to on the ground that the decree obtained by the petitioner was not against the same judgment-debtor against whom exe-

cution had been levied by the counter-petitioner and the assets realised. The Subordinate Judge upheld this contention and dismissed the application. This revision petition is against that order.

A preliminary objection was taken before us that we should not interfere as under section 73, clause (2), of the Code of Civil Procedure, the petitioner had his remedy by a regular suit.

Mr. K. Srinivasa Aiyangar argued that the Court had jurisdiction, as was decided in a number of cases, and that the present case was a fit one for our interference. We feel no doubt that the High Court has jurisdiction to hear the petition. See *Tiruchittambala Chetti* v. *Seshayyangar* (1); *Viraraghava* v. *Parasurama* (2) and *Sri Krishna Doss* v. *Chandook Chand* (3). But we do not think that in the exercise of our powers we should interfere in this particular instance. In the first place we are not satisfied that the Subordinate Judge has either refused to exercise jurisdiction or exercised it with material irregularity as contended for by Mr. Srinivasa Aiyangar. In order to construe the decree in Original Suit No. 169 of 1910 obtained by the petitioner against Chidambaram Chetti, the Subordinate Judge held that it was open to him to examine the records of the suit to ascertain its real scope. It is true that the language used by him seems to indicate that he thought that the personal decree against Chidambaram Chetti was wrongly passed, but on carefully examining the judgment we have come to the conclusion that what the Subordinate Judge meant to say was that if the decree were properly construed it would amount only to a decree against the assets in the hands of Chidambaram Chetti. We do not think that in thus construing the decree he exercised his jurisdiction illegally or with material irregularity. In this connection we may refer to the observations of Sir Lawrence Jenkins, the learned Chief Justice of the Calcutta High Court, in *Sheo Prosad Bungshidur* v. *Ram Chunder Haribux* (4) where his Lordship points out that, where there has been an error of law and not of procedure, it is not open to the High Court to interfere in revision. A similar view was expressed in *Subramanya Chettiar* v. *Arunachellam Chettiar* (5) by a single Judge of this Court. Acting on this view we must hold there is no ground for setting aside the Subordinate Judge's order.

There is also another reason why we should not interfere in revision. As we observed at the outset, the petitioner has his remedy by regular suit. In the revision petition before us, he has impleaded as respondent only the person who opposed his application. It has been admitted that moneys have been paid out to a large number of other creditors after the dismissal of the petitioner's application. Any adjudication regarding the rights of the petitioner in the absence of the various persons to whom moneys have been paid out must be unsatisfactory. If we interfere in revision, the result will be that persons who are not parties to this petition must be called upon to pay back the money paid over to them, thus concluding them by an order passed behind their back. On the other hand if the petitioner institutes a regular suit, he can implead all the persons to whom money has been paid as parties to that suit and can obtain his relief in their presence. They will then have opportunities to resist petitioner's claim not only on the specific objection raised by the respondent now, but will be entitled to put forward other objections which they may be advised to take. Without laying down as a general proposition of law that in all cases where there is a remedy by way of suit the High Court should not interfere in revision, we are prepared to say that where a more efficacious remedy can be had by regular suit and where the result of interference by the High Court will affect the rights of parties not before the Court *eo nomine*, the High Court will not be justified in interfering in revision. This view has been adopted by individual Judges in this High Court in a number of unreported cases. Vide Civil Revision Petition No. 93 of 1911, Civil Revision Petition No. 1 of 1913 and Civil Revision Petition No. 984 of 1912. We dismiss the petition with costs.

Petition dismissed.

(1) 4 M. 383.
(2) 15 M. 372.
(3) 4 Ind. Cas. 509; 32 M. 334; 5 M. L. T. 125; 19 M. L. J. 307.
(4) 23 Ind. Cas. 977; 41 C. 323.
(5) 16 Ind. Cas. 692; (1912) M. W. N. 956

GHULAM SARVAR v. MUHAMMAD AMBAR ALI KHAN.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

PETITION No. 28 OF 1912-13 OF BARA BANKI DISTRICT.

December 12, 1913.

Present:—Mr. D. C. Baillie, S. M., and Mr. G. A. Tweedy, J. M.

GHULAM SARVAR—DEFENDANT—APPELLANT

versus

MUHAMMAD AMBAR ALI KHAN—PLAINTIFF—RESPONDENT.

Rent-free tenure, creation of—Law as to rent-free grants, applicability of—Contracts, valid and binding, overruled by law as to resumption of rent-free tenures—Oudh Rent Act (XXII of 1886), s. 107H—Under-proprietary rights, accrual of—"Land acquired, in perpetuity, by a written instrument and for a valuable consideration"—Purchaser of muafi *land, status of—Interpretation of Statute—Legislature, intention of, to be discussed only in case of ambiguity in words of law.*

A rent-free tenure is created whenever the proprietor of a land creates rights by which the land can be held without payment of rent by one person whilst the liability for revenue rests on another, and the law as to rent-free grants applies to every case where such rights are created.

The law as to resumption of rent-free tenures overrules in view of Government interests contracts which would otherwise be perfectly valid and binding, and in considering their effect considerations other than those which apply to ordinary transactions must be taken into consideration.

A rent-free holding transferred by a sale-deed is a "land .. acquired, in perpetuity, ...by a written instrument and for a valuable consideration" within the meaning of section 107H of the Oudh Rent Act. The view that the acquisition by a written instrument and for valuable consideration must be from the originial proprietor and not from a person who had acquired rights as a rent-free holder without payment of valuable consideration, is wrong.

Courts can discuss the intention of the Legislature only when there is any ambiguity in the words of the law.

Appeal from the decree of the Officiating Commissioner, Fyzabad, dated 26th May 1913, reversing the order of the Deputy Commissioner, Bara Banki, dated 21st January 1913, reversing that of the Assistant Commissioner, Bara Banki, dated 11th November 1912.

Mr. *Ali-ud-din Ahmad*, for the Appellant.

Babu *Bisheshwar Nath*, for the Respondent.

JUDGMENT.

BAILLIE, S. M.—The tenure under which the land now in question is held was originally created in favour of one Rafik-un-nissa. It was left to her under a Will (which had effect in 1894) to be held free of rent. The proprietary interests of the testator passed to the predecessor-in-interest of the present respondent. Appellant purchased the rent-free tenure from Rafik-un nissa in 1901. The Deputy Commissioner found that appellant had acquired the land in perpetuity by a written instrument and for a valuable consideration and accordingly directed that rent should be fixed under section 107H. The case was appealed by the present appellant. Respondent himself did not appeal, but filed a cross-objection in the appellant's appeal. On this cross-objection the Commissioner held that the acquisition by written instrument for valuable consideration mentioned in section 107H must be from the original proprietor and not from a person who had acquired rights as a rent-free holder without payment of valuable consideration.

There are two questions for decision: (*i*) whether the law as to rent-free grants applies, and (*ii*) whether the acquisition in this case was such an acquisition as section 107H contemplates. The first question must, I think, be unhesitatingly answered in the affirmative. A rent-free tenure is created whenever the proprietor of land creates rights by which the land can be held without payment of rent by one person whilst the liability for revenue rests on another. As to the second question, there are, no doubt, reasons, which can be advanced in support of the Commissioner's view.. To hold that a person who purchases for valuable consideration and by written instrument from a rent-free tenure-holder who had not acquired his tenure for valuable consideration, must be a person to whom section 107 H applies, would undoubtedly put the vendee in a better position, than his vendor; but I do not think that in connection with these sections this is a fatal objection. The law as to resumption of rent-free tenures overrules in view of Government interests contracts which would otherwise be perfectly valid and binding, and in considering their effect considerations other than those which apply to ordinary transactions must be taken into consideration. I think it reasonable to consider that the law intended to protect all persons who in good faith paid good money for the acquisition of a right which they regarded as valuable and transferable and which would have been valuable and transferable except for the operation of the special law as to rent-free tenures.

MUNI LAL *v.* CHATTAR SINGH.

A similar question has frequently arisen under the Agra Act, section 151B. The words in that section are similar and the decision has invariably been that a person who has purchased a rent-free tenure on payment of consideration may be held to have acquired it for valuable consideration. To hold otherwise would, it appears to me, be to read into the sections concerned the word 'originally.' In my opinion it is not necessary to hold that this word must be understood in the provisions of section 107H.

I, therefore, take the same view as the Deputy Commissioner in this case and would cancel the order of the Commissioner and restore that of the Deputy Commissioner with costs in favour of appellant.

TWEEDY, J. M.—As regards (*i*) the case is clear. The law as to rent-free grants applies. As to (*ii*) the difficulty as pointed out by the Senior Member is that if we hold the Deputy Commissioner's view to be correct, we are infringing the other universal principle of law that a vendor cannot give his vendee a better title than he has himself. This is undoubtedly a strong argument in favour of the Commissioner's view that the acquisition must be from the original proprietor. It may be doubted whether the Legislature intended the protection contemplated by the Senior Member for the doctrine of *caveat emptor* applies and the purchaser is bound to make sure of the title before he makes the bargain. But I do not think we are called upon to discuss what the Legislature meant. Courts can only do this when there is any ambiguity in the words of the law and there is no ambiguity here. The words are plain: "acquired for valuable consideration." There is no qualification of any kind here and if the Legislature intended to qualify those words they could have done so. We must take law as we find it, regardless of what may possibly have been in the mind of the framers of the law. I, therefore, concur in the proposed order.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 677 OF 1910.

January 8, 1914.

Present:—Mr. Justice Rattigan and Mr. Justice Beadon.

MUNI LAL AND OTHERS—PLAINTIFFS —APPELLANTS

versus

CHATTAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Mortgagor admitting payment of consideration prior to mortgage—Finding that item so admitted is fictitious—Suit by mortgagee.

The Full Bench ruling in *Gokal Chand* v. *Rahman*, 59 P. R. 1907 (F. B.); 62 P. L. R. 1908; 95 P. W. R. 1907, applies only to cases where the mortgagee at the time of mortgage undertakes to pay, or to do something for, the mortgagor after the date of execution of the mortgage and fails to carry out his undertaking. It does not apply to a case where the mortgagor states that he has actually been paid or received consideration at a time prior to the mortgage, whereas, in point of fact, payment of the full sum or receipt of full consideration has not been made or taken place.

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

Second appeal from the decree of the Divisional Judge, Hissar Division, dated the 21st March 1910, affirming that of the District Judge, Rohtak, dated 16th November 1909, dimissing the claim.

Lala *Lajpat Rai*, for the Appellants.

JUDGMENT.—The Courts below concur in finding that the two items, Rs. 500 and Rs. 800, of the alleged consideration money for the mortgage sued upon were fictitious and never paid to the mortgagor. As a result of this finding, which we ourselves have no hesitation in accepting as correct, the Divisional Judge without considering the other points involved in the case and relying upon *Gokal Chand* v. *Rahman* (1), has dismissed plaintiffs' suit with costs.

The learned Divisional Judge in applying the Full Bench ruling to the facts found by him has overlooked the distinction pointed out in *Yakub Khan* v. *Raghpat Rai* (2), between cases where the mortgagor states that he has actually been paid or received consideration at a time prior to the mortgage, whereas, in point of fact, payment

(1) 59 P. R. 1907 (F. B.); 62 P. L. R. 1908; 95 P. W. R. 1907.

(2) 17 Ind. Cas. 235; 165 P. W. R. 1912; 192 P. L. R. 1912.

of the full sum or receipt of full consideration has not been made or taken place, and cases where the mortgagee at the time of mortgage undertakes to pay, or to do something for, the mortgagor after the date of execution of the mortgage and fails to carry out his undertaking. The Full Bench ruling applies to the latter and not to the former class of cases.

We must accordingly hold that the Divisional Judge erred in dismissing the suit on the preliminary ground that the Full Bench ruling applied to it. We accordingly accept this appeal and under Order XLI, rule 23, Civil Procedure Code, we remand the case to the Divisional Judge for determination of the appeal before him in accordance with law.

Costs will abide the event. The Court-fee stamp to be refunded to the appellant.

Appeal accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 15 OF 1913.

June 19, 1914.

Present:—Mr. Kendall, A. J. C.

BENI MADHO—PLAINTIFF—APPELLANT

versus

RAM HARAKH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 31—Judgment of Appellate Court, what it should contain.

There should be in the judgment such a statement of the case as to enable the Appellate Court to be satisfied that the Court below has understood the real issues between the parties and that it has tried those issues and has considered the evidence. A judgment of the first Appellate Court merely to the effect that it is in entire agreement with the findings of the Court of first instance and, therefore, dismisses the appeal, is not sufficient and does not comply with the provisions of Order XLI, rule 31, Civil Procedure Code.

Surji Singh v. *Kunwar Durga Pershad*, 8 O. C. 290, referred to.

Appeal from the decree of the District Judge, Gonda, dated 16th November 1912, upholding that of the Munsif, Gonda, dated 3rd August 1911.

Babu *Nagendra Nath Ghoshal*, for the Appellant.

Babu *Surendro Nath Roy*, for the Respondents.

JUDGMENT.—This case has already been once remanded for a finding on the merits to the lower Appellate Court. That Court has dismissed the appeal, but the judgment which it has written, and which it has headed 'order', does not sufficiently comply with the provisions of Order XLI, rule 31, of the Code of Civil Procedure. The lower Appellate Court has written: "I am in entire agreement with the learned Munsif as I previously indicated; after giving all the facts of the case my best attention I see no reason for modifying the opinion formerly adumbrated by me, and being in entire accord with the findings of the learned Munsif and the grounds on which they are based I dismiss this appeal with costs."

The view which is taken in such matters by this Court may be found in *Surji Singh* v. *Kunwar Durga Pershad* (1), where it has been noted that there should be in the judgment such a statement of the case as will enable the Appellate Court to be satisfied that the Court below has understood the real issues between the parties and that it has tried those issues and has considered the evidence. In the former judgment of the learned Judge to which he has again referred, he had definitely noted that he had not considered the merits of the case. And in this judgment to which exception is now being taken, the learned Judge has expressly not set out that he has read and considered the evidence. I, therefore, set aside the judgment of the lower Appellate Court and remand the case to the learned District Judge to dispose of the appeal according to law. Costs will abide the result.

Case remanded.

(1) 8 O. C. 290.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 494 OF 1913.

September 1, 1914.

Present:—Mr. Justice Seshagiri Aiyar.

VENKATESWARA IYER—PLAINTIFF—PETITIONER

versus

CHERRSERI MADATHIL RAVUNNI NAIR—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 10, 151—Suit by next friend of minor—Death of next friend—Suit dismissed—Fresh suit—Illegal order, effect of—Estoppel—Abuse of process of Court.

On the death of a minor plaintiff's next friend the suit does not abate and, therefore, should not be dismissed.

If, however, an order of dismissal is passed it is a nullity and can have no effect upon the rights of the plaintiff. The duty of the Court is either to appoint a new friend or to allow the suit to be pending till the minor attains majority.

If a party misconceives the effect of an order which is legally a nullity and, therefore, of no force, he is not estopped from pleading subsequently that it was not necessary for him to have that order set aside.

Section 10 of the Civil Procedure Code (corresponding to section 12 of the old Code) does not bar the institution of suits but only their trial, and in this respect there is no substantial difference between the language of the new and old Codes.

Section 151 of the Code of Civil Procedure has been inserted to enable Courts to deal effectually with attempts to abuse the process of the Courts.

The institution of a second suit against the same party for the same relief and on the same cause of action is not "an abuse of the process of the Court" within the meaning of section 151, Civil Procedure Code.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Palghat, in Small Cause Suit No. 2066 of 1912.

Mr. *N. A. Vaidyanatha Aiyar* for Mr. *C. V. Ananthakrishna Aiyar*, for the Petitioner.

Mr. *K. P. M. Menon*, for the Respondent.

JUDGMENT.—Original Suit No. 369 of 1905 was instituted by a next friend of the petitioner who was then a minor. Some time after, the next friend died; on the 25th October 1906 the Munsif declared that the suit abated in consequence of his death. On attaining majority, the petitioner moved in 1912 to set aside this order of abatement. The petition was dismissed on the ground that it was barred by limitation. The present suit was instituted for the same reliefs as those prayed for in Original Suit No. 369 of 1905. The Subordinate Judge dismissed this suit on the ground that the order of abatement precluded the filing of a fresh suit. This petition is against that decision.

There can be no doubt that the order directing the suit to abate was illegal. There is no provision of law which enables a Court on the death of the next friend to dismiss the suit. It was the duty of the Court to see that a new friend was appointed or to allow the suit to be pending till the minor attained majority. The order of the 25th October 1906 was a nullity and can have no effect upon the rights of the plaintiff. The Subordinate Judge is, therefore, wrong in holding that that order precluded the filing of the present suit. Mr. Menon, who appeared for the counter-petitioner, rightly conceded that that conclusion of the Subordinate Judge could not be supported. But he argued that as the petitioner had chosen to apply to set aside the abatement order and as that application had been rejected, he was estopped from pleading that the original order was of no effect. I cannot agree with this contention. If the petitioner misconceived the effect of an order which was legally of no force, he was not estopped from pleading subsequently that it was not necessary for him to set aside that order.

The result of holding that the first order was a nullity and that the proceedings taken to set it aside did not affect the rights of the parties, is that Original Suit No. 369 of 1905 is still pending. Mr. Menon contended that as the suit had not legally terminated it was not open to the petitioner to file a fresh suit and that the order of the Subordinate Judge dismissing it could be sustained upon this ground. I was at first inclined to agree with this argument. But on considering the matter more fully I have come to the conclusion that the order of the Subordinate Judge was wrong. The Code of Civil Procedure provides two remedies to a person who is being harrassed for the same relief more than once. Section 10 enables the defendant to plead that the matter is *lis pendens* and that the suit should not be proceeded to trial. In other words, he can claim that the relief claimed against him is *sub judice* and that he should not be put to the necessity of defending the claim twice over. The other remedy is given

by section 11. If a matter has once before been adjudicated upon, the defendant can say that the matter is *res judicata* and that there should not be a second trial. In neither of these cases can he plead that the suit ought not to have been instituted. Both the pleas above referred to pre-suppose the existence of a suit on the file of the Court. The only provision of law in the Civil Procedure Code which bars the institution of suits is that contained in section 12 which precludes a party from filing a suit in respect of a matter which by the rules he is debarred from enforcing by a suit. The present case is not governed by section 12.

Since the case was heard Mr. Menon has drawn my attention to the decisions reported as *Meckjee Khetsee* v. *Kesowjee Dera Chund* (1) and *Balkishan* v. *Kishan Lal* (2) and *Nemagauda* v. *Paresha* (3) which contain *dicta* to the effect that section 10 (corresponding to section 12 of the old Code) does not bar the institution of suits, but only their trial. The learned Counsel, however, argued that the change in the language of section 10 indicated that the suit could be struck off at once. I am unable to see any substantial difference between the language of the new and old Codes.

The point which I reserved for consideration related to the wording of section 151 of the Code of Civil Procedure. It is a new provision and has been inserted to enable Courts to deal effectually with attempts to abuse the process of the Courts. To a certain extent it introduces into this country the principles underlying 59 & 60 Vic. c. 51, entitled the "Vexatious Actions Act." Section 1 of that Act deals with the abuse of the process of the Court, but it presupposes that the person seeking the aid of the Court is habitually and persistently instituting suits. Lord Halsbury points out in *Reichel* v. *Magrath* (4) that "it would be a scandal to the Administration of Justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again." Therefore in order that the litigant may be shut out from setting up the same case over again, the first case must have been disposed of. In the view I have taken, Original Suit No. 369 of 1905 is still pending. If that is so, although the present suit is against the same party and for the same relief and is based upon the same cause of action, I cannot hold that it would be an abuse of the process of the Court to allow the plaintiff to carry on the present litigation until the previous one comes to a legal termination. It may be that the first suit may fail on some technical ground and if I were to direct that that suit be struck off the file, I may be denying the plaintiff his just rights. After giving my most careful consideration to the points involved, I have come to the conclusion that the only course open to the defendant is to move that the trial of the present suit be stayed under section 10 of the Civil Procedure Code. Mr. Menon drew my attention to the fact that immediately after the death of the next friend a guardian was appointed by the District Court of the person and property of the minor. But there are no materials before me to show whether this guardian prosecuted Original Suit No. 369 of 1905. If he did so and if the suit came to an end, that may be a bar to the present suit. That is a matter to be decided by the Subordinate Judge on the merits.

For these reasons I hold that the order of the Subordinate Judge dismissing the suit *in limine* cannot be upheld. I reverse his order and direct him to re-take the case to his file and dispose of it according to law. The costs will abide the result.

Order set aside

(1) 4 C. L. R. 282.
(2) 11 A. 148; A. W. N. (1889) 42; 13 Ind. Jur. 309.
(3) 22 B. 640.
(4) 14 A. C. 665; 59 L. J. Q. B. 159; 54 J. P. 196.

RAM NATH *v.* BINDESHURI PRASAD SINGH.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 158 OF 1913.

June 4, 1914.

Present:—Mr. Kendall, A. J. C.

RAM NATH— PLAINTIFF—APPELLANT

versus

Raja BINDESHURI PRASAD SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

U. P. Court of Wards Act (III of 1899), *rules made thereunder—District Officer or Special Manager, power of—Grant of land for hundred years for planting grove.*

There is nothing in the Court of Wards Act or in the rules made thereunder, which gives any powers to District Officers or to a Special Manager to make any grant of land out of an estate under the management of the Court of Wards for a hundred years for the planting of a grove.

Appeal against the decree of the Subordinate Judge, Bahraich, dated 4th March 1913, upholding that of the Munsif, Bahraich, dated 13th December 1912.

Pandit *Gokaran Nath Misra*, for the Appellant.

Babu *Basudeva Lal*, for the Respondents.

JUDGMENT.—Ram Nath was given a farm of a village in the Payagpur estate at a time when that estate was under the Court of Wards owing to the minority of the Raja. The estate has now been handed over by the Court of Wards. While Ram Nath was a farmer, he took certain land into his own cultivation.

The period of his farm which was granted having expired, the Raja issued a notice of ejectment to him in respect of his *theka*, and another in respect of the fields which he was cultivating. Ram Nath did not contest the notice. When the Raja applied for the assistance of the Revenue Courts to obtain possession Ram Nath came forward with an objection as to trees which he had planted in certain fields; and I understand that his objection is still pending before the Board of Revenue. Ram Nath has brought this present suit against the Raja of Payagpur and against the new *thekadar* of the village for a perpetual injunction to prohibit them from taking possession of the trees, or cutting them down, on the allegation that this land was given him by the Court of Wards for the purpose of planting a grove according to the terms of a deed of agreement which he had executed.

The lower Courts have found that whatever land was given to him for the purpose of planting a grove was given by the Deputy Commissioner of Bahraich and not by the Court of Wards, and that the Deputy Commissioner was acting *ultra vires*, and the suit, and the appellant's appeal therefrom, were both dismissed.

Appeal is laid on the grounds that the Courts below have erred in law in holding that the Deputy Commissioner of Bahraich had no power to grant permission to the appellant to plant the grove in dispute, that the respondent was bound by the said permission, being an act done by the Deputy Commissioner in the ordinary course of the management of the estate while in charge of the Court of Wards, and that having planted the grove with the permission of the Court of Wards he is the owner of the trees and cannot be ejected from them.

On the 28th February 1908 the appellant, Ram Nath, presented an application to the Special Manager to the effect that he was a *khair-khwah riasat*, that he had no grove, that Hindus considered it a pious act to plant a grove, and that this village was quite close to his house, so that he could easily make arrangements for it. For this reason he prayed that an order might be given that a grove might be planted in certain fields. He added that he was at the time *thekadar* of the village and that these fields were for the time being in his cultivation (*sir*). The Special Manager appears to have dealt with the application as if it were one to which the provisions of rule 99 of the Court of Wards Manual applied. Reference being made to the Deputy Commissioner that officer passed an order that Ram Nath was not a tenant to whom rule 99 applied, but that an *ikrarnama* should be taken from him such as was taken from Salik Ram. It has been ascertained in this Court that this Salik Ram who was present before the Court along with Ram Nath appellant is a relation of Ram Nath and is a *thekadar* in the Nanpara Estate. An *ikrarnama* was accordingly taken from Ram Nath in which he agreed to plant a grove on conditions that he would be responsible for looking after the young trees, that the estate might let out the ground for cultivation or might arrange to pasture cattle there, that he (Ram Nath) should have the usufruct of the grove and that after a hundred years he or

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his successor should have power to cut the grove down and sell the wood. As the trees have been entered in his name in the Government papers, it may be presumed that he was eventually allowed to plant them according to these conditions. There is nothing in the Court of Wards Act or in the rules made thereunder, which are contained in the Court of Wards Manual, which gives any power to District Officers or to a Special Manager to make any grant of land for a hundred years for the planting of a grove. Rule 84 recommends special concessions to be given to specially selected tenants; and rule 99 emphasizes the importance of encouraging tenants to improve their holdings. In each of these rules the granting of land for a grove is mentioned. Whether these rules have the effect of giving the District Officer unlimited power to grant lands in those two cases or not, it is not for this Court to determine. The District Officer did not act, and did not pretend to act, under either of these rules in the present instance. The Court of Wards is defined in the Act as the Board of Revenue. The findings of the lower Courts, therefore, as to the powers of the Deputy Commissioner were correct.

This appeal is dismissed. The respondents may have their costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 247 OF 1913.

September 16, 1914.

Present:—Sir John Edward Power Wallis, Offg. Chief Justice, and Mr. Justice Seshagiri Aiyar.

GOVINDA GOUNDAR AND ANOTHER—APPELLANTS

versus

RAMIEN AND OTHERS—RESPONDENTS.

Land Acquisition Act (I of 1894), ss. 31 (2), 32 (1)—Unenfranchised service inam, owner of, whether competent to alienate.

A service *inam* unless enfranchised, is land which the owner is incompetent to alienate within the meaning of sections 31 (2) and 32 (1) of the Land Acquisition Act.

Appeal against the decree of the District Court of Coimbatore in Original Petition No. 360 of 1912, (Compensation Case No. 11 of 1912.)

HUBDAR KHAN *v.* GAJADHAR CHAUBE.

Mr. *S. T. Srinivasa Gopalachari*, for the Appellants.

Mr. *C. S. Venkatachariar* (with him Mr. *T. M. Krishnaswami Aiyar*), for the Respondents.

JUDGMENT.—The appellants have failed to establish their right to the property. Our attention has, however, been drawn to the provisions of section 31 (2) and section 32 (1) of the Land Acquisition Act as to the acquisition of property which the owner has no power to alienate. The *inam* in question is a service *inam* granted for the performance of a service in the temple and liable, unless it has been enfranchised, to be resumed by Government for failure to perform the service. Unless it has been enfranchised, as to which we have no evidence, it is, in our opinion, land which the owner is incompetent to alienate within the meaning of the sections. These provisions do not appear to have been brought to the notice of the District Judge and we have decided to remit the case to him to ascertain upon fresh evidence, if necessary, whether these sections are applicable and, if so, to dispose of the case according to law. The 1st appellant must pay the costs of the 1st respondent in the appeal.

Appeal allowed; Case remanded.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 97 OF 1913.

June 24, 1914.

Present:—Mr. Stuart, Offg J. C.

HUBDAR KHAN—DEFENDANT—APPELLANT

versus

GAJADHAR CHAUBE—PLAINTIFF—RESPONDENT.

Adverse possession of equity of redemption—Limitation Act (IX of 1908), Sch. I, Art. 144.

Adverse possession over a right of equity of redemption can legally exist.

Puttappa v. Timmaji, 14 B. 176, *Lalla Kanhoo Lal v. Musammat Manki Bibi*, 6 C. W. N. 601; *Khiaraj Mal v. Daim*, 32 C. 296 (P. C.); 32 I. A. 23; 1 C. L. J. 584; 9 C. W. N. 201; 7 Bom. L. R. 1; 2 A. L. J. 71, *Mata Din Sah v. Shaikh Ahmad Ali*, 11 O.C.1, referred to.

Article 144 of the Limitation Act applies to a case of adverse possession of the equity of redemption.

Appeal against the decree of the District Judge, Rae Bareli, dated 11th December 1912, reversing that of the Subordinate

Judge, Sultanpur, dated 24th October 1912.

Mr. *Wasim*, for the Appellant.

Mr. *Samiullah Beg*, for the Respondent.

JUDGMENT.—Manorath, the father of the plaintiff, and Chhutkau, the son of Manorath's brother, executed a deed of mortgage in 1881 in favour of Ghirrau, Rachhpal and another man called Chhutkau. To this deed of mortgage a certain Tulshi and others were also parties, and Tulshi and others mortgaged another property which was included in the same deed. Possession was to be given to the mortgagees under certain conditions, and in 1887 the mortgagees sued on the foot of the deed and obtained possession of the whole property mortgaged. In 1888 Tulshi sued for redemption of the whole property secured by the mortgage and obtained a decree. In 1891 Manorath and the mother of Chhutkau (the son of Manorath's brother) transferred the whole of the right of equity of redemption of Manorath, Kalka and Chhutkau (the son of Manorath's brother) to Hubdar Khan. Chhutkau (the son of Manorath's brother) had then died and his mother was his heir. It is not clear whether Kalka was or was not alive in 1891. In 1906 Hubdar Khan redeemed from Tulshi the share which had been mortgaged by Manorath, Kalka and Chhutkau. In 1912 Gajadhar, the son of Manorath, sued Hubdar Khan for possession of the mortgaged property on the ground that he was a minor in 1891, that Manorath had no right to transfer his right of equity of redemption and that he was entitled to obtain possession of the property. His suit was dismissed by the learned Subordinate Judge, but decreed by the learned District Judge on certain conditions. Hubdar Khan appeals.

There is a finding of fact to the effect that Gajadhar was born in the year 1858 and was 24 years of age at the time of the institution of the suit. The first point which has been argued by the learned Counsel for the appellant is that the suit is barred by limitation. His case is that it is possible for adverse possession to exist with regard to a right of equity of redemption, and that in this particular case adverse possession did exist with regard to Gajadhar's interests in the right of equity of redemption in the property in question. In the transfer in the year 1891, Manorath purported to have full interests in (so far as his own family was concerned) in the equity of redemption, and those interests were tansferred to Hubdar Khan. The learned Counsel for the appellant argues that from 1891 the period of adverse possession began to run against Gajadhar. In ordinary circumstances all his relief with respect to the right of equity of redemption would have expired in the year 1903, but as he was a minor in the year 1903 his right would extend up to the year 1906 when he attained majority, and he was then allowed three years' grace within which to bring his suit. As he had, however, failed to bring his suit before the end of 1909 his claim according to this argument became barred by limitation. In support of this proposition the learned Counsel for the appellant has quoted the decision in *Bisheshar Tewari* v. *Bisheshar Dayal* (1) to show that the Article of Limitation Act applicable to the case is Article 144, Schedule II, of Act XV of 1877. In that case a Hindu died leaving a widow and three sons. The widow, as guardian of one of her minor sons, executed a deed of sale. The minor son instituted a suit to recover possession and it was held that the possession became adverse to him from the date of the deed of sale, that Article 144 applied to the suit and that the extended period of limitation expired three years after he had attained majority. This judgment of a Bench of this Court is sufficient authority for the proposition that in the present case Article 144 applies. I have still to consider whether a right of equity of redemption is such a right as is capable of being the subject of adverse possession and whether in this particular case it is shown that the right of equity of redemption has been the subject of adverse possession. The learned Counsel for the appellant refers me in this connection to the decision of a Bench of the High Court of Bombay in *Puttappa* v. *Timmaji* (2). In that case it was distinctly held that one of two sets of heirs of a deceased person was in possession of an equity of redemption adversely to the other. I have been further referred to a decision of a Bench of the High Court of Calcutta in

(1) 15 Ind. Cas. 394; 15 O. C. 111.
(2) 14 B. 176.

Lalla Kanhoo Lal v. *Musammat Manki Bibi* (3) where the capacity of a right of equity of redemption to be the subject of adverse possession is considered at some length. The discussion commences at page 606 of that ruling and it is sufficient to say that that decision is in favour of the proposition advanced by the learned Counsel for the appellant. Against this proposition the learned Counsel for the respondent has referred me to a ruling of a Bench of this Court in *Mata Din Sah* v. *Shaikh Ahmad Ali* (4). In that case, however, the circumstances were different as the transfer there was absolutely void. In the circumstances the period of redemption did not arise until a date which was well within limitation. I have also been referred to a decision of their Lordships of the Privy Council in *Khiarajmal* v. *Daim* (5). In that case their Lordships found that it was possible to have adverse possession of a right of equity of redemption, but in the particular circumstances there was no evidence of such adverse possession. This further supports the first point which has been taken for the appellant to the effect that it is possible for adverse possession to exist with regard to a right of equity of redemption, and I find in favour of the appellant that adverse possession over a right of equity of redemption can legally exist.

The next point to be decided is whether as a matter of fact adverse possession is proved to exist over the right of equity of redemption in this particular case. The transfer was by Manorath and the heir of Chhutkau, the original mortgagor, who purported to represent all three mortgagors, Manorath, Kalka and Chhutkau. The transfer was by a registered deed of sale and placed the purchasers in ostensible ownership of the full right of equity of redemption in so far as the share mortgaged by those three mortgagors was concerned. If Kalka had been alive, then, as has already been noted it is not clear whether he was or was not then alive, I should have no hesitation in finding that as against him adverse possession over the right of equity of redemption began from the date of the transfer. Would the case be different with regard to Gajadhar? I consider that the case would only be different so far that inasmuch as Gajadhar was a minor, the period of limitation against him would not end until three years after the date when he had attained his majority. The question does not appear to me to be so much as to whether the possession of Tulshi could be considered as possession for or against Gajadhar, but the question as to whether Hubdar Khan obtained adverse possession over the right of equity of redemption from the date of his purchase in 1891, and I am of opinion that he did obtain adverse possession in that year over the right of equity of redemption. In those circumstances the appellant's contention must succeed on the point of limitation. It is unnecessary to go into other grounds raised on his behalf as on this point alone the suit must be dismissed.

I, therefore, direct that the order of the learned Subordinate Judge be restored, that the suit stand dismissed, and that the plaintiff-respondent pay his own costs and those of the appellant in all three Courts.

Suit dismissed.

(3) 6 C. W. N. 601.
(4) 11 O. C. 1.
(5) 32 C. 296 (P. C.); 32 I. A. 23; 1 C. L. J. 584; 9 C. W. N. 201; 7 Bom. L. R. 1; 2 A. L. J. 71.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 181 OF 1914.

July 30, 1914.

Present:—Mr. Justice Oldfield.

In re THAYYANAYAKI ACHI—DEFENDANT—APPELLANT.

Receiver, appointment of—Appointment of party—Jurisdiction—Small estate.

A Court has jurisdiction to appoint, under special circumstances, one of the parties to the suit as Receiver even without the consent of the other, *e.g.*, where the estate is small and cannot afford to have a paid Receiver.

Appeal against the order of the Court of the Subordinate Judge of Kumbakonam in Interlocutory Application No. 435 of 1914 in Original Suit No. 10 of 1914.

JUDGMENT.—It is, no doubt, a general rule that one party should not be appointed a Receiver without the other's consent. But departure from that rule may be justified by the special circumstances of the case. Such special circumstances have, in my opinion, been shown by the lower Court to exist; and I may also refer to the fact that the estate is comparatively small and can ill-afford the

cost of a paid Receiver. Appellant contends that the respectable person nominated by her should be appointed without payment. I am not, however, prepared to hold that the lower Court used its discretion wrongly in refusing his services, since the Court's control over an honorary Receiver must always be small.

It is further contended that no appointment is necessary because it will not be advantageous to call in some of the debts in question, which represent profitable investments and should not be terminated. It will be open to appellant to move the lower Court with reference to these items to direct the Receiver not to sue for them at once, if postponement is advantageous to the estate. The fact, if it be one, that there are such items, is not material with reference to the general question whether a Receiver to protect the estate should be appointed.

This appeal is dismissed.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 975 OF 1913.

September 8, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

SIVA SANKARA REDDY—PLAINTIFF—APPELLANT

versus

MUTHUSAMI KONAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Public path—Obstruction—Suit by private person—Special damage must be both alleged and proved.

An individual member of the public has no cause of action to bring a separate suit in respect of an obstruction to a public way without both alleging and proving special damage of a substantial character to himself.

Khaji Sayyad Hussain Sahib v. *Ediga Narasimhappa*, 16 Ind. Cas. 962; 12 M. L. T. 491; (1913) M. W. N. 991; 23 M. L. J. 539; *Kandasawmy Kovundan* v. *Karupanna Kovundan*, 21 Ind. Cas. 601; (1913) M. W. N. 1001; 14 M. L. T. 509, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Trichinopoly, on the file of the District Court of Trichinopoly, in Appeal Suit No. 147 of 1912, preferred against that of the District Munsif of Kulitalai, in Original Suit No. 298 of 1910.

Mr. *K. S. Jayarama Aiyar*, for Mr. *T. Natesa Aiyar*, for the Appellant.

Mr. *N. Rajagopalachari*, for the Respondents.

JUDGMENT.—On a perusal of paragraphs 8 and 9 of the plaint (the plaintiff referring in paragraph 9 to a petition which he gave to the Deputy Tahsildar, a Revenue Officer whose duty is to look after public paths running through Porambokes) and of the judgment of the lower Appellate Court, we have no doubt that the path in question is a public path.

It is clear law that an individual member of the public has no cause of action to bring a separate suit in respect of an obstruction to a public way without both alleging and proving special damage of a substantial character. The allegation of damage in the plaint is very vague and indefinite and is wholly insufficient to sustain a separate suit. [See *Khaji Sayyad Hussain Sahib* v. *Ediga Narasimhappa* (1) and *Kandasawmy Kovundan* v. *Karupanna Kovundan* (2)].

The second appeal is dismissed with costs

Appeal dismissed.

(1) 16 Ind. Cas. 962; 12 M. L. T. 491; (1913) M. W. N. 991; 23 M. L J. 539.

(2) 21 Ind. Cas. 601; (1913) M. W. N. 1001; 14 M. L. T 509.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 161 OF 1912.

April 28, 1914.

Present:—Mr. Lindsay, J. C., and Mr. Kanhaiya Lal, A. J. C.

PRAG AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAJA MUHAMMAD ABDUL HUSAIN KHAN—PLAINTIFF AND RAJA BHAGWATI PRASAD SINGH—DEFENDANT—RESPONDENTS.

Jurisdiction of Civil and Revenue Courts—Tenancy—Determination of nature or terms—Permanent lessee not possessing heritable and transferable right, whether under-proprietor—Declaration that defendants neither proprietors nor under-proprietors, maintainability of suit for, where they simply claim to be perpetual lessees—Civil Courts not to declare whether decision of Revenue Court binding on party—Specific Relief Act (I of 1877), s. 42—Declaration discretionary—Mere question of law, whether justifies grant of declaration.

A Civil Court can inquire into a proprietary or under-proprietary title but cannot inquire into the nature or the terms of a tenancy where the tenancy is admitted. They lie within the exclusive jurisdiction of the Revenue Courts.

PRAG *v.* MUHAMMAD ABDUL HUSAIN.

Janki Prasad v. *Salig Ram*, 2 O. C. 96; *Bhawani Bhikh Singh* v. *Rup Mahesh*, 3 O. C. 87; *Raghubar* v. *Raja Rampal Singh*, 3 O. C. 365 at p. 368 and *Chhab Narain Singh Rae* v. *Sri Krishna Din*, 2 Ind. Cas. 927; 12 O. C. 164 at p. 167, referred to.

A permanent lessee not possessing a heritable and transferable right is not an under-proprietor.

Maheshar Pershad v. *Muhammad Ewaz Ali Khan*, 8 Ind. Cas. 209; 13 C. W. N. 1093; 10 C. L. J. 133; 11 Bom. L. R. 868; 31 A. 394 (P. C.); 6 M. L. T. 168; 19 M. L. J. 442; 12 O. C. 293, explained.

Sibbu v. *Sita Ram*, S. C. 282; *Nand Ram* v. *Amrnat Fatima Begam*, 6 O. C. 94; and *Muhammad Abdul Karim Khan Nawab* v. *Niwaz Singh*, 3 Ind. Cas 868; 12 O. C. 267, referred to.

Where the plaintiff sued the defendants in the Civil Court for a declaration that they were neither proprietors nor under-proprietors, and the defendants simply claimed to be perpetual lessees as found by the Revenue Court:

Held, that the plaintiff's suit was without any cause of action.

Rani Dhiramraj Kuar v. *Bhondu Khan*, 8 O. C. 84, referred to.

A Civil Court ought not to grant a declaration as to whether a decision of the Revenue Court is binding upon a party, for the power conferred by section 42 of the Specific Relief Act is discretionary and no declaration can properly be granted on a mere question of law.

Zinnatunnissa Khatun v. *Girindra Nath Mukerjee*, 30 C. 788, and *Babu Nirendra Bahadur Singh* v. *Biswdeo Misra*, 14 Ind. Cas. 81, referred to.

Appeal from the decree of the Subordinate Judge, Gonda, dated 20th September 1912.

Pandit *Gokaran Nath Misra*, for the Appellants.

The Hon'ble Rai *Sri Ram Bahadur*, for Respondent No. 1.

JUDGMENT.—The plaintiff is the *talukdar* of *Taluqa* Birwa Mahnon situated in the District of Gonda. The dispute in this case relates to *Mauza* Mahadewa, which forms a part of that *taluqa*. The defendants Nos. 1, 2 and 3 claim to be the perpetual lessees of that village. Their names were entered as such in the revenue papers under an order of the Deputy Commissioner of Gonda, dated the 28th October 1910, to which the plaintiff was a party. The Deputy Commissioner relied in support of his order on a judgment of the Board of Revenue, dated the 26th March 1897, wherein it was held in a suit to contest a notice of ejectment issued by Saiyid Asghar Husain, a mortgagee of Achalram that the defendants Nos. 1, 2 and 3 were in possession since 1852 by virtue of their previous *zemindari* rights, and were not liable to ejectment as ordinary tenants. The plaintiff appealed from the order of the Deputy Commissioner to the Commissioner of the Fyzabad Division, but was unsuccessful. He then appealed to the Board of Revenue, but with no better result. The present suit has been filed by him for a declaration that the defendants Nos. 1, 2 and 3 have no right to retain possession of that village by virtue of any proprietary right, superior or inferior, and that the decision of the Board of Revenue, dated the 26th March 1897, does not affect the rights of the plaintiff. The allegation of the plaintiff is that the defendants Nos. 1, 2 and 3 are ordinary tenants and have no right to possession of the village either as superior or inferior proprietors, and that he is not bound by the decision obtained by the defendants Nos. 1, 2 and 3 against Saiyid Asghar Husain, a mortgagee of Achalram, who was in possession as a trespasser, because the plaintiff does not derive his title from him or from Achalram.

The defendants Nos. 1, 2 and 3 do not claim any proprietary or under-proprietary right in their written statement. They are content with the status of perpetual lessees conceded to them by the Revenue Court. They contended that the plaintiff's suit is without any cause of action and is barred by limitation, and that the suit as framed is not cognizable by the Civil Court.

The learned Subordinate Judge held that the defendants were neither under-proprietors nor perpetual lessees but were common tenants, and that, as they were setting up a proprietary right to the village, the suit was cognizable by the Civil Court. He further found that the claim was not without a cause of action and was not barred by time.

It is difficult, however, to follow the reasoning adopted by the learned Subordinate Judge. It appears that on the 21st April 1874, Ratan, Mathura and Gokul, the predecessors-in-title of the defendants, applied to the Settlement Court for a declaration of their under-proprietary right to the entire village Mahadewa by way of *birt jangal tarashi* (Exhibit 2). The reply of the Court of Wards, which then represented the Birwa Mahnon estate, was that the claimants were *thekadars* and not under-proprietors, and that no *dasaundh* right was allowed to them (Exhibit 3).

The Settlement Officer directed the claimants to pay a deficiency in Court-fees and on their failure to make good the deficiency, dismissed the suit for default under section 31 of Act VIII of 1859 (Exhibit 4). In 1859 Saiyid Asghar Hussain, as a mortgagee of the village from Achalram, sought to eject the defendants Nos. 1, 2 and 3 by the issue of a notice under section 56 of the Oudh Rent Act. The defendants contested the notice and succeeded in getting it cancelled by the Revenue Court on 27th April 1896. The Revenue Court then held that the defendants and their predecessors-in-title had been holding under a lease granted in 1852 for a period of three years, that they continued in possession of the village in spite of the expiry of the lease and that they were not tenants who could be ejected under section 56 by the Revenue Court (Exhibit 5). The Commissioner on appeal held that they were not proved to be lessees (Exhibit 6): but the Board of Revenue came to the conclusion that the defendants were in possession of the village by virtue of their previous *zemindari* rights, that the lease executed in 1852 merely fixed the rent payable for those three years, that the rent varied in accordance with the area under cultivation and the prosperity of the village and that there was nothing to show that they had lost their *zemindari* rights or were in possession of the village as ordinary lessees (Exhibit A8).

In the Settlement of 1904, disputes arose as to the entry of the names of the defendants in the *khewat* in accordance with the provisions of section 34 of Act III of 1901. The Maharaja of Balrampur, who was the mortgagee of half the village, and the father of the plaintiff, who was the owner of the other half, desired that the defendants should be entered as ordinary tenants. The Deputy Commissioner of Gonda found that, according to the previous decision of the Board of Revenue, they were *prima facie* not ordinary tenants, and he directed that they should be entered as lessees in possession of the village and representatives-in-interest of the owners (Exhibit A7). The interpretation put upon this order by the officials charged with the preparation of the Record of Rights was that the defendants were perpetual lessees, and entries were made to that effect accordingly. In 1909 the *Kanungo* reported that the entries were incorrect. The matter was then reopened by an order of the Assistant Collector, dated the 4th July 1910, and the word "*dawami*" was directed to be removed (Exhibit 7). That order was subsequently set aside by the Deputy Commissioner on the 28th October 1910 (Exhibit 8), and the order of the Deputy Commissioner was eventually upheld by the Commissioner and by the Board of Revenue (Exhibits 9 and 10). There is nothing in any of the proceedings which took place subsequent to the order of the Board of Revenue, dated the 26th March 1897, to indicate that the defendants ever claimed under-proprietary rights in the village in dispute. The order of the Deputy Commissioner, dated the 28th October 1910, merely declared that they were perpetual lessees. The defendants do not now claim any proprietary or under-proprietary rights, and *qua* such rights the claim is without any cause of action.

The learned Subordinate Judge states in his judgment that the defendants do not set up or admit the existence of the relationship of ordinary tenants and landlord between them and the plaintiff, but the setting up of a right of pepetual tenancy does not amount to a denial of the tenancy itself.

If the tenancy is admitted, a Civil Court has no jurisdiction to determine the nature of the tenancy or to inquire into the terms on which the tenancy is held. In *Janki Prasad* v. *Salig Ram* (1), where a plaintiff issued a notice of ejectment under the Rent Act in respect of the holding of the defendant, who got the notice cancelled on the ground that his rights were superior to those of a tenant, it was held that the Civil Court had no jurisdiction to entertain a suit for a declaration that the defendant was a mere tenant-at-will, the nature of such tenancy being within the exclusive jurisdiction of the Revenue Courts.

In *Bhawani Bhikh Singh* v. *Rup Mahesh* (2) a suit by certain persons, who had received a notice of ejectment from their landlord and were contesting it on the ground that they were perpetual lessees of

(1) 2 O. C. 96.
(2) 3 O. C. 87.

the holding, for a declaration that they were entitled to hold the share in perpetuity under the lease, was held to be exclusively triable by the Court of Revenue. Under section 233, clause (*i*), of Act III of 1901, the Revenue Court has exclusive jurisdiction, save as provided by section 44, to determine the class of a tenant, or the rent payable by him, or the period for which the rent is fixed. Section 44 relates to cases where a person claims to establish in the Civil Court any interest in land which requires to be recorded in the registers prescribed by clauses (*a*) to (*d*) of section 32 but which has not been so recorded. Section 108, clauses (4) and (8), of the Oudh Rent Act render the decision of a Revenue Court on a question of ejectment or liability to ejectment of a tenant final, so as to bar an adjudication of the same by the Civil Court. The settled law in Oudh, as laid down in *Raghubar* v. *Raja Rampal Singh* (3), is "(*a*) that, in a suit to contest the validity of a notice of ejectment, instituted under the Rent Act, if the plaintiff pleads that he is not a tenant, but has a right in the land which is inconsistent with his being a tenant, the question, whether he has such a right or not, is one which the Revenue Courts are not empowered to decide finally, but is one of which the Civil Courts can take cognizance; (*b*) that, if the plaintiff admits that he is a tenant, but denies that he is one not holding on special terms, the Revenue Courts have exclusive jurisdiction to determine whether he is or is not a tenant holding on special terms; and (*c*) that, in cases in which the plaintiff has denied that he is a tenant, and has set up a right in the land which is inconsistent with his being a tenant, and the Revenue Court decides that he is not a tenant, but has *prima facie* the right in the land which he sets up, the Civil Courts have no jurisdiction to grant the defendant a declaration that the plaintiff is a tenant not holding on special terms." A Civil Court can, as observed by Chamier, J. C., in *Chhab Narain Singh Rae* v. *Sri Krishna Din* (4), inquire into a proprietary or under-proprietary title, but cannot inquire into the terms of the tenancy where the tenancy is admitted.

The learned Subordinate Judge observes that a permanent tenancy and under-proprietary right are convertible terms and relies in support of that statement on *Maheshar Pershad* v. *Muhammad Ewaz Ali Khan* (5). But he has evidently misread a reference to the finding of the Assistant Settlement Officer, in the judgment of their Lordships of the Privy Council as if it were a finding by their Lordships themselves. The question in that case was whether a lease granted by a decree of the Settlement Court for a period of 30 years conferred under-proprietary rights on the lessee. An appeal went up from the decision of the Board of Revenue in an ejectment proceeding and also from a decision of this Court in a suit in which an under-proprietary right was asserted. The two appeals were consolidated by their Lordships of the Privy Council and heard together, with the result that the under-proprietary right was negatived and the tenants were held to be entitled to no rights other than the rights conferred by the farming lease for a period of 30 years which had expired. There is nothing in the judgment of their Lordships to show that a permanent lessee who did not possess a heritable and transferable right was an under-proprietor. On the other hand, as held in *Sabbu* v. *Sita Ram* (6), *Nand Ram* v. *Amanat Fatima Begam* (7) and *Muhammad Abdul Karim Khan Nawab* v. *Niwaz Singh* (8), a decree for a permanent farming lease does not by itself confer under-proprietary rights.

In *Rani Dharamraj Kuar* v. *Bhondu Khan* (9), where in a suit to contest a notice of ejectment the plaintiff pleaded that he held a perpetual lease by the terms of which he was not liable to be ejected and the notice was cancelled by the Revenue

(3) 3 O. C. 365 at p. 368.
(4) 2 Ind. Cas. 927; 12 O. C. 164 at p. 167.
(5) 3 Ind. Cas. 200; 12 O. C. 233; 13 C. W. N. 1093; 10 C. L. J. 133; 11 Bom. L. R. 868; 31 A. 394 (P. C.); 6 M. L. T. 168; 19 M. L. J. 442.
(6) 8. C. 282.
(7) 6 O. C. 94.
(8) 3 Ind. Cas. 868; 12 O. C. 267.
(9) 8 O. C. 84.

Court whereupon the landlord brought a suit in the Civil Court for a declaration that the plaintiff had no proprietary or under-proprietary right in the land, it was held that no proprietary or under-proprietary right having been set up in the Rent Court, no cause of action had accrued to the landlord to seek from the Civil Court the declaration asked for. The plaintiff's suit, so far as it seeks a declaration that the defendants Nos. 1, 2 and 3 are not entitled to retain possession of the village by virtue of any proprietary or under-proprietary right, is, therefore, without any cause of action.

The decision of the Board of Revenue, dated the 26th March 1897, was passed by a competent Court in an ejectment proceeding, of which that Court takes exclusive cognizance. Whether that decision binds the plaintiff is a matter upon which this Court is not prepared to grant any declaration, for the power conferred by section 52 of the Specific Relief Act is discretionary and no declaration can properly be granted on a mere question of law—*Zinnatunnessa Khutun* v. *Girindra Nath Mukerjee* (10) and *Babu Narenda Bahadur Singh* v. *Basudeo Misra* (11).

The appeal is, therefore, allowed and the claim of the plaintiff dismissed with costs throughout.

Appeal allowed.

(10) 30 C. 788.
(11) 14 Ind. Cas. 81.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 428 OF 1913.

September 11, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

NILAMBUR THACHARAKKAVIL KOVILAGATH MANAVIKKARAVAN *alias* THE PRESENT VALIA TIRUMULPAD —DEFENDANT No. 5—APPELLANT

versus

MANJERI PUTHEN KOVILAGAM KARNAVAN AND MANAGER MANA VIKKIRAVAN *alias* MANGERI ELAGA THIRUMALPAD AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 TO 4—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115—New defendants added—Plaint not amended—Defendants not prejudiced—Interference by High Court.

Where, on the addition of new defendants, the plaint was not amended so as to set forth a cause of action against them and both parties proceeded with the trial just as if the plaint had been amended, and the added defendants were not prejudiced by the omission:

Held, that under the circumstances the irregularity was not such as justified interference by the High Court.

Gaj Kumar Chand v. *Lachman Ram*, 10 Ind. Cas. 503; 14 C. L. J. 627, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Palghat, in Appeal Suit No. 602 of 1911, preferred against that of the District Munsif of Walluvanad, in Original Suit No. 20 of 1910.

Mr. *T. R. Ramachandra Aiyar*, for the Appellant.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondent.

JUDGMENT.—The appellant's Vakil points out that when the defendants Nos. 2, 3 and 4 were added as parties, at the request of the plaintiffs in consequence of the statements in the written statement of the original sole defendant, the plaint was not amended so as to set forth a cause of action against them. This is so. But we cannot agree with his contention that it is an incurable illegality. We cannot see that the defendants Nos. 2, 3 and 4 or his client, the present representative of the 4th defendant, were prejudiced by the omission. The 4th defendant claimed title for himself in the suit land, and was allowed to adduce, and did adduce, evidence to prove it. The defect in the plaint was referred to in his written statement, but no issue was taken on the point and it does not seem to have been argued in either of the lower Courts, and even in the present memorandum of appeal grounds it is not very clearly taken. We think the lower Courts and the parties proceeded with the trial just as if the plaint had been amended and we do not think the irregularity would justify our interference. In support of this view we may quote the case of *Gaj Kumar Chand* v. *Lachman Ram* (1).

The findings of fact recorded by the lower Appellate Court are, in our opinion, sufficient to justify the decree, and no error of law is shown in arriving at them. It is argued that

(1) 10 Ind. Cas. 503; 14 C. L. J. 627.

the lower Appellate Court should have found exactly how the defendants Nos. 2 to 4 obtained possession—whether by trespass as alleged in the 1st defendant's written statement, or by the 1st defendant's connivance. We do not think this is necessary. The Court has found in favour of the respondents' and against the appellant's title to the land and in favour of the respondents' possession, and to the effect that the appellant's possession only dates from 1906. These findings are enough to support the decree.

This second appeal is dismissed with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION No. 110 OF 1913.

March 28, 1913.

Present:—Mr. Piggott, J. C.

The Hon'ble Raja Sir BHAGWATI PRASAD SINGH—DECREE-HOLDER—APPLICANT

versus

PARMESHAR AND ANOTHER—OPPOSITE PARTY—RESPONDENTS.

Agency—Oudh Civil Digest (1912), *r.* 573—*General agent duly authorised to receive money from Civil Court on behalf of another, signature of, to be accepted as signature of person entitled to receive money.*

The signature of a general agent duly authorised to receive money on behalf of a person to whom money is payable by a Civil Court may, on the satisfaction of the Court as to the authority of the agent, be accepted as the signature of the applicant for the purposes of rule 573 of the Oudh Civil Digest.

Application against the order of the Subordinate Judge, Gonda, dated 12th September 1912.

JUDGMENT.—The signature of a general agent duly authorized to receive money on behalf of a person to whom money is payable by a Civil Court may be accepted as the signature of the applicant for the purposes of rule 573 of the Oudh Civil Digest. Of course the Courts concerned must be careful to satisfy themselves as to the authority of the person so applying.

The technical difficulty which has troubled the learned Subordinate Judge might have been avoided by permitting the general agent, Mr. Raghunandan Prasad,

to make the application in his own name as a person authorized to make such applications on behalf of the Honourable the Maharaja of Balrampur, or in the alternative, by the Court below accepting Mr. Raghunandan Prasad's application and calling for an office-report, upon which office-report a payment-order could have been passed in strict compliance with the working of Rule 573 above referred to. It would, in my opinion, be imposing an intolerable burden on a gentleman in the position of the Honourable the Maharaja of Balrampur to require him personally to sign all such applications as the one now under consideration. The learned Subordinate Judge should proceed to pass a repayment order as requested.

Application accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2182 OF 1912.

August 20, 1914.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumarasawmy Sastri.

SAMBASIVA MUDALIAR—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—RESPONDENT.

Burden of proof—Possession of Government land—Public pathway, title to.

Where a person proves against Government possession of land, belonging to Government, for more than twelve years and no origin can be ascribed to that possession, a presumption arises as to title in that person and the burden is shifted on to Government to prove possession or title within 60 years; but this rule does not apply where the title claimed is to a public pathway, even where acts of ownership exercised by private persons extend over 40 years, the presumption being that the title or possession is with Government.

Kuthaperumal Rijali v. *Secretary of State for India*, 30 M. 245; 17 M. L. J. 174; *Krishna Iyer* v. *Secretary of State for India*, 4 Ind. Cas. 1070; 6 M. L. T. 306, 20 M. L. T. 71; 33 M. 173; *Venkataramu Aiyar* v. *Secretary of State for India in Council*, 5 Ind. Cas. 118; 7 M. L. T. 139; 20 M. L. J. 74; 33 M. 362; *Narayana Pillai* v. *Secretary of State*, 15 Ind. Cas. 257; (1912) M. W. N. 703; 12 M. L. T. 165; 23 M. L. J. 162, distinguished.

Second appeal against the decree of the Court of the Subordinate Judge of Tanjore, in Appeal Suit No. 559 of 1910, preferred against that of the District

Munsif of Tanjore, in Original Suit No. 29 of 1909.

Mr. *K. B. Ranganatha Aiyar*, for the Appellant.

The *Government Pleader*, for the Respondent.

JUDGMENT.

SESHAGIRI AIYAR, J.—It is with some hesitation that I agree in the conclusion at which my learned colleague has arrived. The facts found may be thus summarised: (1) The property in dispute is a public pathway: (2) The plaintiff built the projection in front of his house between the years 1868 and 1888 and has been in possession: (3) There is no evidence as to any acts of possession by the plaintiff or the Government prior to 1868. On these findings the Courts below have come to the conclusion that the Government have a subsisting title. The decided cases lay down that where a private person proves that he has been in possession for over 12 years, the onus is on the Government to show that they had some possession within 60 years of the suit. I think there are two propositions involved in this —one, that from the fact of possession for a long time a presumption arises that the possessor was in enjoyment for a longer period than is actually covered by the evidence let in by him, and the other, that by way of corrollary from the first the onus is cast on the Government to show that they were in possession within the 60 years which they are entitled to under Article 149. I must take it that the finding that plaintiff was in possession between 1868 to 1888 must be read as meaning that his possession originated only in 1868. Even in this view, the Government have yet to establish that they were in possession within 60 years. It is possible that as against the Government some other person was in possession before 1868; that is the reason why Government are required to prove a subsisting title. What to a certain extent has reconciled me to the view that my learned colleague has taken is the fact that the property in question is public pathway, and the presumption is that the public have been using every portion of it unless some one had encroached upon it and obstructed their user. If that presumption is given effect to, it must follow that prior to 1868 the public as beneficiaries of the Government who have set apart the property for their use have been in enjoyment and that it was only in 1868 that this enjoyment was interfered with. It is mainly with reference to the peculiar nature of the property that I distinguish this case from *Kuthaperumal Rajali* v. *Secretary of State for India* (1); *Krishna Aiyar* v. *Secretary of State for India* (2); *Venkatarama Aiyar* v. *Secretary of State for India in Council* (3) and *Narayana Pillai* v. *Secretary of State* (4).

The second appeal must be dismissed with costs.

KUMARASAWMY SASTRI, J.—The plaintiff is the appellant. He sued to recover possession of a portion of the Koradu alleged by him to have been taken possession of and wrongfully demolished by the Government, and for damages. Both the lower Courts have found that the portion of the Koradu claimed by plaintiff and demolished by Government was part of a public street and was encroached upon subsequent to the survey in the year 1868. The appellant contends that the finding of both Courts is erroneous and based on insufficient evidence, but I see no reason for holding that the evidence on record is insufficient or that there has been any misappreciation of evidence.

It seems to me that on the findings that there was an encroachment and that it was not prior to the year 1868, the suit was rightly dismissed. Under Madras Act III of 1905 all public roads and streets are deemed to be the property of the Government and it is not disputed before us that the case should be treated on the footing that the street is Government property. The contention of the appellant's Vakil is that as the appellant

(1) 30 M. 245; 17 M. L. J. 174.

(2) 4 Ind. Cas. 1070; 33 M. 173; 6 M. L. T. 306; 20 M. L. J. 71.

(3) 5 Ind. Cas. 118; 33 M. 362; 7 M. L. T. 139; 20 M. L. J. 74.

(4) 15 Ind. Cas. 257; 23 M. L. J. 162; (1912) M. W N. 703; 12 M. L. T. 165.

has, on the findings of both Courts, proved possession for nearly 40 years, it should be presumed that possession was with him prior to that and that it lay on the Government to show that they were in possession at any time within 60 years prior to date of suit. Reliance has been placed on *Krishna Iyer* v. *Secretary of State for India* (2); *Venkatarama Aiyar* v. *Secretary of State for India in Council* (3) and *Narayanasawmi Pillai* v. *The Secretary of State* (4). I do not think that these cases lay down an inflexible rule that in a suit against the Government for recovery of possession of immoveable property and damages for trespass, the plaintiff is entitled to succeed merely by showing possession for over twelve years before suit unless the Government can show possession or title within sixty years. All that they decide is that when possession whose origin cannot be definitely fixed has been proved against the Government for a long series of years (not less than twelve) it is reasonable to presume that such possession commenced at a period over 60 years ago so as to throw on the Government the onus of showing either a subsisting title or possession within 60 years.

In the present case the property encroached upon was a public street at the time of the encroachment, and user by the public till the date of the encroachment will be equivalent to possession by the Government. I find nothing which would justify the inference that anybody except the Government was in possession prior to the year 1868, the earliest possible year when the appellant or his predecessor-in-title could have got into possession.

The appeal fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 53 OF 1913.

August 17, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

M. DURAISAMI AIYANGAR—PETITIONER

versus

MEENAKSHI SUNDARA AIYAR—RESPONDENT.

Limitation Act (IX of 1908), ss. 12, 29—Provincial Insolvency Act (III of 1907), s. 22—Receiver's order, time requisite for obtaining copy of, whether excluded.

In computing the period of 21 days prescribed in section 22 of the Provincial Insolvency Act the time requisite for obtaining a copy of the Receiver's decision cannot be excluded under section 12 of the Limitation Act.

Vattakulakaran Sowdaker Abu Backer Sahib v. *Secretary of State for India*, 5 Ind. Cas. 884; 34 M. 505; 7 M. L. T. 132 (F. B.); 20 M. L. J. 283, *Thakur Prasad* v. *Panno Lal*, 20 Ind. Cas. 673; 11 A. L. J. 603; 35 A. 410, *Venkataragayya Appa Row* v. *Murala Sriramulu*, 17 Ind. Cas. 593, followed.

Petition, under section 46, clause 1, of the Provincial Insolvency Act, praying the High Court to revise the order of the District Court of Madura, in Civil Miscellaneous Appeal No. 20 of 1912, preferred against that of the Court of the District Munsif of Madura, in Miscellaneous Petition No. 5 of 1912 (in Insolvency Petition No. 44 of 1910 of the Court of the Official Receiver of Madura).

Mr. *A. Suryanarayanaiah*, for the Petitioner.

Mr. *A. Venkatarayaliah*, for the Respondent.

JUDGMENT.—The question is whether the time occupied by the petitioner in obtaining a copy of the Official Receiver's order can be excluded from the twenty-one days within which he must apply to the Court to modify it under section 22 of the Provincial Insolvency Act. We think that it cannot, for two reasons.

Firstly, we must follow *Vattakulakaran Sowdaker Abu Backer Sahib* v. *Secretary of State for India* (1) and hold that the application of section 12 (3) of the Limitation Act would affect or alter the period of limitation prescribed by the Provincial Insolvency Act. The application of that section is, therefore, inadmissible with reference to section 29 of the Limitation Act.

(1) 5 Ind. Cas. 884; 34 M. 505; 7 M. L.T. 132 (F.B.); 20 M. L. J. 283.

Secondly, section 12 (3) is applicable only to appeals or applications for review and an application under section 22 of the Provincial Insolvency Act is not covered by either of those descriptions. Vide *Thakur Prasad* v. *Panno Lal* (2). The petitioner relies on *Venkataragayya Appa Row* v. *Murala Sriramulu* (3), but that case deals with section 14 of the Limitation Act and is not relevent in the present connection. The petition is dismissed with costs.

Petition dismissed.

(2) 20 Ind. Cas. 673; 35 A. 410; 11 A. L. J. 603.
(3) 17 Ind. Cas. 593.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 770 OF 1913.

July 16, 1914.

Present:—Mr. Justice Piggott.

Musammat ZAIBUNNISSA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PARICHHAT AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession - Mortgage-debt satisfied—Mortgagee's possession after redemption—Limitation Act (IX of 1908), Sch. I, Art. 144.

When a Court by its decree pronounces a mortgage-debt to be satisfied and the mortgagor entitled to immediate possession, that is equivalent to a declaration that the relation, between the parties, of mortgagor and mortgagee has come to an end

Sita Ram v. *Madho Lal*, 24 A. 44 (F. B.); A. W. N. (1901) 194, followed.

Therefore, where in foreclosure proceedings under the Bengal Regulation XVII of 1806 the mortgagor deposited within the year of grace in the Court the full amount necessary to redeem the mortgage but the mortgagee refusing to accept the money so deposited brought a regular suit for foreclosure and possession and despite its dismissal the mortgagee continued in possession:

Held, that, after the dismissal of the mortgagee's suit, his possession ceassed to be that of a mortgagee and became adverse as against the mortgagor within the meaning of Article 144 of the Limitation Act, 1908.

Second appeal from the decision of the District Judge of Jhansi, dated the 28th March 1913.

Mr. *Durga Charan Banerji*, for the Appellants.

Mr. *D. R. Sawhny*, for the Respondents.

JUDGMENT.—This is a second appeal by the plaintiffs in a suit for redemption. The facts of the case were somewhat complicated, and I must congratulate the learned Munsif of Jhansi on the exceedingly lucid and well-considered judgment in which he has set forth those facts and dealt with the issues arising therefrom. It is necessary, however, to disentangle the essential facts bearing on the single point which is now before me for consideration. On the 15th July 1871 a number of co-sharers in village Chumadwara executed a mortgage by conditional sale in favour of one Pakkri, who was the ancestor of most of the defendants-respondents. The mortgage purported to be with possession and redeemable after a term of eight years. There was a special provision permitting any of the co-sharers concerned to redeem his own fractional share in the property mortgaged. On the 22nd of August 1879, when the period limited for payment of the mortgage-debt had expired, the mortgagee issued a notice for foreclosure under section 8 of the Bengal Regulation XVII of 1806 against all the representatives of the original mortgagors. The issue of this notice was followed by certain transfers on the part of some of the mortgagors of their shares in the equity of redemption. The predecessors-in-title of the present plaintiffs-appellants thus acquired the equity of redemption in a share of 6-annas and odd out of the property mortgaged within the year of grace allowed by the said Bengal Regulation. They deposited in Court what they alleged to be the proportionate amount of the mortgage-debt due in respect of this share. The mortgagee refused to accept the money so deposited and brought a regular suit, in which he claimed both foreclosure and recovery of possession in respect of this share of 6-annas and odd. The learned Munsif has described the said suit as one for recovery of proprietary possession, remarking that mortgage possession was already with the plaintiff. This seems to me scarcely correct, for the judgment of September the 6th, 1881, which terminated this suit, shows that the mortgagee, the plaintiff in that case, alleged that he had failed to obtain possession of more than a small fraction of the property mortgaged to him. This point was put in issue between the parties

but was not determined. The Court held that, whether or not the mortgagee had succeeded in obtaining possession of the whole of the property specified in the mortgage-deed of July the 15th, 1871, the mortgagors were in any case entitled to redeem on payment of the principal only of the mortgage-debts. It further held that the defendants in that suit, that is to say, the predecessors-in-title of the present plaintiffs-appellants, had in fact deposited the entire amount necessary to redeem the fractional share of 6-annas and odd which was then in suit. The Court accordingly found that the mortgage had been redeemed, so far as this share was concerned, within the year of grace allowed by Bengal Regulation XVII of 1806, and on this finding it dismissed the plaintiffs' suit for foreclosure and recovery of possession. Now the present suit is brought in respect of a share of 2-annas and odd. It is admitted that this share forms part of the share of 6-annas and odd which was in controversy in the suit of 1881. It is further admitted that the share now in suit can be divided into two fractions, one of which belonged in 1881 to one Bilasi, who is mentioned in the mortgage-deed of July the 15th, 1871, while a smaller fraction belonged to one Banke Rai, the son of one Lallu who was one of the mortgagors under the said deed. I have noted this point because as regards the fractional share which formerly belonged to Bilasi, the defendants in the present suit set up a further plea that this particular share had never been validly mortgaged to them under the deed of 1871, so that their possession over the same had never been that of mortgagees but was from the first that of trespassers in unlawful possession. This point was considered by the learned Munsif and decided by him in favour of the defendants; but it has not been decided by the lower Appellate Court. The learned District Judge has in effect treated the case on the assumption that the share now in suit was covered by the mortgage of July the 15th, 1871, and had been in the possession of Pakku as mortgagee from that date up to the date of the foreclosure proceedings and suit of 1879 to 1881. In effect what the learned District Judge has found is that the relationship of mortgagor and mortgagee between the predecessors-in-title of the parties to the present suit ceased, either when the ancestors of the present plaintiffs deposited in Court the full amount necessary to redeem the share of 6-annas and odd then in question, or at any rate when a competent Court by its judgment of 6th September 1881 definitely decided, as between the parties, that the full amount necessary to redeem the mortgage of this share had been deposited and on this finding dismissed the suit by the mortgagee for foreclosure and recovery of possession. From that time, in the view taken by the lower Appellate Court, the possession of the predecessor-in-title of the defendants-respondents ceased to be that of a mortgagee, but became proprietary and adverse as against the original mortgagors and their descendants or successors-in-interest. This is the point which is now before me for determination.

On behalf of the appellants attention is drawn, first of all, to the provisions of section 60 of the Transfer of Property Act, IV of 1882, and to those of Article 148 of the first Schedule to the Indian Limitation Act, IX of 1908. It is contended that the suit now before the Court is one against a mortgagee to recover possession in consequence of the mortgage-debt having been fully satisfied, and it is further contended that the right to bring such a suit subsists in favour of the successors-in-interest of the original mortgagors so long as the right to bring a suit for redemption has not been extinguished by act of parties or by order of the Court. To this the reply of the respondents is that the right in question has been extinguished by the order of the Court embodied in the judgment of 6th September 1881, already referred to, and by the failure of the representatives-in-interests of the original mortgagors to enforce within the period of 12 years their right to recover possession over the share now in suit, which was conferred upon them by that decision. It is contended that the provisions of Article 148 above referred to are excluded by the simple fact that this is not in reality a suit against a mortgagee, but is a suit to recover possession of immoveable property to which the provisions of Article 144 of Schedule first to the Indian Limitation Act would apply, and that it is barred under that Article by the

fact that the defendants and their predecessors-in-title have been in adverse possession from the year 1881 onward. The cases principally relied on in support of the appeal are *Pokhpal Singh* v. *Bishan Singh* (1) and *Sita Ram* v. *Madho Lal* (2). Along with these may be mentioned the case of *Khiarajmal* v. *Daim* (3) and that of *Srinath Das* v. *Khettar Mohan Singh* (4). On behalf of the respondents it is contended that the case above referred to in the 24th volume of the Allahabad Law Reports is really decisive in their favour and that none of the cases relied upon on behalf of the appellants really justify the maintenance of the present suit. Reference is also made to the case of *Mukhan* v. *Bhagirath Pershad* (5) and *Lotf Hossein* v. *Abdool Ali* (6). The litigation which began with the mortgagee's issue of notice of foreclosure on the 22nd of August 1879 and ended with the dismissal of the mortgagee's suit on the 6th of September 1881 was all conducted before the Transfer of Property Act came into force. The Privy Council case referred to in *Srinath Das* v. *Khettar Mohan Singh* (4) is quoted as authority for the proposition that, inasmnch as 12 years had not elapsed between the 6th of September 1881 and the coming into force of the Transfer of Property Act, IV of 1882, the respective rights of the mortgagors and the mortgagees in the present suit would be governed from the 1st of July 1882 onward by the provisions of the Transfer of Property Act. This may be admitted, but it has no real bearing on the essential question in this case, namely, the effect of the litigation between the parties terminating in the decree of 6th September 1881. The Transfer of Property Act itself introduced a series of provisions carefully drafted in order to secure that, in any suit for foreclosure or for redemption litigated under the provisions of that Act, there should be an adjudication once and for all on every question in controversy between mortgagor and mortgagee and a final decree determining once and for all the mortgage relation between the parties. If the foreclosure proceedings in the present case had taken place after the 1st of July 1882, the mortgagee would presumably have obtained a preliminary decree in the terms of section 86 of Act IV of 1882. The predecessors-in-title of the present plaintiffs would have paid into Court within the period limited by the decree the sum found by the Court to be necessary in order to redeem the mortgage, in so far as the share in which they were interested was concerned. On their making such payment, the decree would have operated in their favour as extinguishing the rights of the mortgagee and giving them a right to be put into possession of the mortgaged property under the provisions of section 87 of the same Act. It can scarcely be denied that under these circumstances no subsequent suit for redemption could have been brought by these mortgagors or their successors-in-title. It seems clear, however, that the passing of the Transfer of Property Act could not make it incumbent upon any mortgagor or mortgagee to bring a further suit for foreclosure or for redemption under the terms of that Act, if there had been a previous litigation between the parties under the law previously in force, that is to say, under the Bengal Regulation XVII of 1806, which had the effect of determining all matters in dispute between the parties in connection with their mortgage just as completely as they would have been determined in a suit under the Transfer of Property Act after that Act came into force. Under sections 7 and 8 of the Bengal Regulation XVII of 1806 when once the mortgagor had paid into Court, within the year of grace allowed him by the notice issued under the second of these two sections, the full amount necessary in order to redeem the mortgage, there was nothing further for him to do in the way of redemption. The mortgage was to be finally foreclosed and the conditional sale made conclusive unless the mortgagor should redeem the mortgaged property in the manner provided by section 7 of the said Regulation within the prescribed year of grace. The manner prescribed by section 7 of the said Regulation

(1) 20 A. 115; A. W. N. (1897) 214.
(2) 24 A. 44 (F. B.); A. W. N. (1901) 194.
(3) 32 C. 296 (P. C.); 32 I. A. 23; 1 C. L. J. 584; 9 C. W. N. 201; 7 Bom. L. R. 1; 2 A. L. J. 71.
(4) 16 C. 693 (P. C.); 16 I. A. 85.
(5) 8 O. C. 33.
(6) 8 W. R. 476.

is the payment or tender of the money due under the mortgage to the mortgagee or his legal representative, or in the alternative the deposit of the amount due in the *Dewani Adalut* of the *Zilla* or city in which the mortgaged property is situated. Now in the present case, when the tender was made by the predecessors-in-title of the present plaintiffs, it was not accepted by the mortgagee as sufficient. It remained, therefore, for the Court to adjudicate upon the question of its sufficiency on the motion of one party or of the other. If the mortgagors had brought a suit for a declaration that the amount deposited by them was sufficient and, if necessary, for possession of the mortgaged property and had obtained a decree as prayed for, it can scarcely be denied that that decree would have been a conclusive adjudication as between the parties and would have put an end to all mortgagor and mortgagee rights as between them. In the present case it happened that a suit was brought by the mortgagee for foreclosure and for recovery of possession. There was an adjudication between the parties that the amount deposited had been sufficient, and on this finding the Court dismissed the mortgagee's suit. In the case of *Sita Ram* v. *Madho Lal* (2), Aikman, J., laid down the principle that "when a Court by its decree pronounces a mortgage-debt to be satisfied, and the mortgagor entitled to immediate possession, that is equivalent to a declaration that the relation, between the parties, of mortgagor and mortgagee has come to an end." I quote these words more particularly because they express the opinion of the same learned Judge who decided the case principally relied on on behalf of the appellants, *i.e.*, *Pokhpal Singh* v. *Bishan Singh* (1). The controversy in that case was about a usufructuary mortgage which contained a provision that the mortgage-debt should be satisfied, both principal and interest, by so many years' usufruct of the mortgaged property, and that the mortgagee should deliver up possession without payment on the expiry of the period thus specified. It was held that when under these circumstances the mortgagee held over after the time limited in the mortgage-deed had expired, his possession did not by that fact alone become adverse to the mortgagor. The suit for redemption was held to be in time up to 60 years from the date of the mortgage under the provisions of Article 148, Schedule I, to the Indian Limitation Act. In this case, however, there had been no adjudication by any competent Court and no decision by such Court pronouncing the mortgage-debt to be satisfied. In the absence of any such decision by a competent Court, or of any act on the part of the mortgagee showing that he set up an adverse title as against his mortgagor, it was held that the possession of the mortgagee continued as such and did not become adverse. I do not think that the learned Judge who decided this case would have seen anything inconsistent between the principle there laid down by him and that enunciated by himself in the case of *Sita Ram* v. *Madho Lal* (2) already referred to. The two other cases relied on on behalf of the respondents point in the same direction. The Oudh case of *Makhan* v. *Bhagirath Pershad* (5) was decided by a Bench of two Judges, one of whom is now a Judge of this Court. He examined the litigation which had taken place between the parties in that case and held that the effect of that litigation had been to put the mortgagee in possession as proprietor. A very similar point seems to have been decided in the case quoted as *Lotf Hossein* v. *Abdool Ali* (6). That case is specially important as having been decided under the Bengal Regulation XVII of 1806. It would seem that in that case the mortgagee had issued a notice under the said Regulation, but had taken no further action when the year of grace expired without any payment having been made by the mortgagor. It was held that his possession was adverse as against the mortgagor from the date of the expiration of the year of grace. Both this case and the Oudh case already referred to are so far distinguishable from the one now before me that they were cases in which, on foreclosure proceedings taken by the mortgagee, payment of the amount of the mortgage-debt was not made by or on behalf of the mortgagor. They are, however, both of them authority for the proposition that litigation between mortgagor and mortgagee and more particularly litigation which had the effect of judicially determining the amount

due under the mortgage, may have the effect of converting the possession of a mortgagee as such into adverse and proprietary possession against the mortgagor, even though no particular act on the part of the mortgagee is proved. On a review of the authorities as a whole, I am of opinion that this case is governed by the *dictum* of Mr. Justice Aikman already quoted from the case of *Sita Ram* v. *Madho Lal* (2). The mortgage relationship between the parties was terminated by the decision of September the 6th, 1881, in which it was definitely held that the mortgage had been completely redeemed in so far as it affected the parties to the present suit. There was nothing left for the predecessors-in-interest of the mortgagors to do after that decision except to demand possession from the mortgagee, and to sue for his ejectment as a trespasser in unlawful possession in the event of his refusing to give up the share in question. I hold, therefore, that the Courts below have rightly applied Article 144, Schedule I, to the Indian Limitation Act, to the circumstances of the present case and have rightly held the suit to be time-barred. I accordingly dismiss this appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 90 OF 1914.

September 23, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

ADATRAO GAVAYAYYAMMA—

PLAINTIFF—APPELLANT

versus

DANDI SEETHARAMASWAMI AND

OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 116—Landlord and Tenant—Estoppel—Civil Procedure Code (Act V of 1908), s. 11, Expl. IV—Plea which might have been made ground of defence, not adjudicated upon, whether operates as res judicata.

Section 116 of the Evidence Act applies not only to tenants let into possession at the beginning of the lease but also to tenants who are already in possession and continue in it.

Madras Hindu Mutual Benefit Permanent Fund v. *Raghava Chetti*, 19 M. 200, followed.

The mere failure to have adjudicated upon, in a suit a, plea which *might* have been made a ground of defence but should not necessarily have been so made a ground, does not always and necessarily operate as *res judicata*.

Thyila Kandi Ummatha v. *Thyla Kandi Cheria Kunhamed*, 4 M. 308; *Annayyan* v. *Chinnan*, 5 Ind. Cas. 84, 7 M. L. T. 140; 33 M. 366; 20 M. L. J. 355; *Rup Chand Ghosh* v. *Sarreswar Chandra*, 10 C. W. N. 747; 3 C. L. J. 629; 33 C. 915, referred to.

Appeal against the order of the District Court of Vizagapatam, in Appeal Suit No. 131 of 1913, preferred against that of the District Munsif of Chodavaram, in Original Suit No. 899 of 1912.

Mr. *M. Patanjali Sastri* for Mr. *P. Narayanamurthy*, for the Appellant.

Mr. *V. Ramesam*, for the Respondents.

JUDGMENT.

OLDFIELD, J.—I think that the learned Judge was right in his order of remand, because the previous judgment was not *res judicata*. In the previous proceedings defendants were, I hold, debarred from raising the question of plaintiff's title with reference to section 116 of the Indian Evidence Act and neither authority nor reason has been shown for applying that provision only to tenants admitted to possession at the beginning of the lease and not to persons who are already in possession and continue in it. *Vide* also *Madras Hindu Mutual Benefit Permanant Fund* v. *Raghava Chetti* (1).

The appeal is dismissed with costs.

TYABJI, J.—This is an appeal from a decision of the learned District Judge who remanded the case for hearing on the merits on the ground that the matter now in issue between the parties was not *res judicata*. The matter in issue now between the parties is whether the defendant has title to the land referred to in the plaint. In the previous decision the plaintiff had sued the defendant for rent and had obtained a decree. The learned District Judge held that the District Munsif had "somewhat studiously avoided considering and deciding the question of title" in the previous suit. It is argued, however, that the question of title was a matter within Explanation IV of section 11 of the Civil Procedure Code. One

(1) 19 M. 200.

answer to this argument is, the defendant could not have questioned the plaintiff's title, being estopped by section 116 of the Evidence Act. In answer to this it is contended that section 116 would not have, estopped; the defendant who was not let into possession by the plaintiff and that it is only in such cases that the estoppel referred to in the section applies. But the question for the purpose of *res judicata* is not merely whether the matter *might* have been made a ground of defence, but that it *ought* to have been so made a ground. It is unnecessary to express any opinion on the question whether the decisions in *Annayyan* v. *Chinnan* (2) and *Rup Chand Ghosh* v. *Sarveswar Chandra* (3) lay down that the estoppel in section 116 applies only to a tenant who having obtained possession from a person as his landlord subsequently wishes to deny that the person from whom he has derived possession was entitled to give him possession, whether, in other words, the principle is restricted to a person who has derived property from another disputing the title of the person from whom he has derived it—or whether the section is wide enough to have estopped the defendant in the previous suit from questioning the title of the plaintiff though the defendant had not obtained possession from the plaintiff.

Assuming that the defence was available to the defendant, I take *Thyila Kandi Ummatha* v. *Thyila Kandi Cheria Kunhamed* (4) to be authority for the proposition that the failure to have the question adjudicated upon does not always and necessarily operate as *res judicata*. Assuming that it might have been made a ground of defence, I cannot say that it ought to have been so made.

Appeal dismissed.

(2) 5 Ind. Cas. 84; 7 M. L. T. 140; 33 M. 366; 20 M. L. J. 355.
(3) 10 C. W. N. 747; 3 C. L. J. 629; 33 C. 915.
(4) 4 M. 308.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1536 OF 1912.
February 24, 1914.
Present:—Mr. Justice Beadon.

MULA SINGH AND OTHERS—PLAINTIFFS —APPELLANTS
versus
BUDH SINGH AND OTHERS—DEFENDANTS —RESPONDENTS.

Adverse possession—Mortgage—Encroachment by mortgagee on other land of mortgagor—Effect of his being recorded in Settlement paper as mortgagee of encroached land.

Where a mortgagee encroaches upon his mortgagor's land not mortgaged to him, he holds it adversely to the mortgagor from the date of encroachment, although in the Settlement papers the encroached area is also shown as mortgaged property.

Second appeal from the decree of the Divisional Judge, Sialkot Division, dated the 23rd May 1912, affirming that of the Munsif, first Class, Sialkot, dated 10th May 1910, dismissing claim.

Mr. *N. C. Mehra*, for the Appellants.

Mr. *Badr-ud-Din Kureshi*, for the Respondents.

JUDGMENT.—Admittedly an area of 133 *kanals* 2 *marlas* was mortgaged by the ancestors of the plaintiffs to the ancestors of defendants Nos. 1 to 8 with possession in 1870, but in addition to this area of 133 *kanals* 2 *marlas* defendants Nos. 1 to 8 at the Settlement of 1892 were recorded as mortgagees of a further area of 55 *kanals* 5 *marlas* which was also in their possession.

In 1906 the plaintiffs mortgaged both these areas together with other land to defendants Nos. 9 and 10 giving the right to redeem the two areas of 133 *kanals* 2 *marlas* and 55 *kanals* 5 *marlas* which were stated in the deed to be already under mortgage to defendants Nos. 1 to 8. Defendants Nos. 9 and 10 in the same year brought a suit for redemption of the two areas in the possession of defendants Nos. 1 to 8, but obtained a decree only in respect of the area of 133 *kanals* 2 *marlas*. In respect of the other area of 55 *kanals* 5 *marlas* it was held that the present defendants Nos. 1 to 8 were not holding as mortgagees and the claim as regards this area was dismissed.

In the present suit the plaintiffs claim possession of the area of 55 *kanals* 5 *marlas*, alleging the defendants Nos. 1 to 8 to be in possession as trespassers, and the lower Courts have dismissed the suit holding that the

possession of defendants Nos. 1 to 8 has been adverse for more than twelve years.

It is contended that the ancestors of defendants Nos. 1 to 8 originally held land under the plaintiffs' ancestors as tenants, that subsequently the area of 133 *kanals* 2 *marlas* was mortgaged to them, that after this mortgage they encroached on the further area of 55 *kanals* 5 *marlas*, that the plaintiffs' ancestors permitted them to include this further area in their mortgage and that their possession did not become adverse till 1906 when they pleaded in the redemption suit that this area of 55 *kanals* 5 *marlas* was not included in the mortgage. I think, however, that this contention cannot be accepted. The defendants Nos. 1 to 8 had clearly taken possession of the area of 55 *kanals* 5 *marlas* before the Settlement of 1892 without authority, and though they were recorded as mortgagees at the Settlement of 1892, they were then, as in 1906 when they were still recorded as mortgagees, holding adversely. I accordingly dismiss the appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 320 OF 1914.

August 4, 1914.

Present:—Mr. Justice Chamier.

Musammat NIHALI—DEFENDANT—APPELLANT

versus

KANAK SINGH AND ANOTHER—PLAINTIFF AND DEFENDANTS—RESPONDENT.

Hindu Law—Jat *widow—Re-marriage, effect of—Property of husband, whether divested—Custom.*

Where the rules of caste allow a Hindu widow to re-marry, her second marriage does not under the Hindu Law divest her of the property of her first husband; but a custom to the contrary may, of course, be proved.

Where the *Wajib-ul-arz* of the village in which the property in suit lies is silent as regards the custom:

Held, that the *Wajib-ul-arz* of other villages in which the parties to the suit have no connection whatsoever, does not prove the custom.

Second appeal from the decision of the Additional District Judge of Meerut, dated 2nd January 1914.

Dr. *S. C. Banerji* and The Hon'ble Mr. *Gokul Prasad*, for the Appellant.

Mr. *Sital Prasad Ghose*, for the Respondents.

JUDGMENT.—The only question in this appeal is whether the marriage of a *Jat* widow named Amin Koer divested her of her interest in the property of her first husband. If this question is answered in the negative this appeal must be dismissed.

It is common ground that Amin Koer was entitled to contract a second marriage. According to the decision of *Mula* v. *Partab* (1) where the rules of her caste allow a Hindu widow to re-marry, the second marriage does not under the Hindu Law divest her of the property of her first husband.

But a custom to the contrary may, of course, be proved and the defendants essayed to prove such a custom in this case. Both Courts below have held that the custom has not been proved. In second appeal one of the defendants contends that the decisions of the Courts below are erroneous and they rely on the decision in *Ram Kishan* v. *Medh Singh* (2). That case related to a village the *Wajib-ul-arz* of which laid down that a widow was entitled to her husband's property provided that she did not marry again. On that and other evidence the Court held that the custom now in question had been proved. It is not suggested that the parties to that case are in any way connected with the parties to the present case. Several *Wajib-ul-araiz* have been produced in this case which lay down the custom in unmistakeable terms, but the *Wajib-ul-arz* of the village in which the property in suit lies is silent as regards the custom and in the opinion of the Courts below at least four instances are proved in which widows married again in this village and did not lose their husband's property. The *Wajib-ul-arz* relied upon by the defendants relate to families and villages with which the parties to the present case are not shown to have any connection whatever. In the circumstances I am not prepared to hold, as a matter of law, that the custom has been proved even if it is open to me to do so. The appeal is dismissed with costs, fees on the higher scale.

Appeal dismissed.

(1) 6 Ind. Cas. 116, 32 A. 489: 7 A. L. J. 417.
(2) 1 Ind. Cas. 141.

ARUNACHALA AIYAR v. RAMASAMI AIYAR.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 636 OF 1913.

September 9, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

ARUNACHALA AIYAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

T. RAMASAMI AIYAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 55 (2)—Limitation Act (IX of 1908), Sch. I, Arts. 62, 97, 116—Breach of covenant for title—Suit for compensation.

In all registered conveyances executed after the Transfer of Property Act came into force a covenant for title is implied by section 55, clause (2), of that Act, and the registered conveyance should be read as if it expressly embodied that covenant and the breach of that covenant is the breach of a contract in writing registered within the meaning of Article 116, Schedule I, of the Limitation Act.

The limitation, therefore, for a suit to recover compensation for such a breach is six years under Article 116 of Schedule I of the Limitation Act and not merely three years either under Article 62 or 97 of the Act.

Kasturi Naicken v. *Venkatasubba Mudaly*, 1 M. L. J. 162, *Narayana Reddi* v. *Pedda Rama Reddi*, 1 M. L. J. 479, *Chidambaram Pillai* v. *Sivathasamy Thever*, 15 M. L. J. 396, *Zemindar of Vizianagaram* v. *Behara Suryanarayana Patrulu*, 25 M. 587; 12 M. L. J. 249, *Tavala Nageswara Row* v. *Sripalli Sambasiva Row*, 11 Ind. Cas. 337, (1911) 1 M. W. N. 361, *Krishna Nambiar* v. *Kannan*, 21 M. 8, *Unichaman* v. *Ahmed Kutti Kayi*, 21 M. 242; 8 M. L. J. 81, *Subbaraya Reddiar* v. *Rajagopala Reddiar*, 23 Ind. Cas. 570; 15 M. L. T. 240; (1914) M. W. N. 376, followed.

Kowuri Basivireddy v. *Tallapaparagada Nagamma*, 8 Ind. Cas. 1087; 35 M. 39; (1910) M. W. N. 827; 9 M. L. T. 467; *Hanuman Kamat* v. *Hanuman Mundur*, 19 C. 123 (P. C.); 18 I. A. 158, *Sawaba Khandapa* v. *Abaji Jotirav*, 11 B. 475, *Ramanatha Iyer* v. *Ozhaloor Pathiriserri Raman Nambudripad*, 21 Ind. Cas. 740; 14 M. L. T. 524; 1 L.W. 110; (1913) M.W.N. 1029, distinguished.

Second appeal against the decree of the District Court of Tanjore, in Appeal Suit No. 297 of 1911, preferred against that of the District Munsif of Tiruvadi, in Original Suit No. 45 of 1910.

Mr. *C. V. Anantha Krishna Iyer*, for the Appellants.

Mr. *G. S. Venkatarama Aiyer*, for the Respondents.

JUDGMENT.—The learned District Judge has reversed the decision of the District Munsif who granted a decree for money against the 1st defendant personally. The District Judge held that the suit of the plaintiff (the vendee) so far as it prayed for recovery of compensation from the 1st defendant (the vendor) for the breach of the covenants for title and possession, was barred by limitation, the period being three years under Article 62 or 97 of the Limitation Act. The learned District Judge relied on *Kowuri Basivireddy* v. *Tallapaparagada Nagamma* (1) in support of his decision.

It is contended before us that as the sale-deed in this case was executed in 1904 long after the Transfer of Property Act came into force, the proper Article to be applied in respect of a suit claiming compensation for breach of an express or implied covenant of title and quiet enjoyment is Article 116 which allows a period of six years. We think that this contention must be upheld. It has been decided in a series of cases beginning in 1889 [see the two cases reported in *Kasturi Naicken* v. *Venkatasubba Mudaly* (2) and *Narayana Reddi* v. *Pedda Rama Reddi* (3)] that in all registered conveyances executed after the Transfer of Property Act came into force, a covenant for title is implied by section 55, clause 2, of that Act, that the registered conveyance should be read as if it expressly embodied that covenant and that the breach of that covenant is the breach of a contract in writing registered within the meaning of Article 116.

We need refer only to a few of the later cases, namely, those in *Chidambaram Pillai* v. *Sivathasamy Thever* (4); *Zemindar of Vizianagaram* v. *Behara Suryanarayana Patrulu* (5); *Tavala Nageswara Row* v. *Sripalli Sambasiva Row* (6); *Krishnan Nambiar* v. *Kannan* (7) and *Unichaman* v. *Ahmed Kutti Kayi* (8). It must, however, be admitted that the case in *Kowuri Basivireddy* v. *Tallapaparagada Nagamma* (1) seems to throw some doubt on the decision in *Krishnan Nambiar* v. *Kannan* (7), which follows the current of the earlier decisions. The reasoning in *Kowuri Basivireddy* v. *Tallapaparagada Nagamma*

(1) 8 Ind. Cas. 1087; 35 M. 39; (1910) M. W. N. 827; 9 M. L. T. 467.
(2) 1 M. L. J. 162.
(3) 1 M. L. J. 479.
(4) 15 M. L. J. 396.
(5) 25 M. 587; 12 M. L. J. 249.
(6) 11 Ind. Cas. 337; (1911) 1 M. W. N. 361.
(7) 21 M. 8.
(8) 21 M. 242; 8 M. L. J. 81.

(1) is not quite clear and one of the two learned Judges who took part in it, was also a party to the later decision which expressly followed the current of the earlier decisions [see the subsequent case reported in *Tavala Nageswara Row* v. *Sripalli Sambasiva Row* (6)] distinguishing the case in *Kowuri Basivireddy* v. *Tallapaparagada Nagamma* (1) as "not in point". In *Kowuri Basivireddy* v. *Tallapaparagada Nagamma* (1), the correctness of the decision in *Krishnan Nambiar* v. *Kannan* (7) was doubted on the strength of the Privy Council ruling in *Hanuman Kamat* v. *Hanuman Mandur* (9), wherein their Lordships held that in the case of a conveyance executed in 1879 (before the Transfer of Property Act came into force) a suit for compensation for failure of consideration (that is, for the recovery of the purchase-money paid to the vendor) through the failure of the vendee to obtain possession of the land sold fell under Article 97 (3 years' rule) and that the date of the cause of action was the date of the obstruction by the vendor's co-parceners. Their Lordships had no occasion to consider the effect of section 55, clause (2), of the Transfer of Property Act on a registered conveyance executed after the date of that Act. That case is, therefore, not an authority for the proposition that to a suit brought on the covenant added by the Statute Law to all registered conveyances executed after the Transfer of Property Act came into force, Article 116 did not apply but only Article 62 or 97. In *Unichaman* v. *Ahmed Kutti Kayi* (8) a similar argument was addressed to a Bench of this Court, namely, that Article 97 applied to such a suit, because the Bombay High Court held that view in *Sawaba Khandapa* v. *Abaji Jotirav* (10). But as a Division Bench of this Court point out in *Unichaman* v. *Ahmed Kutti Kayi* (8), the Transfer of Property Act was not in force in Bombay when that decision in *Sawaba Khandapa* v. *Abaji Jotirav* (10) was given. This distinction seems not to have been in the minds of the learned Judges who decided *Kowuri Bisivireddy* v. *Tallpaparagada Nagamma* (1). We might add that Benson, J., who took part in *Kowuri Bisivireddy* v. *Tallpaparagada Nagamma* (1), was also a party to the prior case in *Unichaman* v. *Ahmed Kutti Kayi* (8).

(9) 19 C. 123; 18 I. A. 158.
(10) 11 B. 475.

Next it was contended that Bakewell, J., doubted the correctness of *Krishnan Nambiar* v. *Kannan* (7) in his judgment in *Ramanatha Aiyar* v. *Ozhaloor Pathiriserri Raman Nambudri pad* (11). In the first place, the observation is *obiter*. In the second place, (with the greatest respect) we find difficulty in following the observation of the learned Judge that the Transfer of Property Act "may be construed as having annexed the statutory agreement" (that is, the contract embodying the covenant for title and other covenants) to the *contract of sale* and not to the *deed of conveyance itself*. As said in Dart's Vendors and Purchasers, Volume I, page 567, these covenants are by the English Conveyancing Act, 1881, section 7, "implied in every *conveyance*" and we do not see why they should be held under the Transfer of Property Act to be attached only to the *contract of sale* and not to the conveyance. The other learned Judge Miller, J., was prepared to follow *Krishnan Nambiar* v. *Kannan* (7). The respondents' Vakil's argument that a covenant for title cannot be implied where the buyer knows the defect of title, is opposed to the recent decision by Seshagiri Aiyar, J., in *Subbaraya Reddiar* v. *Rajagopala Reddiar* (12), with which decision we agree.

The learned District Judge has decided the case only on the preliminary ground of limitation raised in the 9th ground of the appeal memorandum presented to the District Court. We are unable to agree with him in that finding and if Article 116 applies, as we hold it to apply, it is not denied that the suit is not barred. The question whether plaintiff can be given a decree for recovery of the money due under the original hypothecation bond has also not been decided (see Order XLI, rule 33, of the Civil Procedure Code and the wide powers of the Appellate Court).

We, therefore, reverse the District Judge's decision and remand the case for the disposal of the appeal preferred to the District Court on the other points arising in the case.

Costs will abide the result.

Appeal allowed; Suit remanded.

(11) 21 Ind. Cas. 740; 14 M. L. T. 524; 1 L. W. 110; (1913) M. W. N. 1029 at p. 1034.
(12) 23 Ind. Cas. 570; 14 M. L. T. 240; (1914) M. W. N. 376.

RAM NAIN SHUKUL *v.* GANGA SHUKUL.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 25 OF 1914.

July 17, 1914.

Present:—Mr. Justice Sunder Lal.

RAM NAIN SHUKUL—PLAINTIFF—APPELLANT

versus

GANGA SHUKUL AND OTHERS—DEFENDANTS—RESPONDENTS.

Guardian and Ward—Suit against minor—Appointment of guardian ad litem*—Practice—Father, a fit person to act as guardian of his son where no question of immorality is raised—Confession of judgment, whether compromise—Civil Procedure Code (Act XIV of 1882), s. 462, application of.*

The mere absence of a formal order of appointment of a guardian is not of itself fatal to a suit against a minor if it appears from the record that the minor was effectively represented in the suit by his father with the sanction of the Court.

Walian v. *Banke Behari Pershad Singh*, 30 C. 1021; (P. C.); 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 882, referred to.

If a loan, which is the subject-matter of a suit was advanced for purposes which made it binding upon the son and there is no basis for the suggestion that the debt was incurred for immoral purposes, there can be no objection to the father acting as guardian *ad litem* of his son and filing a confession of judgment.

Bhagwati Prasad v. *Bhagwati Prosad*, 17 Ind. Cas. 846; 11 A. L. J. 76, 35 A. 126, referred to.

The confession of judgment in a case where the defendant has no defence to make is no compromise to which the provisions of Order XXXII, rule 7, (section 462, of the Code of Civil Procedure, 1882), apply.

Second appeal from the decision of the District Judge of Gorakhpur, dated 24th Septemer 1913.

Mr. *Jang Bahadur Lal*, for the Appellant.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.—The circumstances under which this appeal arises are as follows:—On 13th November 1898 one Bindesri Shukal executed a deed of mortgage of a 3-pie 5-*khums zemindari* share in *Mouza* Panapur in favour of one Sheo Bakhsh Shukal, grandfather of defendants Nos. 1 to 4 and the husband of defendant No. 5. On 23rd July 1902 the mortgagee brought a suit for sale on foot of the said mortgage. Bindesri Shukul was the principal defendant in the said suit, but his sons Ram Suchit and Ram Nain, who were then minors, were also impleaded as defendants to that suit under the guardianship of their father. It was alleged in the suit that the defendants were members of a joint Hindu family of which the first defendant was the head and the managing member. The plaint went on to say that the father had borrowed the money for certain legal and necessary purposes and for the benefit of the family, and the suit was for the sale of the entire mortgaged property. No copies of the application made for the appointment of defendant No. 1 as guardian of his minor sons, nor a copy of the order, if any, appointing him such a guardian has been filed. The whole record of that suit is not before me, and I am, therefore, unable to say that such an application was made and granted.

On 11th August 1902, the father on his own behalf and as guardian of his minor sons filed a confession of judgment, on the strength of which a decree for sale was made on that date. A decree absolute for sale was made on 15th April 1903, and in execution of the said decree the property in suit was put up to sale and purchased by the decree-holder on 20th January 1906. The decree-holders-purchasers are now in possession of the said property.

The present suit was filed by the sons of Bindesri Shukul on 27th November 1912. They allege that they have only recently attained majority, and have come to know of the mortgage, the decree and the sale mentioned above and they brought this suit for obtaining a declaration that the decree aforesaid was obtained by the mortgagee fraudulently and is not binding upon the plaintiffs, and the sale in execution held thereunder is void against them. They claim possession of a $\frac{1}{2}$-pie share in the village.

It is not alleged in the plaint that the debt secured by the mortgage of 13th November 1898 was incurred for an illegal or immoral purpose, or for no legal necessity. The mortgage itself is not impugned in the plaint. The main ground of attack set forth in the plaint is that the father was not a fit and proper person to be appointed a guardian of his minor sons, and his interest was adverse to that of his minor sons in that he could not set up a plea of the illegality of the debt incurred by himself: in his capacity as guardian *ad litem* of his minor sons, the confession of judgment made by him on behalf of his minor sons was not in the interest of the minors. They urge that the conduct of the mortgagee in thus nominating an unfit and unsuitable

guardian was fraudulent. Upon this ground as also upon the ground that no order for the appointment of a guardian *ad litem* had been made by the Court, they impugn the decree and the sale that followed in execution. Both the Courts below have dismissed the claim. The present appeal has been filed on behalf of one of the sons, *viz.*, Ram Nain Shukal alone.

The first point for consideration is, was the appellant properly represented in that suit by a duly appointed guardian? This resolves itself into two questions, *viz.*:—

(1) Was Bindesri Shukul appointed by the Court guardian *ad litem* of his minor sons?

(2) If so, was his interest adverse to that of his sons and is his appointment vitiated for that reason?

As to the first point, in the absence of the record of the former suit it is impossible to say whether an order appointing the father a guardian *ad litem* was formally put upon the record or not, nor Mr. Jang Bahdura Lal has shown me the copy of the order-sheet in that case. No such order is stated in it. Under the practice now in force, every order made on any application is not written on the application itself, but in the order-sheet. This is a comparatively recent practice. In 1902 the orders used to be written on the applications themselves and the Courts below only noted the leading orders on the order-sheet. The absence of the record of such order in the order-sheet is, therefore, not conclusive. The first defendant is recited in the plaint as the guardian of his minor sons and figures in the proceedings in the suit as such. In *Walian* v. *Banke Behari Pershad Singh* (1) their Lordships of the Privy Council lay down the law on the question. Mere absence of a formal order of appointment of a guardian is not of itself fatal to the suit, if it appears from the record that the minors were effectively represented in that suit by their father with the sanction of the Court.

It is next urged that the father was not a suitable person to be appointed a guradian *ad litem* of the minor defendants. If the defence to the suit was that the debt in question was incurred by the father for an illegal or immoral purpose, he could not perhaps properly act in the suit as the guardian of the defendants who had set up such a defence. It is, however, not suggested that such defence was available to the minors. It is not alleged that such was the case in the plaint in the present suit. No question about the propriety of the mortgage or of the absence of a legal necessity to raise the loan has been urged in this case. If the loan was advanced for purposes which made it binding upon the sons and there was no basis for a suggestion to the contrary, I see no objection to the father acting as guardian *ad litem* of his sons, and filing a confession of judgment. It saved the minors from the liability of paying a full fee on account of Pleader's fee in the taxation of the costs of the plaintiff, as also the costs of proving the mortgage [see *Bhagwati Prasad* v. *Bhagwati Prosad* (2)].

Be that as it may, the decree was in any event properly passed against the father. From the plaint in the suit it is evident that, though the sons were also made parties to the suit, the father was impleaded as the head of the family. A sale in execution of the decree made in the case has taken place; and the suit is against the auction-purchaser. Under the Full Bench ruling in the case of *Hori Lal* v. *Nimman Kunwar* (3) a decree against the father as head of the family is as good as a decree against him and his sons. After a sale in execution of such a decree, the sons could not recover back the property sold from the auction-purchaser, without proving that the debt to satisfy which the sale took place was an improper debt for which they were not responsible [*Balwant Singh* v. *Aman Singh* (4)]. Even a right to redeem was denied to the plaintiffs in that case. In a later case [*Baldeo Singh* v. *Hira Lal* (5)] there was a difference of opinion among the members of the Bench which heard that case. An appeal under the Letters Patent was preferred against the judgment of Mr. Justice

(1) 30 C. 1021 (P. C.); 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 882.

(2) 17 Ind. Cas. 846; 11 A. L. J. 76; 35 A. 126.
(3) 15 Ind. Cas. 126; 34 A. 549; 11 A. L. J. 819.
(4) 7 Ind. Cas. 112; 33 A. 7; 7 A. L. J. 852.
(5) 13 Ind. Cas. 951; 9 A. L. J. 67.

Chamier, but his decree was affirmed in the appeal. In *Sheo Dayal* v. *Jagar Nath* (6) Knox and Piggott, JJ., have held that "the property having passed out of the family, whether by private sale in satisfaction of an antecedent debt, or by an auction sale in execution of a mortgage decree, or by virtue of a decree absolute for foreclosure, the sons of a Hindu father whose property has thus passed out of the family are bound by virtue of their liability to pay their father's debt not tainted with immorality, so that they cannot sue to set aside an alienation which has thus become final, except on some ground which would relieve them from the liability to pay the debt which is the consideration for the sale."

No such ground is suggested by the plaintiffs in their plaint. All that is said is that the decree was fraudulently obtained by the mortgagee, and the only fraud suggested is that the decree-holder ought not to have nominated the father as the guardian *ad litem* of his minor sons. I have already shown that the interests of the father and the sons were identical in the absence of any suggestion that the debt was tainted with immorality or was for other reasons not recoverable from the interest of the sons in the joint family property. There was no fraud, therefore, in getting him appointed as their guardian for the purposes of the suit.

Mr. Jung Bahadur Lal has lastly relied upon the case of *Kunwar Partab Singh* v. *Bhabuti Singh* (7). In that case the decree impugned was based on a compromise entered into on behalf of the minors of their guardian without the leave of the Court under section 462, Civil Procedure Code (Act XIV of 1882). The compromise and the decree were, therefore, voidable at the instance of the minors, and their Lordships of the Privy Council restored the plaintiffs to the same position and "to such rights as they had before their suit was dismissed on 15th December 1899." The confession of judgment filed in this case is not a compromise to which the provisions of section 462, Civil Procedure Code, were applicable. This was a case in which apparently the defendants had no defence to make. It is not suggested in the plaint what possible defence they had to the suit and it seems that the father only saved himself and his sons from all further costs by confessing judgment in the case.

Their position is in no way made worse by the decree passed in that suit. They had a right to redeem the mortgage by paying up the amount due under it. They did not do so. They do not seek to redeem even now. They do not question or impugn the mortgage in suit in that case. They do not show that no order appointing the father as their guardian *ad litem* was in fact made. They also do not allege or prove circumstances under which it could be held that their father's interest was adverse to their interests. Under the circumstances the Courts below had no alternative but to dismiss the suit.

I dismiss the appeal and affirm the decree of the lower Appellate Court with costs.

Appeal dismissed.

(6) 12 Ind. Cas. 111; 8 A. L. J. 922.

(7) 21 Ind. Cas. 288; 11 A L.J. 901; 17 C W.N. 1165; (1913) M. W. N. 785; 14 M. L. T. 299; 25 M. L. J. 422; 16 O. C. 247; 18 C. L J. 384; 15 Bom. L. R. 1001; 35 A. 487; 40 I. A. 182 (P. C.).

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1413 OF 1913.

April 30, 1914.

Present:—Mr. Justice Johnstone.

Bawa HARCHARAN DAS—PLAINTIFF—APPELLANT

versus

DIWAN CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Jurisdiction of Civil or Revenue Court—Muafi—*Punjab Land Revenue Act (XVII of 1887)*, s. 158 (viii)—*Return of plaint.*

The Civil Courts have no jurisdiction to question the authority of the Revenue Officers to settle, in case of resumption of *muafi*, the land with the heirs of the last *muafidar*, ignoring the representatives of another joint *muafidar* who died earlier.

Dya Ram v. *Thakur Das*, 25 P. R. 1872, followed.

Where it is found, after inquiry, that a suit is cognizable by a Revenue Court and not by a Civil Court the plaint may not be returned for presentation to the proper Court.

THEKKA THOTTUM MUKKATH RARAN *v.* NATUKKANDY CHEKKUTI.

Second appeal from the decree of the Additional Divisional Judge, Amritsar, at Jullundur, dated the 1st April 1913, reversing that of the Munsif, first Class, Amritsar, dated the 29th February 1912, decreeing the plaintiff's claim.

FACTS.—Plaintiff brought a suit for possession of half the land on the allegation that plaintiff's grandfather held a *muafi*. At the Settelment of 1865 the names of Fateh Singh, grandfather of defendants and others were added as *co-muafidars*, and the condition was that the *muafi* would continue to the survivor. Plaintiff's grandfather and Fateh Singh remained in possession in equal shares.

Plaintiff's grandfather died 20 years ago and defendants' grandfather, Fateh Singh, on 26th June 1898.

On 3rd October 1893, mutation of names was effected in favour of grandsons of Fateh Singh.

The Collector accordingly made the Settlement with Fateh Singh's grandsons.

Lala *Mehr Chand*, for the Appellant.

Mr. *N. C. Mehra*, for the Respondents.

JUDGMENT.—This appeal has no force. The section quoted—section 158 (*viii*), Land Revenue Act, with which may be read *Dya Ram* v. *Thakur Das* (1)—makes it clear that the Civil Courts have no jurisdiction. Counsel for appellant talks of some legal right in his client as heir of Partap Singh, one of the original *muafidars*, to a sort of sub-proprietary title in the land. No such right exists. No doubt under revenue rules the local Revenue Officers are enjoined in case of resumption of *muafis* to settle the land with the heirs of the late *muafidars*; but this is simply an administrative rule. Here the local officers made the Settlement with the heirs of Fateh Singh, last surviving *muafidar*, ignoring appellants, heirs of another joint *muafidar* who died earlier. I very much doubt whether Government would recognise the claims of appellants, and in any case I am quite clear that the Civil Courts cannot interfere. Nor do I think the case is one for return of plaint for presentation in a Revenue Court. Dismissed with costs.

Appeal dismissed.

(I) 25 P. R. 1872.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2350 OF 1912.

July 31, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

THEKKA THOTTUM MUKKATH RARAN AND OTHERS—DEFENDANTS NOS. 2, 3, 5 AND 6—APPELLANTS

versus

NATUKKANDY CHEKKUTI AND OTHERS —PLAINTIFFS AND DEFENDANT NO. 1— RESPONDENTS.

Malabar Law—Malabar Compensation for Tenants' Improvements Act (I of 1900)—Shop erected by tenant on holding—Compensation.

Under the Malabar Compensation for Tenants' Improvements Act a tenant cannot claim compensation for a shop erected by him on the holding, where the shop is found to be inconsistent with the purpose for which the holding was let.

Second appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut, in Appeal Suit No. 37 of 1912, preferred against that of the Additional District Munsif of Calicut, in Original Suit No. 338 of 1911.

Mr. *C. V. Anantha Krishna Aiyer*, for the Appellants.

Mr. *C. Madhavan Nair*, for the Respondents.

JUDGMENT.—The Subordinate Judge's finding is that the building for which compensation is claimed by the appellant under the Malabar Compensation for Tenants' Improvements Act (Madras Act I of 1900) is a shop and not a dwelling house, that it was not meant "for the purposes of habitation" and that "the shop in question is unsuitable to the holding and inconsistent with the purpose for which the property was let."

We see no sufficient reasons for not accepting this finding, though the learned Subordinate Judge has referred in his judgment to some irrelevant matters such as the present dismantled and damaged state of the shop.

It is clear that under the Act the appellant is not entitled to compensation for a building which is unsuitable to the holding.

The contention that the appellants' right to compensation for a shop building exists independently of the Act was not raised in the lower Courts and even if it could be raised now, we have not been referred to any clear authority which entitles a tenant to

claim compensation for a shop building put upon his holding.

We dismiss the second appeal with costs. The time both for redemption and for removal of the building is extended to three months from this day.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

PETITION No. 9 OF 1913-14 OF SULTANPUR DISTRICT.

April 9, 1914.

Present:—Sir Duncan Colvin Baillie, S. M.

RAM SUNDAR SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Raja MUHAMMAD MEHDI ALI KHAN—DEFENDANT—RESPONDENT.

Ejectment, notice of—Notice cancelled as having been issued on wrong person—Heirs of deceased tenant served with notice without delay on part of landlord—Admission, fresh, to tenancy—Acquiescence—Non-acceptance of rent, effect of—Unstamped notice of ejectment, validity of.

Where a previous notice, issued at the earliest possible opportunity but by mistake on a person who was not the heir of the deceased tenant, was on that ground cancelled, and the landlord immediately issued another notice to the heirs of the tenant and never accepted rent from them:

Held, that there had been no fresh admission, express or implied, of the heirs to the tenancy, nor any acquiescence on the part of the landlord and that, therefore, the notice, even though unstamped, was valid.

Lachman Singh v. Mahant Harcharan Das, File No. 1051 of 1891 and *Ram Kuar v. Lal Sheo Pratab Bahadur Singh*, 3 S. D. 1904, distinguished from.

Appeal from the decree of the Commissioner, Fyzabad, dated 1st September 1913.

JUDGMENT.—The appellants are the two minor sons of a tenant who died during the currency of the year 1318 *Fasli*. At the earliest possible opportunity, that is to say, in 1319 *Fasli* the landlord issued a notice of ejectment against the brother of the deceased tenant. This notice was cancelled on the grounds that it referred to two holdings and that the brother was not the successor-in-interest of the deceased tenant. The landlord thereupon immediately issued a notice for 1321 *Fasli* against the appellants. The notice was unstamped, appellants being treated as heirs of the deceased tenant. The standard published rulings on the subject are Mr. J. R. Reid's decision in *Lachman Singh v. Mahant Harcharan Das* (1) and Mr. Thomson's decision in *Ram Kuar v. Lal Sheo Pratab Bahadur Singh* (2). The question for decision is as laid down in both of these rulings, whether there has been an admission, express or implied, to the holding on the part of the landlord. Both cases are clearly distinguishable from the present case. In Mr. Reid's case there was not only a year's delay in issuing the notice of ejectment, but there had been a previous notice cancelled by the landlord and rent had been accepted for the intervening year. In Mr. Thomson's case there was an interval of five years between the death of the tenant and the issue of the notice of ejectment on his heirs and, it is presumed, acceptance of rent in the meantime. In the present case the landlord has made clear from the first his intention that the heirs of the deceased tenant should not succeed to this holding. By a mistake of fact he issued his first notice on the wrong person, but he never accepted rent from the appellants and as soon as his first notice was cancelled, he issued a fresh notice. It is impossible to say that there has been acquiescence in this case. There has, therefore, been no fresh admission to the tenancy and the unstamped notice was, therefore, valid.

The appeal is dismissed with costs on appellant.

Appeal dismissed.

(1) File No. 1051 of 1891.
(2) 3 S. D. 1904.

SARJU PRASAD *v.* EMPEROR.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 385 OF 1913.

February 2, 1914.

Present:—Mr. Stuart, A. J. C., and Mr. Kanhaiya Lal, A. J. C.

SARJU PRASAD—PRISONER—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Abetment—Presence—Inaction—Criminality—Probability compatible with innocence—Conviction, justification for.

Where in a murder case, a co-accused stated that she remained an unwilling spectator while the offence was being committed by the other accused:

Held, that the alleged omission of a co-accused to intervene or raise an alarm did not constitute an abetment of murder, inasmuch as her inaction did not constitute criminality.

Where the circumstances of a case point to the conclusion that the accused committed the offence, but there is also a reasonable probability compatible with his innocence, there is no sufficient justification for the conviction of the accused.

Appeal against the order of the Additional Sessions Judge, Lucknow, dated 1st December 1913.

The *Government Pleader*, for the Crown.

JUDGMENT.—The facts of this case are as follows: Ram Adhin, a reservist in the Indian Army, lived with his wife, Kaunsilla, in the village of Sahrawan in the Unao District. His second cousin Sarju Prasad lived in a house close by. Mangal *Sunar*, resident of the same village, had three sons, the second of whom was a boy, called Bhajan, aged seven years. On the 1st September Bhajan went out to play at about 9 A. M. He was never seen alive again. At the time he went out to play he was wearing ornaments of fairly considerable value. Search was made for the boy without avail and in the evening the attention of the searchers was attracted to the quarters where the Brahmans of the village live. The beat constable, Mata Badal, had arrived in Sahrawan. On information received he placed guards round this quarter and with two *chaukidars* patrolled the quarter during the night. It is proved that early next morning the door of Ram Adhin's house was opened by him, and that Kaunsilla was let out. Mangal followed her to see where she was going, and finding that she was going some distance had her stopped. As she stopped she dropped an ornament belonging to the missing child. Later on she produced from her person practically all the ornaments that the child had been wearing when he was last seen. She subsequently took the constable and other witnesses to the house and indicated a place on the premises which was dug up. The dead body of Bhajan was discovered in that place with no less than seven incised wounds on the face, neck and chest. One of these wounds had severed the carotid artery and must have caused almost instantaneous death. On information given by Kaunsilla Sarju Prasad was apprehended and search was made for Ram Adhin, who was not found in the village. He had absconded after his wife had left the house, and was discovered at a place called Gurdaspur several days later. Ram Adhin, Sarju and Kaunsilla were placed on their trial before the Sessions Judge of Unao. He convicted them on a charge of murder, and sentenced the first two to death subject to confirmation by this Court, and the woman to transportation for life.

It is proved that the deceased boy took a meal at about two hours after sunrise on 1st September 1913, and left his house to play in the village streets about 9 A. M. The medical evidence as to the state of the semi-digested food in his stomach shows that he was murdered at about 10 A. M.

The evidence of two women called Hansi and Rania proves that they were weeding an *urd* field belonging to Ram Adhin before forenoon on the same day, and that Ram Adhin was present on the field directing their work. At a time which would appear from reasonable inferences to be drawn from their evidence to be about 10-15 A. M. Sarju came to the field and said something to Ram Adhin. The women cannot say definitely what conversation took place between the two men. The result of the conversation was that Ram Adhin went away leaving Sarju on the field. Ram Adhin returned at 11 A. M. Sarju then went away, but returned almost immediately. Then Ram Adhin went away towards his cotton field. Sarju took the women to his house where he paid and discharged them.

Kaunsilla has made two statements. In the first she asserted that Sarju enticed the boy to her house and having locked

him in with her and her own child, fetched Ram Adhin from the fields and that the two men after entering the house and locking themselves in had stripped their persons and murdered the boy. In her subsequent statement she stated that Sarju alone was the murderer.

In no case could anything in these statements be used to convict Ram Adhin or Sarju with the murder, because the woman has asserted in both that she was an unwilling spectator. Neither statement contains a confession. We do not agree with the learned Sessions Judge that the alleged omission to intervene or raise an alarm on her part constitutes an abetment. If these statements were true her alleged inaction would not have constituted criminality. The evidence of Hansi and Rania convinces us, however, that neither statement is true. On the evidence of these women it is clear that Sarju and Ram Adhin could not have committed the murder jointly as Kaunsilla asserts in her first statement, and the allegations in the second statement are absolutely inconsistent with the incident of Sarju's visit to Ram Adhin at the latter's field.

That evening Ram Adhin is proved to have been seen leaving his house and returning to it at short intervals. It is proved that early next morning Ram Adhin let Kaunsilla stealthily out of the house, and shortly afterwards absconded. The door was found locked. There is the further evidence of the apprehension of Kaunsilla in possession of the dead body's ornaments, and the discovery of his corpse buried in the premises of the house of Ram Adhin on information supplied by her.

Taking these circumstances together we are of opinion after considering the several defences raised by the various appellants that the evidence establishes that Kaunsilla murdered the boy without aid from any one. She need not necessarily have committed the crime with premeditation. She may well have seen the child at play, and under the influence of a sudden impulse to obtain his ornaments enticed him into the house and murdered him from greed. It would appear from the evidence that Sarju discovered the fact and proceeded to inform Ram Adhin, and that the latter hastened to the house. It is possible that he dug up the floor and buried the corpse. An attempt would probably have been made to remove the ornaments the same evening: but the patrolling of the village streets rendered such action inadvisable and the escape of Kaunsilla with the jewels was, therefore, postponed till the following morning.

Upon this finding we arrive at the conclusion that Kaunsilla was rightly convicted. We do not consider that the sentence passed on her is too lenient, but we can see no reason for bringing the case to the notice of the Lieutenant-Governor with a view to reduction of the sentence passed upon her. We dismiss her appeal.

There is no sufficient evidence to justify the conviction of Sarju Prasad on any charge. We allow his appeal, set aside the conviction and sentence and direct that he be set at liberty.

Ram Adhin's conviction of murder cannot be upheld. We set aside that conviction and the sentence passed upon him. But on the view that we have taken of the facts we called upon him to show cause why he should not be convicted on a charge under section 201 of the Indian Penal Code. After having heard the arguments of his Counsel we are of opinion that, though the circumstances of the case point to the conclusion that he dug up the floor and buried the body of the murdered boy, there is a reasonable probability that Kaunsilla herself not only murdered the child but also concealed the corpse and that Ram Adhin did not arrive at the house until the body had been buried. In these circumstances we are unable to find that there is sufficient justification for the conviction of Ram Adhin upon any charge. We, therefore, direct that he be set at liberty.

Appeal allowed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 110 OF 1914.
CRIMINAL REVISION PETITION NO. 96 OF 1914.
September 10, 1914.

Present:—Mr. Justice Sadasiva Aiyar.

DASARI VENKATA AND OTHERS—ACCUSED —PETITIONERS

versus

REDDY SANJEEVI REDDY—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 435 and 437—Order for further inquiry—Notice to accused.

A District Magistrate ordered further inquiry in a case where the accused were discharged under section 253, Criminal Procedure Code, without giving notice to the accused:

Held, that the order of the District Magistrate was irregular, though not illegal.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of the District Magistrate of Kurnool, in Revision No. 16 of 1913, preferred against that of the Stationary Second Class Magistrate of Kurnool Town, in Calendar Case No. 413 of 1913, and to direct stay of proceedings in the said Calendar Case No. 413 of 1913 pending the disposal of the criminal revision case.

FACTS.—The accused were charged with having committed an offence under section 147, Indian Penal Code. The second Class Magistrate, holding on the evidence that no case against the accused was made out, discharged them under section 253, Criminal Procedure Code. The District Magistrate on petition by the complainant examined the records and *without giving notice to the accused* directed the case to be restored to the file of the second Class Magistrate and examined into according to law, being of opinion that the evidence disclosed an illegal assembly and that there was also evidence that the complainant was beaten. The criminal revision petition is against this order of the District Magistrate.

Mr. *P. Appu Nair*, for Mr. *C. Madhavan Nair*, for the Petitioner.

Mr. *P. R. Grant*, for the *Public Prosecutor*, for the Government.

ORDER.—The District Magistrate was not justified in ordering further inquiry into the trivial incident disclosed in the Sub-Magistrate's judgment. His action in not giving notice to the accused was also very irregular, though his order was not bad on that account alone. *Alagiriswami Naidu* v. *Balakrishna Mudaliar* (1).

I set aside the District Magistrate's order and direct all further proceedings to be dropped.

Order set aside.

(1) 26 M. 418

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 447 OF 1914.
CRIMINAL REVISION PETITION NO. 376 OF 1914.
October 9, 1914.

Present:—Mr. Justice Kumaraswamy Sastri.

SUBBARAYA PILLAI—COMPLAINANT—PETITIONER

versus

KRISHNASWAMI PILLAI—ACCUSED No. 3 —RESPONDENT.

Practice—Re-trial ordered by High Court on certain finding of fact—Re-trial Court, whether competent to go behind that finding—Criminal Procedure Code (Act V of 1898), s. 439.

When a case is directed, to be re-tried the Judge re-trying it cannot go behind the findings of fact which were accepted by all the Courts and which were the basis on which a re-trial was ordered.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Sub-Divisional first Class Magistrate of Negapatam, in Criminal Appeal No. 9 of 1914, preferred against that of the Stationary Second Class Magistrate of Nannilam, in Calendar Case No. 66 of 1913.

Mr. *T. S. Ramaswamy Aiyar*, for the Petitioner.

Mr. *M. D. Devadoss*, for the Respondent.

ORDER.—The petitioner filed a complaint against the counter-petitioner (who was the 3rd accused) and others charging them under section 426 of the Indian Penal Code with having intentionally driven their cattle into, and thrashed before the produce was harvested, the crops on his field. The Stationary Magistrate of Nannilam convicted the accused and sentenced them to pay a fine of Rs. 10 each.

On appeal the Sub-Divisional Magistrate reversed the conviction on the ground that the 3rd accused thought that he had a perfectly genuine claim to the land and the crops. Reading the judgment as a whole, there can

be little doubt that he agreed with the Stationary Magistrate in thinking that mischief was caused. His finding that there was malice can only be reconciled with the view that he found that mischief was caused.

A revision petition was filed by the present petitioner (Criminal Revision Case No. 475 of 1913) against the order of the Sub-Divisional Magistrate, and the Honourable Mr. Justice Sadasiva Aiyar set aside the acquittal and directed a re-hearing. His Lordship observed as follows: "The Sub-Divisional Magistrate admits that the action was" no doubt "actuated by 'malice.' This means, I take it, that accused wanted to injure prosecution witnesses Nos. 1 and 2 and as such injury will be wrongful damage * * * the accused were guilty of mischief." The Sub-Divisional Magistrate was ordered to re-hear the appeal with reference to the observations made in the order.

The case came on before another Sub-Divisional Magistrate. He states in paragraph 2 of his judgment that his predecessor, as a matter of fact, found that the crops were damaged by the accused; but in dealing with the case he differed from his predecessor and found that no damage was caused and acquitted the 3rd accused.

The questions are whether it was open to the Sub-Divisional Magistrate to go behind the finding of his predecessor (that mischief was caused) and the observations of the High Court which accepted the finding and laid down the law which was to guide the Magistrate in re-trial.

It is argued by Mr. Devadoss that when the case was sent down to him for re-trial, the Sub-Divisional Magistrate had to apply his mind afresh to the appeal and that it was open to him to come to a different conclusion on facts. It is also argued that as the order of the lower Court was set aside it must be treated as non-existent. No authority has been cited for the broad proposition that when a case is directed to be re-tried, the Judge re-trying it can go behind findings of fact which have been accepted by all the Courts and which were the basis on which a re-trial was ordered. I do not think this contention is sound. In the present case it is an accident that a different Sub-Divisional Magistrate tried the case on remand.

The effect of the setting aside of an order and directing re-trial must depend upon the facts of each case and on the scope of the order of remand. In the present case the Sub-Divisional Magistrate was ordered to re-try the appeal "with reference" to the observations made by the High Court. I do not think it empowered the Magistrate to go behind the findings of his predecessor which were accepted by the High Court as the basis of the order directing a re-trial.

I set aside the order of the lower Court and direct that the Sub-Divisional Magistrate do dispose of the case according to law on the footing that injury was caused to the crops by the 3rd accused.

Order set aside.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 774 OF 1913.

CRIMINAL REVISION PETITION NO. 625 OF 1913.

February 27, 1914.

Present:—Mr. Justice Sankaran Nair.

PRATI APPALA RAJU—PETITIONER

versus

MUTHARAJU SURPA RAJU—COMPLAINANT—RESPONDENT.

Madras Estates Land Act (I of 1908), s. 212—Landlord and tenant—Decree for ejectment prior to Act—Tenant in possession without consent, whether can be convicted under section 212.

Where a landlord had obtained a decree for ejectment against the *ryot* prior to the coming into force of the Madras Estates Land Act, the tenant cannot be prosecuted and convicted under section 212 of the Madras Estates Land Act for being in possession of the land without the landlord's consent. That section would apply only if the decree could be treated as one passed under section 163 of the Act.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Head-quarter Deputy Magistrate of Cocoanada, in Criminal Appeal No. 37 of 1913, preferred against that of the Sub-Magistrate of Pittāpuram, in Calendar Case No. 106 of 1913.

In re KUKATI NARASA REDDI.

Mr. *B. Somayya*, for the Petitioner.

Mr. *V. Ramesam*, for the Respondent.

ORDER.—The accused was a tenant in possession of lands of which the complainant is said to be the landholder. His father was in possession before him. The landlord sued him in ejectment, and a decree for possession was passed in his favour before the Estates Land Act came into force on the ground that the tenant had no occupancy right and that his right to possession had been determined by notice to quit. He is now prosecuted and convicted under section 212 of the Estates Land Act for being in possession of the land without the landlord's consent. Section 212 of the Estates Land Act would apply only if the decree could be treated as one passed under section 163. It could not be so treated in this case, as the accused is not a person who occupies the land "otherwise than by inheritance." The conviction cannot, therefore, be sustained. The conviction and sentence are set aside and the fine, if levied, will be refunded.

Conviction set aside.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 143 OF 1914.

TAKEN UP NO. 7 OF 1914.

April 30, 1914.

Present:—Mr. Justice Miller.

In re KUKATI NARASA REDDI—

ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 481 (2), 537—Penal Code (Act XLV of 1860), s. 228—Offence—Record must show stage of interruption—Evidence—Intention.

Where a person making a noise in Court is charged with an offence under section 228 of the Penal Code, the record convicting him must show the stage of judicial proceeding interrupted and the evidence must establish that such interruption was intentional, as such vital irregularities in procedure are not cured by section 537 of the Code of Criminal Procedure.

Criminal revision from an order of the District Munsif of Kaveli, dated 24th November 1913.

FACTS.—So far as facts can be ascertained they will be found in the following judgment of the lower Court.

1. The appellant has been fined Rs. 5 by the District Munsif of Kaveli under section 228, Indian Penal Code. It is very necessary when a Court proceeds under section 480, Criminal Procedure Code, that the provisions of the Code should be very strictly complied with; section 481 requires that if the offence is under section 228, Indian Penal Code, the record shall show the nature and stage of the judicial proceeding in which the Court interrupted was sitting and the nature of the interruption.

2. In the present case it is not possible from the record to ascertain exactly the nature and stage of the judicial proceeding. The order passed by the District Munsif does not show it. It is, no doubt, stated therein that the accused interrupted the Court "while sitting in the stage of a judicial proceeding," but it omits to mention what the judicial proceeding was and what was the stage thereof C. W. No. 3 states that he is the Small Cause Bench Clerk and was attending to the Bench work at about 2 P. M., when he heard a loud noise. But from his evidence it cannot be found out definitely what the judicial proceeding was. The learned District Munsif ought to have placed on record information as to the suit, if any, that was being tried and whether depositions were being taken or argument being heard or judgment being given and so on.

3. I think the omission of this information from the record is fatal to the order since the provision in clause 2, section 481, Criminal Procedure Code, is mandatory.

4. Further, the nature of the interruption is by no means clear. The learned first Munsif says that the accused rushed into the Court-house making a loud noise. But it is difficult from this for an Appellate Court to get an exact idea of what happened. I cannot know what was the nature of the noise, whether it consisted of loud noise or shouts or simply was a noise occasioned by his movement.

5. Again, the learned District Munsif says: "The accused went on making a loud noise, I had to send the Bench Clerk outside to restore order." One might gather from this that the offence took place outside the Court and not in the view or presence of the Court. But possibly this was merely a continuation of what occurred first of all inside. But the noise should be particularised.

In re NANDAMURI ANANDAYYA.

6. The order being thus defective it cannot be upheld. The conviction must be reversed and the fine refunded. Probably the learned District Munsif will find that it is rarely necessary to have recourse to section 480, Criminal Procedure Code. A word of serious warning from the Bench is generally sufficient. My own experience is that the attendant peons, as a rule, cause more noise and disturbance than the members of the public by their officious interference with them.

Mr. *J. C. Adam*, for the Crown.

ORDER.—The District Munsif should have complied with the provisions of section 481 (2) of the Code of Criminal Procedure, and though his failure to do so seems to be only an irregularity which may be cured by section 537 of the Code, yet, in the present case, there is no evidence on the record from which it can be gathered what was the judicial proceeding or what was the stage of that proceeding which was interrupted.

Moreover, it seems very doubtful whether the evidence established the fact that the noise was intended to be an interruption of the Court.

I think, in the circumstances, the Sessions Judge's order cannot be said to be clearly wrong or to require interference.

Petition disallowed.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 691 OF 1913.

February 27, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

In re NANDAMURI ANANDAYYA—

PRISONER—APPELLANT.

Penal Code (Act XLV of 1860), s. 211—Telegram to Police, whether amounts to false charge—Subsequent statement in writing containing false statement—Criminal Procedure Code (Act V of 1898), ss. 154, 157 and 228—"Information received," meaning of—Amendment of charge by Sessions Judge—No objection and no prejudice—Irregularity.

The mere despatch of a telegram falsely stating that a dacoity had been committed without mentioning the names of any persons alleged to have been concerned or suspected of complicity in the offence, does not amount to the institution of a false charge within the meaning of section 211, Indian Penal Code.

The phrase "information received" in section 157 of the Criminal Procedure Code refers to information furnished and recorded under section 154, and a telegram is not such information.

Emperor v. *Jonnalagadda Venkatrayudu*, 28 M. 565; 3 Cr. L. J. 108; *Chinna Ramana Gowd* v. *Emperor*, 31 M. 506; 9 Cr. L. J. 77; 18 M. L. J. 573; and *Sessions Judge of Tinnevelly Division* v. *Sivan Chetty* 1 Ind. Cas. 187; 9 Cr. L. J. 170; 5 M. L. T. 269 (F.B.); 32 M. 258, distinguished.

Every inquiry which a Police Officer makes is not necessarily an investigation under section 157, Criminal Procedure Code, and an informal inquiry, preliminary to a formal investigation, is an inquiry of that kind.

There is no specific provision in the Criminal Procedure Code regarding the procedure to be followed by a Station House Officer receiving information of the commission of a cognizable offence outside his station limits. Section 154 does not prevent his receiving and recording the information, though he has no power to conduct an investigation under section 157.

Where a Committing Magistrate framed a charge in respect of Exhibits A and B, but the Sessions Judge, at the very outset of the trial, and without any objection on the part of the accused, amended the charge into one with reference to Exhibits B and C, and it was not shown that the accused was prejudiced thereby.

Held, that the case was covered by section 228 of the Criminal Procedure Code and that the conviction was legal.

Appeal against the order of the Court of Sessions of Kistna Division at Masulipatam, in Case No. 35 of the Calender for 1913.

FACTS.—A telegram, purporting to have been sent by one Anandayya and complaining of a dacoity as having been committed at a certain village, was received by the Police Inspector of Bezwada. He then proceeded to the scene of offence and made inquiries of Village Officers and others and found that no dacoity had been committed and the sender of the telegram was not known in the village. As the telegram purported to have been sent from Gudivada, he sent it to the Gudivada Inspector for making inquiries as to the authenticity of the message without sending an occurrence report to the Magistrate. The Gudivada Inspector sent it on to the Station House Officer of Gudivada. While the matter was pending with the said Station House Officer, the accused appeared before him and gave him a statement in writing, Exhibit B. This statement was not entered in any Crime Register, but was sent to the Bezwada Inspector along with the telegram as the village where

the alleged offence was committed was found to be within the charge of the Bezwada Inspector. The latter sent the telegram and the statement, Exhibit B, to the Station House Officer of Vuyyur, within whose station limits the village where the offence was alleged to have been committed was situate. The Station House Officer of Vuyyur then registered the crime and sent for the accused and recorded a second statement, Exhibit C, from him, and eventually referred the complaint as false. Thereupon the Superintendent of Police ordered the prosecution of the accused under section 211, Indian Penal Code. The Police put up a charge sheet treating the telegram as the false complaint. In the meanwhile the original telegram was destroyed. The prosecution, however, adduced evidence about the statements contained in Exhibits B and C. The Sub-Magistrate, who conducted the preliminary inquiry, disbelieved the genuineness of Exhibit B and committed the accused to the Sessions only in respect of Exhibit C. At the Sessions trial the accused was charged with respect to both the statements. The Sessions Judge finding that under section 162, Criminal Procedure Code, Exhibit C could not be made the basis of a prosecution for a false charge, as it was made in the course of an investigation by a Police Officer, altered the charge into one in respect of Exhibit B and holding that to be genuine convicted the accused in respect thereof. The accused thereupon appealed to the High Court.

Mr. *V. Ramadoss*, for the Accused:—The telegram is the complaint or the first information about the offence. Everything that was done in pursuance thereof was part of the investigation. *Emperor* v. *Jonnalagadda Venkatrayudu* (1); *Chinna Ramana Gowd* v. *Emperor* (2); *Sessions Judge of Tinnevelly Division* v. *Sivan Chetty* (3) and *In re Krishna Baipadithaya* (4). Even if the telegram did not amount to a complaint, the investigation had begun (as it may well be even in the absence of a complaint under sections 154 and 157, Criminal Procedure Code). In either view Exhibit B could not form the basis of a charge such as the present.

Mr. *C. F. Napier*, for the Prosecution.—The telegram was not a complaint. It did not contain any details. The statement, Exhibit B, was the complaint. The Station House Officer of Gudivada was bound by law to record it, although he had no jurisdiction to investigate the complaint. The accused was charged without objection at the Sessions trial in respect of the first statement and he was not prejudiced by the conviction.

JUDGMENT.

AYLING, J.—Appellant has been convicted of an offence under section 211 of the Indian Penal Code in respect of a statement, Exhibit B, given by him to the Head Constable in charge of Gudivada Police Station (Prosecution Witness No. 2) on 5th May 1912. In this statement he charges five persons (Prosecution Witnesses Nos. 5 to 9) with having robbed him of jewels and committed dacoity.

We see no reason to distrust the evidence of Prosecution Witness No. 2; and we are satisfied that the statement, Exhibit B, was given by appellant, and given with a full knowledge of its purport and probable consequences. It is not suggested that the statements it contains as to the alleged dacoity are true and we have no doubt they are false.

It has been argued, however, on various grounds that the conviction is bad in law and with these arguments we proceed to deal.

The first contention is that the statements in Exhibit B cannot constitute an offence under section 211 of the Indian Penal Code, because a charge had already been made and criminal proceedings instituted against Prosecution Witnesses Nos. 5 to 9 by a telegram, Exhibit A, which reached the Bezwada Police Inspector, Prosecution Witness No. 1, on April 27th. The Sessions Judge finds, and in our opinion rightly, that this telegram was despatched by appellant. It runs thus:—"Dacoity, Kalavapamula; property lost, kindly come immediately. Nandamuri Anandayya." It will be seen that no names are mentioned of persons alleged or sus-

(1) 28 M. 565; 3 Cr. L. J. 108.
(2) 31 M. 506; 9 Cr. L. J. 77; 18 M. L. J. 573.
(3) 1 Ind. Cas. 187; 32 M. 258; 9 Cr. L. J. 170; 5 M. L. T. 269 (F. B.).
(4) 5 Ind. Cas. 908; 20 M. L. J. 182; 11 Cr. L. J. 286; 8 M. L. T. 87.

pected of complicity in the dacoity, so that it cannot be held to constitute a "false charge" within the meaning of section 211. The question is whether it could amount to causing the institution of criminal proceedings against the five *malas* whose names were subsequently given in Exhibit B. The contention of appellant's Vakil is that on receipt of Exhibit A, Prosecution Witness No. 1 started an investigation under section 157 of the Criminal Procedure Code into the complaint of dacoity, that the statement, Exhibit B, was recorded in the course of that investigation, and that Exhibit B cannot, therefore, be regarded as the institution of the criminal proceedings.

Reliance is placed on the cases reported in *Emperor* v. *Jonnalagadda Venkatrayudu* (1); *Chinna Ramana Gowd* v. *Emperor* (2) and *Sessions Judge of Tinnevelly Division* v. *Sivan Chetty* (3). All these deal with the legal effect, in connection with section 211 of the Indian Penal Code, of information personally furnished to a village headman or other person mentioned in section 45 of the Criminal Procedure Code, regarding matters therein referred to and have no particular bearing on the question now before us. Section 157 empowers a Police Officer to take action when he has reason to suspect the commission of a cognizable offence "from information received or otherwise." The phrase "information received" undoubtedly refers to information furnished and recorded under section 154 of the Criminal Procedure Code, and it cannot be contended that the telegram, Exhibit A, was such information. The words "or otherwise" are, no doubt, wide enough to cover the receipt of a telegram or even less definite and less satisfactory sources of information. But the question remains whether on receipt of Exhibit A, Prosecution Witness No. 1 did, as a fact, institute an investigation under the section. What the Inspector, Prosecution Witness No. 1, actually did is clear from his own evidence and the endorsement on Exhibit A. The day after receipt of the latter he went to Kalavapamula, questioned the Village Officers and others and ascertained that no one had heard of a dacoity and that no one named Nandamuri Anandayya was known in the village. He then sent the telegram to the Gudivada Inspector (Gudivada being the place from which it had been despatched) with a request to have inquiries made "as to who is the sender of the message and if it is true." The Gudivada Inspector referred the telegram for report to the Station House Officer of Gudivada (Prosecution Witness No. 4) and while it was pending with him, appellant presented himself before him and gave the statement Exhibit B.

Now there is nothing in all this indicative of an investigation under section 157 and the fact that the Bezwada Inspector did not consider himself to be conducting one, is apparent from the simple fact that he did not send an occurrence report to the Magistrate—a step which is an essential preliminary under that section to the commencement of an investigation.

It can hardly be contended that every inquiry which a Police Officer makes must necessarily be an investigation under section 157. Most investigations are initiated on information recorded under section 154 and vouched for by the informant. But the Police must frequently hear of alleged offences from less reliable sources, *e.g.*, village gossip, or the receipt of telegram, which, so far as authenticity goes, stands in no better position. In such cases it is discretionary with the officer to take action or not and before deciding as to the course to adopt, he may frequently deem it well to make a few preliminary and informal inquiries as to whether there is anything in what he has heard to render a formal investigation desirable. This is what, as it seems to us, the Inspector has done in the present case and we have no hesitation in holding that his action did not amount to an investigation under section 157.

As regards the Gudivada Head Constable his evidence as Prosecution Witness No. 2 makes it perfectly clear that he also did not register any offence, but made informal inquiries under the orders of his departmental superiors as to the identity of the sender of Exhibit A.

We, therefore, hold that up to the time of recording the statement, Exhibit B, no criminal proceedings had been instituted. It is next argued that Exhibit B cannot be the basis of a conviction under section

211, because the dacoity was alleged to have been committed outside the territorial limits of the Gudivada Police Station and, therefore, Prosecution Witness No. 2 had no power to investigate it. This argument is equally unsustainable. The Criminal Procedure Code is curiously silent as to the correct procedure to be adopted by a Station House Officer who receives information of the commission of a cognizable offence outside his station limits. But there is nothing in section 154 to prevent his receiving and recording the information though he has no power under section 157 to conduct an investigation. In the present case, Prosecution Witness No. 2 recorded the information given by appellant in Exhibit B and submitted it to his superior officer, the Gudivada Inspector. The latter forwarded it to the Bezwada Inspector (Prosecution Witness No. 1), who sent it down to the Station House Officer of Vuyyur (Prosecution Witness No. 3) within whose station limits the dacoity was said to have been committed. The latter, on receipt, for the first time registered the dacoity as Crime No. 38 and instituted a formal investigation under section 157, in the course of which he took a further statement from appellant (Exhibit C).

In our opinion Exhibit B and nothing else must be regarded as the cause of the institution of the criminal proceedings against the *malas*.

The last contention is that as the basis of the charges framed by the Committing Magistrate was Exhibits A and C, the Sessions Judge was not justified in amending the charge to one with reference to Exhibits B and C. The Sessions Judge framed his charge at the outset of the trial, no objection appears to have been taken and no attempt is made to show how appellant was prejudiced. In our opinion the case is covered by section 228 of the Criminal Procedure Code.

We confirm the conviction and sentence and dismiss the appeal.

SANKARAN NAIR, J.—I agree.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 34 OF 1914.

March 17, 1914.

Present:—Mr. Lindsay, J. C.

MAHPAL SINGH AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss 147 and 149—Rioting and some other offence committed in its connection—Sentences, separate for each offence.

Separate sentences may be passed under section 147, Indian Penal Code and any other section which becomes applicable to the accused with reference to the terms of section 149, Indian Penal Code.

In the matter of Bhagwandin Singh, Select Case No. 125, *Queen-Empress* v. *Ram Sarup*, A. W. N. (1885) 195; 7 A. 757 and *Queen-Empress* v. *Bama Punja*, 17 B. 260 (F. B.), followed.

Nilmony Poddar v. *Queen-Empress*, 16 C. 442 (F. B.) and *Bhup Singh* v. *Emperor*, 8 C. W. N. 305; 1 Cr. L. J. 139, distinguished.

Application against the order of the Sessions Judge, Lucknow, dated 30th January 1914, upholding that of the Deputy Magistrate, Lucknow, dated 17th December 1913.

Mr. *R. F. Bahadurji*, for the Applicants.

The *Government Pleader*, for the Opposite Party.

JUDGMENT.—The only point which has been debated in this application for revision is with regard to the sentences. The applicants were convicted under sections 147 and 325 read with section 149, and they have been sentenced to separate terms of imprisonment in respect of offences under these sections. Mr. Bahadurji's contention is to the effect that separate sentences could not be passed. The facts are not disputed here. It would seem that Mahpal Singh who was the principal man in this affair and the other accused who were with him went into a field and attacked one Kalyan. Mahpal was armed with a *lathi* which is said to have carried something like an axe at the end of it. Other prisoners were armed with ordinary *lathis*. Mahpal Singh, according to the findings of the Court below, struck Kalyan twice with his axe-like weapon and inflicted two incised wounds on his body. It is by reason of this offence committed by Mahpal that the other applicants were convicted under section 324 by the application of section 149.

There have been many cases upon the point raised by Mr. Bahadurji in this application. There is a case of this Court, *In the matter of Bhagwandin Singh* (1). There is also a decision of Mr. Piggott in Criminal Revision No. 47 of 1910. There is a ruling of the Allahabad High Court reported as *Empress* v. *Ram Sarup* (2). There is also a ruling of the Bombay High Court in *Queen-Empress* v. *Bana Punja* (3). All of these cases lay down that separate sentences may be passed under section 147 and any other section which becomes applicable to the accused with reference to the terms of section 149. Mr. Bahadurji has cited *Nilmony Poddar* v. *Queen-Empress* (4) as a contrary authority, but it is apparent from the head-note of the ruling that the facts there do not correspond with the facts of the case now before me. It would seem that in the Calcutta case which was under consideration it was found that no individual member of the unlawful assembly had been proved to have committed any act which amounted to the voluntarily causing of hurt. Here there is a clear finding that Mahpal Singh, one of the members of the unlawful assembly, did actually commit the offence made punishable by section 324 of the Indian Penal Code. *Bhup Singh* v. *Emperor* (5) was also referred to, but that ruling does not seem to be in point here either. It appears to me on the authorities quite clear that no exception can be taken to the sentences in this case. Mr. Bahadurji has also asked for a reduction of sentences in the case of Mahpal Singh on the ground that the lower Appellate Court has reduced the others' sentences below the periods inflicted by the Court of first instance. However, it appears that Mahpal Singh was the principal offender in the case and was treated as the ringleader while the others were treated as being guilty only in a minor degree. I see no ground for reduction of the sentences in case of Mahpal Singh.

The application is dismissed.

Application dismissed.

(1) Select Case No. 125.
(2) A. W. N. (1885) 195; 7 A. 757.
(3) 17 B. 260 (F. B.).
(4) 16 C. 442 (F. B.).
(5) 8 C. W. N. 305, 1 Cr. L. J. 139.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 590 OF 1914.

August 13, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Scott-Smith.

JAWAN AND ANOTHER—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Confession—Retracted confession—Value of confession against co-accused.

The net result of authorities on the value of confessions seems to be this:

(*i*) That it is not *illegal* to base a conviction upon the uncorroborated confession of an accused person, provided the Court is satisfied that the confession was voluntary and is true in fact;

(*ii*) that, *from the point of view of legality, pure and simple*, the fact that a confession has been retracted, is immaterial;

(*iii*) that the use to be made by the Court of a confession, whether retracted or not, is a matter rather of prudence than of law, the business of the Court being to make up its mind, in accordance with the dictates of common sense, whether it is safe to believe the confession or not;

(*iv*) that experience and common sense show that in the absence of corroboration in material particulars, it is not safe to convict on a confession, unless from the peculiar circumstances in which it was made and judging from the reasons alleged or apparent, of the retraction, there remains a high degree of certainty that the confession, notwithstanding its having been resiled from, is genuine;

(*v*) that when it is a question of using a confession against a co-accused of the person confessing and the Court would not be prepared to accept the confession *per se* as sufficient the corroboration ought to be of the kind that not only confirms the general story of the crime, but also unmistakably connects the said co-accused with the crime.

Appeal from the order of the Sessions Judge of the Rawalpindi Division, dated the 18th of June 1914, convicting the appellants.

Mr. *Fazal Ilahi*, for the Appellants.

The *Government Advocate*, for the Respondent.

JUDGMENT.—Two men, Jawan, accused No. 1, and Wilayat Ali, accused No. 2, have been convicted under section 302, Indian Penal Code, of the murder of one Shakar, on 10th March last, the former being sentenced to death and the latter to transportation for life. The learned Sessions Judge calls the latter punishment penal servitude, but he no doubt means what we have said. They have both appealed and we have heard Mr. Fazl Ilahi on their behalf and the learned Government Advocate on behalf of the Crown. According to the

prosecution these two men intercepted Shakar on his way home at a certain *kassi*, a mile or so from his and their village, Pind Dakhili Marigala, Tahsil Kahuta, District Rawalpindi, and took him on a certain pretext down the ravine to a convenient spot where, taking him unawares, first accused No. 1 struck him from behind with an axe below the right jaw, felling him to the ground, whereupon accused No. 2, at the instance of accused No. 1, fractured his skull by a blow with the back of an axe on the forehead. Accused No. 2 followed this up, the handle of his axe having broken, by another blow on the head with a stone, and finally accused No. 1 struck him again with the back of his axe and with stones. This is said to have happened on Tuesday March 10th, 1913, late in the afternoon, and the reason for the outrage, as stated or suggested, was twofold: deceased, who had recently returned from Burma from service in the Royal Artillery, had deposited Rs. 300 with accused No. 1, who is said to have wished to avoid re-payment, and further accused No. 1 is said to have had a *liaison* with P. W. No. 2, the young wife of deceased whom the latter had married two months before his departure for Burma five years before the murder. Accused No. 1 and deceased are cousins on both the mother's and father's side, and accusd No. 2 is first cousin of accused No. 1 and is supposed to have joined accused No. 1 in the affair at his request without promise of reward, merely out of friendly feeling.

The body was not found until it was accidentally seen on Friday 13th March by Allahdad, P. W. No. 21, who observed a stick lying near it and a handkerchief some way off and who sent a message to the *Zaildar*. Report was made at the *Thana* at 2 A. M. on 14th March and the Police duly arrived at 5 A. M. We may say at once that there is no doubt whatever as to the identity of the corpse or as to the cause of death, for, though somewhat decomposed, it had not been mangled by bird or animal. No suspects were named at that time. Footprints were noticed near the spot and covered up, and, according to the Police diaries, one Allah Rakha, tracker, compared the tracks with those of the two accused and with deceased's shoes and found correspondence; but apparently the Police must have had doubts on the subject for they sent up no track evidence with the *chalan*. In our opinion the accused are entitled to take this as a point in their favour.

We have carefully examined the record and we find against the accused persons the following evidence, namely:

(*a*) The confession of accused No. 2, implicating equally himself and accused No. 1, made in the Committing Court on 3rd April, but retracted at the trial.

(*b*) Deposition of Dost Muhammad, P. W. No. 6, who says he met the accused persons and deceased together where the road crosses the *kassi* and saw them go off down the latter.

(*c*) Deposition of Muhammad Hasan, P. W. No. 4, a boy of 12, who with the two accused is said to have been the only herdsman in the village, and who testifies that on the fatal afternoon the accused at *ligar rela* left him in charge of their flocks, saying they had to go home to eat, and never returned, the boy, according to practice, taking home their flocks for them.

(*d*) The production of the articles mentioned in the margin by accused No. 2.

1. Blade of an axe. 2. Piece of handle thereof. 3. Three pice. 4. Three more pieces of aforesaid handle:—See P. W. No. 23.

(*e*) The presence of blood on certain things, see later in this judgment.

(*f*) The presence of colouring matter of blood on certain other things, see later on.

(*g*) Evidence of motive.

The decision of the case seems to us to depend almost entirely on (*a*) and (*d*), the confession of accused No. 2 and his action in connection with his confession. We have heard an argument on the value of retracted confessions and have consulted the rulings noted below* and also the remarks†

**Sajjad Hussain* v *Emperor*, 16 P. R. 1908 Cr.; 153 P. L. R. 1908; *Gul Hassan* v. *Emperor*, 8 Ind. Cas 250; 24 P. R. 1910 Cr.; 11 Cr. L. J. 604; 38 P. W. R. 1910 Cr. 193; P.L.R. 1910; *Ataya* v. *Emperor*, 10 Ind Cas. 857; 5 P. R. 1911 Cr.; 12 Cr. L. J. 276; 91 P. L. R 1911; 27 P.W.R. 1911 Cr.; *Emperor* v. *Kehri*, 29 A. 434 A. W. N. (1907) 140; 4 A. L. J. 310; 5 Cr. L. J. 360; *Bhag Singh* v. *Emperor*, 4 Ind. Cas. 429; 153 P. L. R. 1909; 24 P. W. R. 1909 Cr.; 10 Cr. L. J. 584; *Crown* v. *Musammat Piari*, 21 P. R. 1869 Cr. obsolete; *Queen-Empress* v. *Jadub Das*, 27 C. 295; 4 C. W. N. 129; *Musammat Chandan* v. *Emperor*, 3 P.W.R. 1907 Cr.; 5 Cr. L. J. 120.

†Page 255, 5th Edition.

under section 24, Indian Evidence Act, in Ameer Ali's valuable work on the Law of Evidence in India. The net result of the authorities seems to be this:

(*i*) That it is not *illegal* to base a conviction upon the uncorroborated confession of an accused person, provided the Court is satisfied that the confession was voluntary and is true in fact;

(*ii*) that, *from the point of view of legality, pure and simple*, the fact that a confession has been retracted, is immaterial;

(*iii*) that the use to be made by the Court of a confession, whether retracted or not, is a matter rather of prudence than of law, the business of the Court being to make up its mind, in accordance with the dictates of common sense, whether it is safe to believe the confession or not;

(*iv*) that experience and common sense show that, in the absence of corroboration in material particulars, it is not safe to convict on a confession, unless, from the peculiar circumstances in which it was made and judging from the reasons, alleged or apparent, of the retraction, there remains a high degree of certainty that the confession, notwithstanding its having been resiled from, is genuine;

(*v*) that, when it is a question of using a confession against a co-accused of the person confessing and the Court would not be prepared to accept the confession *per se* as sufficient, the corroboration ought to be of the kind that not only confirms the general story of the crime, but also unmistakably connects the said co-accused with the crime.

It is clear, therefore, that no part of the evidence in the case must be lost sight of, and we proceed to discuss first the evidence of motive for the crime. As regards accused No. 2 no motive appears except perhaps the influence of accused No. 1, as near kinsman and friend, causing accused No. 2 to appropriate the desires of accused No. 1 as his own. Taking, first, the alleged passion of accused No. 1 for deceased's wife, we have on the record:

(1) Her statement that accused No. 1 once accosted her, the implication being that he made some improper proposal, which being repelled he never troubled her again;

(2) the statement of Hashmat Ali, P. W. No. 3, that the lady complained to him of molestation by accused No. 1, but never complained again after witness had remonstrated with him;

(3) the statement of Gaman, P. W. No. 22, that he "never heard any breath of scandal" with respect to the lady and accused No. 1;

(4) the statement by accused No. 2 in his confession that accused No. 1 had an illicit intimacy with the lady;

(5) the further statement of Hashmat Ali, when asked why he suspected the accused No. 1, that he did so "for the sake of the money," making no mention of the alleged *liaison*.

Now this, taken as it stands, appears to us rather a slender foundation for the theory that accused No. 1 was so consumed by passion for the lady as to plot a brutal murder in order to get the husband out of the way. It is easy for the learned Government Advocate to suggest that all those witnesses are trying to minimise the matter, but after all we must go by the record and we cannot see that we have sufficient indication here of motive for a murder.

We turn next to the matter of the money. This need not take us long. The fact of deposit of the money with accused No. 1 may be true or not. All one can say is that, if, on the evidence before us, deceased had sued accused No. 1 for it, it is doubtful whether any Court would have given him a decree. But even if, for the sake of argument, we concede the fact of deposit, we find absolutely no evidence that accused No. 1 was making difficulties about re-payment. Hashmat Ali aforesaid seems to have been nervous about the re-payment—see his evidence and the post card* Exhibit P. F.—but we fail to see how this is any evidence against accused No. 1. The witness has not ventured to explain why he thought accused No. 1 was going to embezzle the money, and we have not a tittle of evidence that deceased or any one else ever demanded the money from accused No. 1, or that he ever expressed any intention of refusing refund, or that he had spent the money. Here too, of course, it can be argued that there is a conspiracy of silence; but we have only the record to go

* Page 8 paper-book.

upon. It is fairly clear, therefore, that no adequate motive for the murder is made out.

We turn next to the circumstances leading up to the confession by accused No. 2—see evidence of P. W. No. 23, the *Thanadar*. On 14th the house of accused No. 1 was searched and next day that of accused No. 2, in neither case anything incriminating being found. On 14th from the person of accused No. 1 were taken a *safa* and *kurta* which appeared to be blood-stained. On 16th the loin cloth of one Husain, also a suspect, and the turban and loin cloth of accused No. 2 were taken over as having suspicious marks. Next day at 2 P. M. the *kurta* of Bakar, another suspect, was taken over, and an hour later the report of the *post mortem* examination arrived. Soon after that it was learnt that P. W. No. 6, Dost Muhammad, was saying he had seen the accused and deceased together in the *Kassi* and at 6 P.M. he made a statement. Next morning, 18th March, accused No. 2 made a detailed statement to the *Thanadar* confessing the crime and implicating accused No. 1, but no statement seems to have been made to a Magistrate until 3rd April, 11 days before committal to the Sessions. The Committing Magistrate did not examine accused No. 2 again nor even take his plea, and we are, therefore, uncertain what his attitude in that Court was.

The history of the matter thus seems natural enough. There was a gradual accumulation of evidence culminating in the statement of P. W. No. 6; and accused No. 2, seeing danger approaching and the net closing in on him, may have thought the game was up and that he might gain and could not lose by helping the Police and telling a tale. We are inclined to look upon the confession as purely voluntary, corroborated as it is by the production of the axe and its handle, though we are not inclined to attach too much importance to the evidence of P. W. No. 6; but this must not blind us to the distinction between the effect of the confession as against accused No. 1 and accused No. 2 respectively. We may note at once here that we look upon the matter of the production of axe and handle (*d*) above as peculiarly valuable, for the story of the different pieces of the handle is hardly one that could have been invented, the burying of one piece in the jungle as being blood-stained and the consignment of the other two pieces to his stock of firewood having the stamp of truth on it, and the axe-head was produced from a hole in the ground *in the inner courtyard of Umar, accused No. 2's uncle*, where it could hardly have been put by an enemy or by the Police.

Turning next to the depositions of Dost Muhammad and Muhammad Husain, (*b*) and (*c*) above, all we can say is that they *may* be true; but against them both is the fact that they did not come forward very promptly* and the latter's statement does not carry us far. Dost Muhammad admits, without explanation, that he was coming from Daud Gali to Mohra Nangrial at the time and that he did not take the natural "main road" between those two places but another route; and while before the Committing Magistrate he said, accused No. 1 had an axe with him, in the Sessions Court he said he "saw" that accused No. 1 "had nothing." Lastly, he contradicts the *Thanadar* by saying that for six days he came before him and was questioned and said invariably that he knew nothing, the *Thanadar* denying that he ever spoke to him till the 17th. These facts seem to us to deprive the deposition of Dost Muhammad of nearly all value.

We need not trouble about the pice produced by accused No. 2: as the case is complete against him without that, and the other accused is not affected; but to complete our survey a few words are necessary about the blood-stained articles—see Chemical Examiner's Report at page 4, paper-book. Mammalian blood was found on Bakar's "sweater", and on the pieces of axe-handle, and colouring matter *of blood*—not, as Mr. Fazal Ilahi would have it, merely some reddish stuff—on a *chadar* (also called *safa*) and *kurta* of accused No. 1, on a *chadar* of Hussain's, and on the axe-head. Where the other evidence is strong, evidence of blood on clothes may sometimes afford useful support to a case, but here it is noticeable that neither of the lower Courts asked accused No. 1 to explain how blood came to be on his things and we are not disposed to attach much importance to the incident.

Looking at the whole case as stated above, we are driven to the conclusion that accused No. 2 was certainly one of the murderers, if

* 17th and 18th March respectively,

there were more in it than one. We can see no other explanation of his confession to the Committing Magistrate and of his production of the axe and its handle. We are by no means satisfied of the guilt of accused No. 1. Putting aside the depositions of Dost Muhammad and Muhammad Husain and holding adequate motive not made out, we have really nothing against him but the confession of the co-accused and the existence of blood-stains on *kurta* and *safa*. It may seem at first sight a little inconsistent to accept the confession as true *qua* accused No. 2 himself and to reject it as unworthy of reliance *qua* accused 1: but a moment's reflection will suffice to show that this is not so. We are satisfied that accused No. 2 was one of the murderers: his story and conduct prove this. But there is always a possibility that, for reasons unknown to us, he may have falsely implicated accused No. 1 perhaps to screen some one else; and the reason why it is unsafe and unfair to accept accused No. 2's denunciation of accused No. 1 as gospel truth is that accused No. 2 was not on solemn affirmation, and his story was not and could not be tested by cross-examination, and is, therefore, not so valuable as even an approver's story would be. The wording of section 30, Indian Evidence Act, shows that the Legislature has fully recognised this aspect of the matter. Accused No. 2 may have told the story correctly enough except as to the name of his comrade, who may have been one of the suspects, Bakar and Hussain, or some other man not known to us.

We, therefore, accept the appeal as regards Jawan, accused No. 1, and acquit him, and we reject the appeal as regards accused No. 2, Wilayat Ali. In our opinion the latter has been lucky in escaping the death penalty; but we do not intend to interfere in this connection as Government does not press for enhancement.

Appeal of Accused No. 1 accepted;
Appeal of Accused No. 2 rejected.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 131 OF 1914.
April 17, 1914.
Present:—Mr. Stuart, A. J. C.

JAGAN NATH—ACCUSED—APPELLANT
versus
EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 361 and 366 – Kidnapping from lawful guardianship –"Taking" to be physical.

The word "taking" in section 361, Indian Penal Code, is nothing but physical taking.

Where a father sent his daughter to live in a house with certain of his relations and one of those relations married in that house the daughter without the consent of the father:

Held, that no offence under section 366, Indian Penal Code, was committed by the relative, because there was no taking out of lawful guardianship, inasmuch as the daughter never left the house where she was residing with the consent of her father.

Appeal against the order of the Additional Sessions Judge, Sitapur, dated 13th February 1914.

Mr. *St. George Jackson*, for the Appellant.
The *Government Pleader*, for the Crown.

JUDGMENT.—In this case Jagan Nath has been convicted on a charge under section 366 of the Indian Penal Code of having kidnapped a girl, called Sunder, with intent that she should be compelled to marry him against her will. The facts are as follows :—

Sunder is the daughter of Ram Lal *Sunar*. Ram Lal has two daughters, Kailasa and Sunder. Their mother was his first wife who is now dead. He has married again and has a son by his second wife. Kailasa is married to Maheshar, the youngest brother of the appellant. Kailasa went to stay with the family of her husband before her *gauna* took place. On that occasion Sunder accompanied her. The *gauna* took place, and when Kailasa returned after the *gauna* to her husband's house Sunder was admittedly allowed again to accompany her. After a few days Sunder admittedly married Jagan Nath in the house of Maheshar and Kailasa, where he also resides. The above facts are clear, but there are many points in the story upon which it is not so easy to arrive at a decision.

In the first place the evidence as to the age of Sunder is not satisfactory. Ram Lal states that she is only seven

years old, but the evidence of her sister Kailasa goes to show that Sunder is considerably older. Sunder has given evidence, and the manner in which her deposition is recorded establishes that, if she is only seven years old, she is a child of precocious intelligence. I find that she is certainly more than seven years old, and is probably about ten or eleven. In the second place, Ram Lal asserts that he was persuaded against his will to permit Sunder to accompany Kailasa to his son-in-law's house. I do not believe that the circumstances of the taking of Sunder to the joint house of the appellant and Maheshar are as Ram Lal has described them to be. I believe that Sunder wished to accompany her sister and that she was permitted to go without any objection on the part of Ram Lal. In the third place, Sunder has deposed that she was married to Jagan Nath against her will. I do not believe her on this point. I see no reason to distrust the evidence of Kailasa, which is to the effect that Sunder consented to the marriage. The circumstance that Ram Lal had permitted Kailasa to marry the appellant's brother is sufficient to show that the marriage of Sunder with a member of the same family would not necessarily be a marriage to which her father would object, unless he had reason to take exception to the personality of the bridegroom. He has given as a reason for refusing to have the appellant as a son-in-law the fact that the appellant is much older than Sunder. The appellant is older than Sunder, though I do not find that he is as old as Ram Lal suggests. He is probably a man of about 33 years of age, and the marriage of a man of that age with a child of ten would not in itself be objectionable to many *Sunar* parents. There is no suggestion that the appellant after going through the ceremony of marriage with Sunder had sexual relations with her. The record goes to show that the child is still a virgin, and that the appellant, although he was living in the same house, scrupulously refrained from approaching her. I do not find that the evidence, to the effect that Ram Lal consented to the appellant's marriage with Sunder, is true. But there is nothing to show that Jagan Nath had reason to suppose that Ram Lal would have refused his consent to the marriage if he had been offered certain conditions. It appears that Maheshar, Jagan Nath and Kailasa married Sunder to Jagan Nath without taking the trouble to obtain her father's consent. Their motive for doing this appears from the evidence on the record to have been that they apprehended that Ram Lal would demand a considerable sum of money as the price of his consent, and I find that the criminal prosecution owes its institution in all probability to the fact that the appellant has refused to satisfy the demands of Ram Lal after the marriage took place. I have to decide upon these findings of fact whether the offence of kidnapping has been committed. Under the provisions of section 361 of the Indian Penal Code, it is necessary to prove that Sunder was taken or enticed out of the keeping of her lawful guardian. It is not suggested that she was enticed. Ram Lal admittedly permitted her to go to her sister's house, and she never left that house. She was not "taken" from the house of Ram Lal without his consent. Was she "taken" from the house of her sister? There was no physical "taking" from her sister's house. The learned Sessions Judge is of opinion that she was "taken" from the custody of her father, who was her lawful guardian, owing to the fact that she went through the ceremony of marriage with Jagan Nath, the "taking" not being of a physical nature but originating in her change of status from an unmarried girl under the guardianship of her father to a married girl under the guardianship of her husband. Kailasa and Maheshar undoubtedly consented to the marrige, and under the explanation to section 361 they were the lawful guardians of Sunder, as they had been lawfully entrusted with her care or custody. It is true that they had no authority, express or implied, to bestow her in marriage upon any person, and the weight of opinion is in favour of the doctrine that the powers of temporary guardians of a minor must be strictly confined within the limits of their delegated authority. It is, however, a doubtful point whether the very wide explanation to section 361 cannot be successfully pleaded in defence in a case of

this kind. It is unnecessary to decide this question, for, even admitting that the appellant cannot shelter himself behind the consent of Kailasa and Maheshar, it appears to me impossible to hold that there was any "taking" out of lawful guardianship, inasmuch as Sunder never left the house of Maheshar where she was residing with the consent of her father. I have been unable to discover any authority for the proposition that the word "taking" in section 361, Indian Penal Code, is a "taking" other than physical. For the above reasons I find that on the facts no offence has been committed.

I, therefore, accept this appeal, set aside the conviction and sentence, and direct that Jagan Nath appellant be released from custody.

Appeal accepted.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 201 OF 1914.
CRIMINAL REVISION PETITION No. 171 OF 1914.
September 10, 1914.

Present:—Mr. Justice Sadasiva Aiyar.

In re MALA NAICKEN AND ANOTHER—PETITIONERS—ACCUSED.

Treasure Trove Act (VI of 1878), ss. 4, 20—"Finder", meaning of—Labourer, whether "finder"—Finder taking no share of treasure, liability of—Possession taken by employer—Impossible act—Criminal liability.

The petitioners discovered a treasure buried in the ground while they were cutting a tree under the orders and in the presence of their employer. The latter at once assumed control over the treasure of which the former obtained no share at all:

Held, that even though the petitioners found the treasure in the course of the performance of labour for an employer, they were "finders" of it within the meaning of section 4 of the Treasure Trove Act.

Obiter.—Nobody can be convicted under the criminal law for not doing an impossible act unless the terms and intention of the Statute are absolutely clear and inflict a penalty even on an innocent person.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the first Class Assistant Magistrate of Trichinopoly, in Criminal Appeal No. 1 of 1914, preferred against that of the Stationary Second Class Magistrate of Namakkal in Calendar Case No. 554 of 1913.

Mr. *P. R. Narayanasawmy Aiyar*, for the Petitioners.

Mr. *P. R. Grant*, for the Government.

ORDER.—The two accused (very poor coolies) have been convicted and sentenced under section 20 of the Treasure Trove Act (VI of 1878) read with section 4.

Their contention in revision is that neither of them is a 'finder' of the treasure within the meaning of that term as used in section 4. The term "finder" is not defined in the Act, and the established fact is that the accused discovered the treasure buried in the ground while they were cutting a tree under the orders and in the presence of their employer.

I think that the accused were "finders" of the treasure even though they found it in the course of the performance of labour for an employer. It is contended that because the concluding portion of section 4 imposes a duty on the "finder" "to deposit the treasure in the nearest Government Treasury", etc., a person who has not the physical control of the treasure found by him cannot be a "finder" under that section, and that in this case, the accused's employer at once assumed control over the treasure. I think that the meaning of the term "finder" cannot be restricted by reason of one of the obligations imposed on the finder being to deposit the treasure in the treasury. If it is impossible for him to discharge that particular obligation he should be held absolved from its performance, as nobody could be convicted under the criminal law for not doing an impossible act unless the terms and intention of the Statute are absolutely clear and inflict a penalty on even an innocent person. I, therefore, see no reason to interfere with the conviction.

As regards the sentences, the accused are stated by the Sub-Magistrate to be "the poorest of the villagers". There is no legal evidence that they obtained a substantial or any portion of the treasure trove and though it seems clear that some rich person or persons is or are assisting them in filing this revision petition and assisted them in their defence in the lower Courts, I do not think that these facts can be taken into consideration in arriving at a conclusion as to what is the reasonable fine which could be imposed on the accused. The fine of Rs. 50 imposed on the 2nd petitioner is, therefore, reduced to Rs. 10 and the balance (if already recovered) will be refunded to him. In other respects, the petition is dismissed.

Conviction affirmed; Sentence modified.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 637 OF 1913.

August 11, 1914.

Present:—Mr. Justice Oldfield.

PANAMBATTA KALATHIL KUNCHU MENON—DEFENDANT—PETITIONER

versus

KALATHINPADIKIL NARAYANAN EZHUTESSAN—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 76 (c)—Mortgagee's duty to pay enhanced Government revenue—Contract to contrary—Construction of deed of mortgage.

Under section 76 *(c)* of the Transfer of Property Act a mortgagee is bound, in the absence of a contract to the contrary, to pay the Government revenue.

Where a mortgage-deed provided that out of the produce of the properties "60 *paras* 15 *nazhis* (of paddy) is allowed for the Government revenue of 60 *fanams* 4 *visams*" due on the land, followed by an appropriation of the balance of the total produce estimated at a specified quantity to interest on the mortgage amount at a specified rate, and the assessment on the lands was subsequently enhanced:

Held, that this constituted a contract to the contrary as referred to in section 76 (*c*) of the Transfer of Property Act and that the mortgagee was not bound to pay the amount by which the revenue was enhanced.

Kolli Valappil v. *Natuwath Pappu*, 14 Ind. Cas. 590, *Tuppan Nambudri* v. *Chinna Pari Kutti*, 18 M. L. J. 31, distinguished.

Panigaton Kanaran v *Raman Nair*, 17 M. L. J. 517, followed.

Petition, under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Ottapalam in Small Cause Suit No. 114 of 1913.

Mr. *C. Madhavan Nair*, for the Petitioner.

Mr. *N. A. Vaidyanatha Iyer*, for Mr. *C. V. Ananthakrishna Iyer*, for the Respondent.

JUDGMENT.—I do not deal with the lower Court's finding on issue (2) that the plaintiff had an interest entitling him to pay the amount sued for on the defendant's behalf, because my conclusion on issue (1) that the defendant was not bound to make the payment, will be sufficient for the disposal of the petition.

The defendant is a mortgagee in possession and the question is whether he is bound as such to pay the amount by which the assessment on the land mortgaged was enhanced after the date of the mortgage. Under section 76 (*c*) of the Transfer of Property Act the mortgagee in possession is bound to pay the revenue in the absence of a contract to the contrary. The following words in the mortgage, Exhibit II, are relied on, as constituting such a contract as regards at least revenue in excess of that specified in them:—

"Out of this 60 *paras* 15 *nazhis* of paddy is allowed for payment of revenue of 60 *fanams* 4 *visams* due on these, you having consented and undertaken to pay same from 1058 (1883) and obtain receipt therefor."

This is followed by an appropriation of the balance of the total produce, estimated at a specified quantity to interest at a specified rate. I do not think this can be treated as a general provision for the payment of revenue, whatever its amount. If it were one, the reference to the quantity of paddy appropriated for revenue would be superfluous. Nor can it, in my opinion, be read as requiring a payment of the revenue whatever its amount up to the value of the paddy so appropriated; that is negatived by the specification of the amount of revenue payable. The natural sense of the words is that the total estimated income being assigned to the mortgagee, it is appropriated in order that he may be guaranteed interest at not less than the rate fixed and may pay a specified amount of revenue that was then payable, and it is not to be supposed that the parties contemplated a deviation from the assumption involved in the latter provision which would have frustrated the purpose of the former. I, therefore, hold that the mortgage contains a contract to the contrary such as is referred to in section 76 (*c*).

Of the cases relied on by the plaintiff, in *Kolli Valappil* v. *Natuwath Pappu* (1) the terms of the mortgage are not given, but the judgments state that it contained no contract to the contrary; and in *Tuppan Nambudri* v. *Chinna Pari Kutti* (2) there was no apportionment of the produce in any specific way to interest and revenue. On the other hand in *Panigaton Kanaran* v. *Raman Nair* (3) there was an appropriation of an estimated lump amount of produce on those accounts and the decision was in the defendant's favour. No such general rule as the lower Court relies on can be deduced from the authorities. The only question is

(1) 14 Ind. Cas. 590.
(2) 18 M. L. J. 31.
(3) 17 M. L. J. 517.

whether the particular mortgage under consideration contains a contract to the contrary: and I hold that Exhibit II in this case contains one.

The defendant is, therefore, not bound to pay the addition to the assessment due to enhancement. It is conceded that if he is not, the plaintiff's suit must fail.

The lower Court's decision is set aside and the suit dismissed with costs in both Courts.

Suit dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 1293 OF 1911.

January 9, 1914.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Kensington.

JAMUN RAM—PLAINTIFF—APPELLANT

versus

KISHEN RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Suit for declaration that decree has been satisfied, whether maintainable.

Section 47 of the Code of Civil Procedure, 1908, does not bar a suit for declaration that a decree obtained by the defendant against the plaintiff and others has been satisfied so far as the plaintiff's father is concerned, and that it is incapable of execution against him (plaintiff).

Diwan Singh v. *Amir Singh*, 5 Ind. Cas. 814; 16 P. R. 1910; 18 P. W. R. 1910; 62 P. L. R. 1910, followed.

First appeal from the decree of the District Judge, Multan, dated the 9th October 1911, dismissing the claim.

Mr. *Badr-ud-din*, Qureshi, for the Appellant.

Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—The plaintiff-appellant sued for a declaration that a decree in favour of the defendants-respondents Nos. 1 and 2, passed on the 11th June 1906 against the plaintiff's father and others, had been satisfied so far as it concerned the plaintiff and his father, and consequently should not be executed against the plaintiff. The Court below confused the question of satisfaction with the question whether the suit lay, held that section 47 of the Code of Civil Procedure was a bar to the suit, and distinguished the facts before it from those dealt with in *Diwan Singh* v. *Amir Singh* (1) on the ground that in the case cited it was found as a fact that the decree had been satisfied and that the judgment-debtor was consequently entitled to file a regular suit to establish satisfaction in case it could not be recognised under section 258 of the old Code (Order XXI, rule 2, of the present Code)

This distinction is erroneous. In that case the judgment-debtor sued for a declaration that the decree had been satisfied and could no longer be executed. The suit was dismissed on an authority of the Calcutta Court from which this Court differed, and the suit was remanded by this Court for decision on the merits, the Court holding that the suit lay. The question, whether the decree had or had not been satisfied, had nothing to do with this Court's decision and the ruling is, therefore, directly in point and supports the appeal.

There is no force in the contentions of Counsel for respondents that the plaint contained no allegation of the satisfaction of the decree and that section 47 of the Code of Civil Procedure bars the suit. The lower Court professed to deal only with the preliminary issue framed on the 16th August 1911 at page 14 of the paper-book,—"whether the present suit can lie or whether section 47 of the Code of Civil Procedure operates as a bar", and then proceeded, apparently to assist it in deciding that issue, to consider the suit on the merits without giving plaintiff-appellant an opportunity of adducing evidence, and appears to have based its decision on the merits merely on an examination of the execution records.

For these reasons we decree the appeal, set aside the decree of the Court below and remand the suit under Order XLI, rule 23, of the Code of Civil Procedure, for disposal in accordance with law. Court-fee on the memorandum of appeal here will be refunded and other costs will be costs in the cause.

Appeal allowed; Case remanded.

(1) 5 Ind. Cas. 814; 16 P. R. 1910; 18 P. W. R. 1910; 62 P. L. R. 1910.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 278 OF 1914.

July 17, 1914.

Present:—Mr. Justice Sunder Lal.

Mulvi WALAYAT HUSAIN AND OTHERS —PLAINTIFFS—APPELLANTS

versus

RAM LAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 21, 43, 104 —Order for abatement of suit, whether decree and appealable.

An order directing the abatement of a suit is not a decree within the meaning of that term as defined in the Code of Civil Procedure and, therefore, is not appealable.

Hamida Bibi v. *Ali Husein Khan*, 17 A. 172; A. W. N. (1895) 42; *Jwala Prasad* v. *Salig Ram*, 13 A. 575; A. W. N. (1891) 158, followed.

Second appeal from the decision of the Additional Subordinate Judge of Moradabad, dated 26th November 1913.

Mr. *Muhammad Ishaq*, for the Appellants.

Mr. *Mohan Lal Sandal*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for pre-emption filed by one Khoda Bux. During the pendency of the suit Khoda Bux died. His heirs were not brought upon the record and the Court of first instance on August 13th, 1913, held that the suit had abated and made the order for the abatement of the suit under rule 3 of Order XXII. It gave no cost to the defendant vendee. The defendant vendee preferred an appeal to the lower Appellate Court impleading the heirs of the deceased plaintiff as respondents to the appeal. An order directing the abatement of a suit is not a 'decree' within the meaning of that term as defined in the Code of Civil Procedure. It has been so ruled by this Court under Act XIV of 1882 in several cases and among them I may mention the case of *Hamida Bibi* v. *Ali Husein Khan* (1). The order is not also appealable either under section 104 or under Order XLIII of the new Code of Civil Procedure. The Court below, therefore, ought to have rejected the appeal on the ground that no appeal lay against the order. The Court, however, proceeded to hear the appeal to which the heirs of Khoda Bux were parties and varied the order of the Court below by awarding costs. The present appeal is

(1) 17 A. 172; A. W. N. (1895) 42.

filed against that decree. As I have already pointed out, no appeal lay to the Court below and that Court has erred in treating the order of the Court of first instance as a decree. The appellants to this Court have, therefore, come up here by way of appeal against the decree of the Court below. This they are entitled to under the practice of this Court as laid down in *Jwala Prasad* v. *Salig Ram* (2) and in Second Appeal No. 825 of 1910 decided on May 8th, 1911, and I allow the appeal, and setting aside the decree of the Court below restore the order of the Court of first instance on the ground that the said order was not appealable under the Code of Civil Procedure. I make no order as to costs as the point ought to have been taken by the appellants both here and in the Court below.

Appeal allowed.

(2) 13 A. 575; A. W. N. (1891) 158.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 1015 TO 1017 OF 1912.

July 24, 1914.

Present:—Mr. Justice Seshagiri Aiyar.

RAMANATHAN CHETTY—PLAINTIFF—PETITIONER

versus

MARUTHAPPA KONE AND OTHERS—DEFENDANTS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), s. 25—"Decided," meaning of.

The word "decided" in section 25 of the Provincial Small Cause Courts Act (IX of 1887), does not mean "decided on the merits." It simply means "disposed of", and the High Court's power to interfere is not restricted only to cases where there is a decision on the merits.

Umesh Chandra Palodhi v. *Rakhal Chandra Chatterjee*, 10 Ind. Cas. 8; 15 C. W. N. 666; 14 C. L. J. 118, followed.

Subal Ram] *Dutt* v. *Jagadananda Mazumdar*, 1 Ind. Cas. 288; 13 C. W. N. 403, dissented from.

Petitions, under section 25 of Act IX of 1887, praying the High Court to revise the orders of the Temporary Subordinate Judge of Ramnad, in Small Cause Suits Nos. 479 to 481 of 1912, dated 30th September 1912.

Mr. *P. S. Narayanaswamy Aiyar*, for Mr. *C. V. Anantha Krishna Aiyar*, for the Petitioner.

Mr. *C. A. Seshagiri Sastri*, for Mr. *K. V. Krishnaswami Aiyar*, for the Respondents.

JUDGMENT.—In this case, the plaintiff sued defendants Nos. 1 and 2 for rent due under a registered lease executed by them in favour of the plaintiff and the third defendant. The third defendant was made a party, because defendants Nos. 1 and 2 stated that he had received the full amount due from them. In his written statement, paragraph 10, the 3rd defendant pleaded that he appropriated the amount which he had thus recovered from defendants Nos. 1 and 2 towards certain sums of money due to him under what he alleged to be a *marakal kootoo* right. He did not say that the amount due under this *marakal kootoo* right had been ascertained and that an ascertained sum of money was due to him. Under these circumstances no question of set-off arises in this case. The real question to be discussed in this case is whether defendants Nos. 1 and 2 have paid the money honestly to the third defendant and whether that payment is a bar to the plaintiff recovering his share. That question should be decided by a Court of Small Causes and there is no necessity for directing the plaint to be returned to the plaintiff for presentation to the proper Court.

Mr. Seshagiri Sastri raises a preliminary objection before me that this petition does not lie under section 25 of the Small Cause Courts Act, because there is no "*case decided*" by the Subordinate Judge sitting on the Small Cause side; and he quoted *Subal Ram Dutt* v. *Jagadanunda Mazumdar* (1) for the position that, unless there has been a decision on the merits, section 25 has no application. With all respect, I am unable to follow this decision. The word "decided" in section 25 means "disposed of." It does not mean that there must be a decision upon the merits. I am fortified in this position by the decision of Mookerjee and Teunon, JJ., in *Umesh Chandra Palodhi* v. *Rakhal Chandra Chatterjee* (2). The Subordinate Judge is wrong in thinking that any question of title has to be gone into in this case. I reverse his order and direct him to take back the case on his file and to dispose of it according to law. The costs will abide the result.

Civil Revision Petitions Nos. 1016 and 1017 of 1912 follow.

Order set aside; Case remanded.

(1) 1 Ind. Cas. 288; 13 C. W. N. 403.
(2) 10 Ind. Cas. 8; 15 C. W. N. 666; 14 C. L. J. 118.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

CIVIL REVISION PETITION NO. 8 OF 1913-14 OF KHERI DISTRICT.

March 28, 1914.

Present:—Sir Duncan Colvin Baillie, S.M., and Mr. Tweedy, J. M.

BEGAM-UN-NISA—PLAINTIFF—APPELLANT

versus

HABIB-ULLAH KHAN—DEFENDANT—RESPONDENT.

Oudh Rent Act (*XXII of* 1886), *s.* 108 (5 A)—*Favourable rent, enhancement of—Lessee holding under heritable but non-transferable lease and not holding under judicial decision—U. P. Land Revenue Act* (*III of* 1901), *s.* 79—Board's Circulars, 2-1, r. 2, foot-note.

The favourable rent paid by a tenant holding under a heritable but non-transferable lease can properly be enhanced under the provisions of section 108 (5 A) of the Oudh Rent Act if he is not holding under a judicial decision. Section 79 of the U. P. Land Revenue Act is not applicable to such cases, and the footnote to rule 2 of the Board's extant Circulars 2-1 is wrong and misleading in so far as it has no force under the present altered law.

Appeal from the decree of the Officiating Commissioner, Lucknow, dated 26th August 1913, reversing that of the Deputy Commissioner, Kheri, dated 15th April 1913, modifying that of the Assistant Collector, Kheri, dated 14th February 1913.

FACTS.—A tenant held under a heritable but non-transferable lease, dated 21st June 1901, at a rent of Rs. 20. The landlord sued the tenant under section 108 (5 A) of the Oudh Rent Act for enhancement of rent from Rs. 20 to Rs. 171 on the ground of its being very low as compared with that of other lands of a similar quality and with similar advantages in the neighbourhood. The Court of first instance found that the rent was a favourable one and, therefore, enhanced it from Rs. 20 to Rs. 41-13-9. The first Appellate Court slightly modified the decree of the Court of first instance. When the case came up in appeal before the Commissioner, he found that the tenant held under a perpetual lease, dated 21st June 1901, at the then favourable rate of rent, that the two positions, *viz.*, one of a permanent lessee and the other of a tenant at a favourable rate of rent, could not exist at one and the same time, and that, therefore, the Resumption Chapter of the Oudh Rent Act did not apply to the case. Accordingly he dismissed the suit and held that the rent could only be enhanced at the time of a Settlement inasmuch as section 79 of the U. P. Land

Revenue Act was clearly applicable to the case; and in holding so he relied upon a foot-note appearing under rule 2 of the Board's extant Circulars 2-I. The correctness of this foot-note was questioned in appeal before the Board of Revenue.

Mr. *Mumtaz Husain* and Babu *Sarswati Prasad*, for the Appellant.

Mr. *St. George Jackson*, for the Respondent.

JUDGMENT.

TWEEDY, J. M.—(*March 27th*, 1914)—The facts of this case are given in detail in the judgments of the lower Courts. The respondent admittedly holds under a heritable but non-transferable lease, dated 21st June 1901, and the Court of the Assistant Collector found that the rent was a favourable one and that rent could be enhanced under section 108 (5 A), and enhanced it from Rs. 20 to Rs. 41-13-9. In appeal the Commissioner, relying on the foot-note to rule 2 of the Board's extant Circular 2-I, held that section 79 of Act III applied to the case and decreed the appeal, and dismissed the claim for enhancement. It is clear that if the foot-note above referred to is correct the Commissioner's decision cannot be impugned, and we, therefore, have to see how far the law as laid down in the foot-note is correct. Section 79 of Act III says that during the progress of the Settlement, the Settlement Officer "shall determine the rent to be paid..... .... by all holders of heritable non-transferable leases *holding under a judicial decision*." The foot-note says: "The Board have held judicially that all holders of permanent leases in whose leases there is no contract fixing the rent after the expiry of the Settlement are leases whose rent the Settlement Officer is required to fix under section 79. This ruling applies to all permanent leases whether given or ratified by decree at last Settlement or granted since by deed executed by the proprietor." A careful search has failed to discover any ruling of the kind alluded to, but a perusal of the files which bear on the history of former Acts and former Editions of the Circulars tends to show that the foot-note is wrong and that although it may have been applicable under the old Acts, it does not apply under the law as it stands at present. It appears that the old Oudh Revenue Act which was in force prior to 1901 contained a section (§ 40) which corresponds to the present section 79. It says: "The Settlement Officer shall determine the rent of.....all holders of heritable and non-transferable leases whose rent *has not been fixed by contract*." The foot-note now in question was attached to the Circulars which were issued under the Oudh Revenue Act. When the present Revenue Act was drafted the phraseology of section 79, which corresponds to section 40 of the old Act, was altered, in an important particular and the words "holding under a judicial decision" were substituted for the words "not fixed by contract." The law was thus entirely altered but the Circular did not follow suit, and the foot-note is, therefore, entirely misleading.

The lease in question is a permanent heritable non-transferable lease, but the lessee holds under no judicial decision, and the Settlement Officer at last Settlement was, therefore, justified in not dealing with it under section 79. The rent is clearly a favourable one and enhancement has rightly been given. I would decree the appeal and restore the finding of the Assistant Collector with costs throughout.

BAILLIE, S. M.—I concur.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 376 OF 1913.

August 6, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

JAMBAGATHAMMAL—APPELLANT

versus

KANAKATHAMMAL AND OTHERS—RESPONDENTS.

Receiver—Discretion to spend money on litigation—Appellate Court, interference by—Security for restitution—Civil Procedure Code (Act V of 1908), O. XL, r. 1 (d)—Appeal.

A Receiver's discretion to spend money on litigation ought not to be interfered with by an Appellate Court. If necessary or desirable the Court of first instance will take security from him for restitution to the estate of such expenses in certain events.

Quære.—Whether an appeal lies against an order of the lower Court regulating such expense?

Kamalathammal v. *Srinivasachariar*, 14 Ind. Cas. 277; 11 M. L. T. 383, *Mohunt Anant Das* v. *Ram Parkash Das*, 5 Ind. Cas. 69; 14 C. W. N. 183, *Eastern*

BAIJU SINGH *v.* NARAIN DIN.

Mortgage Agency Co. Ltd. v. *Fakuruddin Mahomed Chowdhury*, 17 Ind. Cas. 849; 17 C.W.N. 1, *Keshobati Kumari* v. *Mac Gregor*, 35 C. 568; 12 C. W. N. 648, followed.

Appeal against the order of the Court of the Subordinate Judge of Tanjore, dated the 16th September 1910, in Interlocutory Appeal No. 178 of 1913, in Original Suit No. 35 of 1912.

Mr. *P. R. Srinivasa Aiyangar*, for the Appellant.

Mr. *T. V. Gopalasawmi Mudaliar*, (with him Mr. *K. Bashyam Aiyangar*), for the Respondents.

JUDGMENT.—We do not see sufficient reason to interfere with the discretion of the lower Court in refusing to direct the Receiver not to spend money for the conduct of the defence of the minor 2nd defendant, especially as the learned Subordinate Judge has directed the Receiver to obtain the orders of the Court "before actually disbursing amount or incurring the expenditure." We take it that, if necessary or desirable, the lower Court will pass orders that the Receiver shall give security for restitution to the estate of such expenses in certain events.

We, therefore, dismiss the appeal with costs without deciding the rather difficult question whether an appeal really lies from the order of the Subordinate Court, that is, whether the order really falls under Order XL, rule 1 (*d*), of the Civil Procedure Code. [See *Kamalathammal* v. *Srinivasachariar* (1); *Mohunt Anant Das* v. *Ram Perkash Das* (2); Civil Revision Petition No. 555 of 1912; *Eastern Mortgage Agency Co. Ltd.* v. *Fakuruddin Mahomed Chowdhury* (3) and *Keshobati Kumari* v. *MacGregor* (4)].

Appeal dismissed.

(1) 14 Ind. Cas. 277; 11 M. L. T. 383.
(2) 5 Ind. Cas. 69; 14 C. W. N. 183.
(3) 17 Ind. Cas. 849; 17 C. W. N. 1.
(4) 35 C. 568; 12 C. W. N. 648.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

CIVIL REVISION PETITION No. 30 OF 1913-14 OF UNAO DISTRICT.

April 5, 1914.

Present:—Sir Duncan Colvin Baillie, S.M., and Mr. Tweedy, J. M.

BAIJU SINGH—DEFENDANT—APPELLANT

versus

NARAIN DIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Oudh Rent Act (XXII of 1886), s. 108 (10)—Recovery of occupancy of land, suit for, maitainability of—Under-proprietor—"Haqiyat mutafarriqa", *holder of—Plot proprietor paying revenue to* lambardar, *not under-proprietor—Government revenue, engagement of, right as to.*

A plot proprietor, generally known as a holder of "*haqiyat mutafarriqa* (miscellaneous area), who pays his revenue (and not rent) to the *lambardar* and has his name recorded in the *khewat*, has, like every other proprietor, a right to engage for the Government revenue, although for convenience' sake the engagement is made through the *lambardar*, and is thus a co-sharer and not an under-proprietor as defined in the Oudh Rent Act. He is, therefore, not entitled to bring a suit for the recovery of the occupancy of land under section 108 (10) of the Act.

Munshi Gobind Prasad v. *Suraj Bakhsh*, 4 S. D. 1903, explained.

Appeal from the decree of the Commissioner, Lucknow, dated 24th November 1913.

JUDGMENT.

TWEEDY, J. M.—(*March 30th*, 1914)—The main question for disposal in this appeal is whether the respondent is entitled to bring a suit for the recovery of the occupancy of land under section 108 (10). He is recorded as a *plot proprietor*, a holder of what is generally known as a "*haqiyat mutafarriqa*" or miscellaneous area, and he pays his revenue to the *lambardar*. The Court of first instance appears to have never considered the legal difficulty but to have assumed that a "plot proprietor" was an under-proprietor. The difficulty was present to the mind of the Commissioner but, relying on *Munshi Gobind Prasad* v. *Suraj Bakhsh* (1), he has come to the same conclusion as the Assistant Collector. The first thing to note is that the definition of an under-proprietor in the Oudh Rent Act is that he is a person who has heritable and transferable interests in land *for which he is liable to pay rent*. There is no evidence that the respondent is liable to pay rent and it is perfectly certain that he would repudiate any such idea, for he has full proprietary rights in his plot and pays Government revenue. He is, therefore, not an "under-proprietor" within the meaning of the Oudh Rent Act and cannot sue under section 108 (10). I think the Commissioner has to a certain extent misunderstood the Selected Decision quoted, and it must be admitted that there is one sentence in it which lends itself to misconstruction. At the bottom of page 5 it says, "an under-proprietor is the owner of

(1) 4 S. D. 1903.

land within a *mahal* who does not engage directly with Government but who pays his assessment to the proprietor of a *mahal*." The Board's meaning is more clearly expressed in the sentence following at the top of page 6 where it is laid down that "the point to ascertain is whether the proprietary interest reserved included *the right to engage* for the revenue or not." The test laid down in the ruling is not whether Government revenue is paid direct, but whether the right to engage to its payment exists. Every proprietor has this right, although for convenience' sake the engagement is generally made through the *lambardar*. A plot proprietor stands on the same footing in this respect as a co-sharer, for his name is in the *khewat* and he is liable for the revenue assessed on his plot.

It is clear then that the respondent is not an under-proprietor and I would accordingly decree the appeal and, setting aside the judgments of both Courts with costs, order the suit for the recovery of occupany of land to stand dismissed.

BALLIE, S. M.—I concur.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 403 OF 1913.

September 25, 1914.

Present:—Mr. Justice Hannay.

N. C. KUPPUSAMY AIYANGAR AND OTHERS—DEFENDANTS—PETITIONERS

versus

N. C. NARAYANA AIYANGAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115, O. XX, r. 7—Revision, wrong decision on point of limitation, whether ground for—Presidency Small Cause Courts Act (XV of 1882), s. 38—Eight days' period, from what date to commence when decree amended as to costs.

An erroneous decision on a question of limitation by a Court having power to decide that question does not justify a High Court's interference under section 115, Civil Procedure Code.

Sundar Singh v. *Doru Shankar*, 20 A. 78; A. W. N. (1898) 168, *Ramgopal Jhoonjhoonwalla* v. *Joharmal Khemka*, 15 Ind. Cas. 547; 39 C. 473, followed.

Even where a decree is amended as to costs the eight days' period of limitation for re-opening the case on its merits will be reckoned from the date of the original decree and not from the date of the amended decree.

Brojo Lal Rai Chowdhury v. *Tara Prasanna Bhattacharji*, 3 C. L. J. 188, *Parameshraya* v. *Seshagiriappa*, 22 M. 364, followed.

Venkata Jogayya v. *Venkatasimhadri Jagapatirazu*, 24 M. 25, distinguished.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the judgment of the Court of Small Causes, Madras, in Full Bench Application No. 1 of 1913 (Suit No. 7221 of 1912).

Mr. *V. C. Seshachariar*, for the Petitioners.

Mr. *T. G. Raghavachariar*, for Mr. *V. V. Srinivasa Aiyangar*, for the Respondent.

JUDGMENT.—The preliminary objection is taken that this revision petition under section 115 of the Code of Civil Procedure is not sustainable, as it raises no question of jurisdiction. The Full Bench of the Presidency Small Cause Court dismissed the application of the present petitioners (defendants in the suit) for a new trial, on the ground that the application was barred by limitation, and it is this judgment of the Full Bench which is now sought to be revised.

Though the petition for revision attacks the decision of the Full Bench upon the question of limitation as erroneous in law on various grounds, it nowhere raises any question of jurisdiction in that connection. The only paragraph of the revision petition which raises any question of jurisdiction (*viz.*, No. 8) refers to other matters than that of limitation. Apart from this the cases *Sundar Singh* v. *Doru Shankar* (1) and *Ramgopal Jhoonjhoonwalla* v. *Joharmall Khemka* (2), cited by the respondent's Vakil, are authority for the position that an erroneous decision on a question of limitation by a Court having power to decide that question does not justify interference under section 115 of the Code of Civil Procedure. For the petitioners the case of *Naraya Hegde* v. *Vitla Prabhu* (3) is referred to. That case,

(1) 20 A. 78; A. W. N. (1898) 168.

(2) 15 Ind. Cas. 547; 39 C. 473.

(3) 12 Ind. Cas. 75; 21 M. L. J. 1020; (1911) M. W. N. 239; 10 M. L. T. 281.

however, does not purport to deal with the question decided in the Allahabad and Calcutta cases above mentioned, nor to lay down any proposition of law opposed to the conclusion arrived at by them. It does not appear to have been intended even to lay down the general proposition which appears in the head-note. As I understand the facts of the case, there was more than a mere error in deciding a question of limitation. The initial error was a misconstruction of section 48 of the Code, the construction placed thereupon by the lower Court being found to be opposed to a long series of decisions. I, therefore, follow the Allahabad and Calcutta cases cited above, both of which rely upon the decision of the Privy Council in *Amir Hassan Khan* v. *Sheo Baksh Singh* (4), and hold that I have no power under section 115 of the Code of Civil Procedure to revise the decision of the Full Bench of the Presidency Small Cause Court on the question of limitation merely because it is alleged to be erroneous.

The petitioners then urge, upon the strength of the Full Bench ruling in *Kristamma Naidu* v. *Chapa Naidu*(5), that the Full Bench of the Presidency Small Cause Court may be said to have acted in the exercise of its jurisdiction illegally or with material irregularity inasmuch as the decision on the question of limitation is perverse in the sense that it involves a conscious departure from some rule of law or procedure. The decision turned upon the question whether the starting point of limitation for the purposes of the application to the Full Bench was the date of the original decree or the date of an amendment thereof relating to costs only. The original decree was dated the 30th September 1912 and the amendment was made on the 19th December 1912. The period for making an application under section 38 of the Presidency Small Cause Courts Act is eight days. The application in this case was one on the merits of the case and had no reference at all to the amendment as to costs. The Court, relying on Order XX, rule 7, of the Code of Civil Procedure, and the decision in *Brojo Lal Rai Chowdhury* v. *Tara Prasanna Bhattacharji* (6) and *Parameshraya* v. *Seshagiriappa* (7), held that limitation began to run from the date of the original decree and declined to adopt the suggestion that the decision in *Venkata Jogayya* v. *Venkatasimhadri Jagapatirazu* (8) should be applied and that the amendment should be treated as virtually an application for review of judgment, on the ground that the case cited referred to execution of decrees, and that the Court has no powers of review. I can find nothing here to support the contention that there was any conscious departure from any rule of law or procedure such as to justify interference under section 115, Civil Procedure Code.

The petition is, therefore, dismissed with costs.

Petition dismissed.

(4) 11 C. 6 (P. C.); 11 I. A. 237; 4 Sar. P. C. J. 559; Rafique and Jackson's P. C. No. 83.
(5) 17 M. 410 (F. B.).
(6) 3 C. L. J. 188.
(7) 22 M. 364.
(8) 24 M. 25.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 135 OF 1911.

March 7, 1912.

Present:—Mr. Lindsay, J. C., and Mr. Rafique, A. J. C.

Chaudhri MUHAMMAD HUSAIN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Thakur LALJI SINGH—PLAINTIFF AND *Chaudhri* MEHDI HUSAIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pleadings—Execution of deed denied—Burden of proof—Contract—Minority, plea of—Proof of majority—Discharge of burden of proof—Facts elicited in cross-examination of opposite party's witnesses—Endorsement as to age made by registering officer, effect of—Registration Act (XVI of 1908), s. 35—Burden of proof shifted in appeal—Opportunity to produce fresh evidence, when to be granted.

Where in a mortgage-suit a defendant pleaded that he never executed the mortgage-deed, that if it was signed by him it was done under undue influence and that if the execution of the deed was proved the contract was void by reason of his being minor at the time of the execution:

Held, that on the above pleadings it must be taken that the defendant did positively deny the execution of the deed.

Where in a suit upon a contract, *e.g.*, a mortgage, a plea of minority is raised by the defendant, the burden of proving that he was of age when the contract was entered into, lies upon the plaintiff seeking to enforce the contract, for he

must show that the contract is valid and legally enforceable.

Kanhaya Lal v. *Girdhari Lal*, 13 Ind. Cas. 956; 9 A. L. J. 103 and *Gaya Din* v. *Musammat Dulari*, 2 Ind. Cas. 839; 6 A. L. J. 693, referred to.

An endorsement made on a document by a Registering Officer at the time of registration showing that the executant described himself as a major, is no proof that he was so at that time, when no inference as to the age of the executant can be drawn from the body of the document itself, inasmuch as under the provisions of the Registration Act a Registering Officer is not bound to record the age of any person appearing before him.

In considering whether or not the defendant discharged the burden laid upon him of proving a certain fact, he is, apart from the evidence of his own witnesses, entitled to have taken into consideration the statements elicited from the plaintiff's witnesses in their cross-examination as regards that fact.

A party to whom the burden of proof is shifted on by the Appellate Court cannot be allowed an opportunity to produce fresh evidence in order to discharge that burden, if he is not put to any disadvantage or in any way taken by surprise in the matter by the lower Court's putting the burden on the wrong party

Chandra Kunwar v. *Chaudhri Narpat Singh*, 29 A. 184 (P. C.), 4 A. L. J. 102, 11 C. W. N 321; 5 C. L. J. 115; 17 M. L J. 103, 2 M L. T. 109; 9 Bom. L R. 267, referred to.

Appeal from the decree of the Subordinate Judge, Tahsil Biswan, dated 28th July 1911.

Syed *Wazir Hasan*, for the Appellants.

Babu *Ishri Prasad*, Babu *Shami Dayal* and Babu *Shyam Sunder*, for Respondent No. 1.

JUDGMENT.—This appeal arises out of a suit brought by the first respondent, Thakur Lalji Singh, in which he claimed possession as mortgagee over *Mauza* Bahoti. There was also a further prayer in the plaint that in the event of its not being possible to award the plaintiff possession over any portion of the said *mauza* he might be awarded possession of portions of two other villages named Azizpur and Daulatpur, the property of the defendants. The defendants to this suit were Chaudhri Mehdi Husain and his three sons, Muhammad Husain, Ali Husain and Hadi Husain. The appeal before us is on behalf of two of these defendants only, namely, Muhammad Husain and Ali Husain who were respectively the defendants Nos. 2 and 3 in the suit. With regard to the fourth defendant Hadi Husain, the claim of the plaintiff so far as his interest in the mortgaged property was concerned was dismissed, and there is no appeal before us against this decision. The defence of the two appellants Muhammad Husain and Ali Husain to the suit brought by the plaintiff-respondent No. 1 was to the effect that they were in reality no parties to the mortgage contract in suit. They pleaded in the first place that they never executed the mortgage in question and they further pleaded that at the time the mortgage contract referred to was entered into they were minors and that consequently the contract relied upon by the plaintiff was as regards them utterly void in law. Other pleas were also taken in defence, but for the purposes of disposing of this appeal it is necessary to refer only to the two pleas we have just mentioned.

Before going to discuss the points which arise for determination in this appeal it is necessary to set out certain facts in order to elucidate the nature of the case brought by the plaintiff in the Court below. It appears that the three villages Bahoti, Azizpur and Daulatpur belonged at one time to two brothers named Wazir Ali and Ehsan Ali in equal shares. Ehsan Ali had no issue. The defendant Chaudhri Mehdi Husain is a son of Wazir Ali and the other three defendants in the case who are the sons of Mehdi Husain are, therefore, the grandsons of Wazir Ali. It is stated that by reason of Ehsan Ali's not having any issue of his own he made over his half share in the village mentioned to the three sons of Chaudhri Mehdi Husain. The allegation is that this transfer was made by means of a gift. There is no very clear evidence as to the method in which the transfer alleged took place, but it is a fact that the names of Muhammad Husain, Ali Husain and Hadi Husain were and are still recorded in the revenue papers as the owners of an eight-annas share in each of these villages. The other eight-annas share is recorded in the name of the father of these three persons, namely, Chaudhri Mehdi Husain. It may be well to note here that before the trial of the case began in the Court below, the plaintiff's Pleader admitted that mutation of names with regard to an eight-annas share in each of these three villages was effected in favour of these three defendants with the consent

of Wazir Ali. The learned Pleader did not admit that any gift had been executed in favour of these three defendants, but he informed the Court that it was not necessary that the question of title of these defendants should be discussed in this case. It is further recorded that the same learned Pleader denied the title of these defendants, but stated that they were the ostensible owners of a share of the property in suit and that even if the title were not proved the mortgage would be binding on them. The attitude of the plaintiff's Pleader in this connection is a somewhat curious one. It looks as if in spite of his client the plaintiff's being the mortgagee, he was disputing the title of these three defendants whom he alleged to be his mortgagors—a position which it was not open to him to take. We need not say anything more about this part of the case except that we must take it that the suit proceeded on the footing that these three defendants were in fact owners of an eight-annas share in the villages Bahoti, Daulatpur and Azizpur.

The mortgage under which this suit for possession was brought bears the date 23rd July 1902. It is admitted that the deed in question is nothing more than a fresh contract substituted in place of a previous contract dated the 18th July 1900 to which we will first refer. This latter deed is a deed of mortgage with possession executed in favour of Thakur Balbhaddar Singh, the father of the present plaintiff. It purports to have been executed by Chaudhri Wazir Ali, grandfather of the appellants, and by the two appellants and their younger brother, Hadi Husain. According to the recitals contained in the deed Saiyed Wazir Ali and Muhammad Husain, the first appellant in this case, executed on their own behalf, while Wazir Ali executed on behalf of the other two defendants, namely, Ali Husain and Hadi Husain, purporting to act in the capacity of their guardian. It has not been explained how, while their father Chaudhri Mehdi Husain was still alive, it was possible for the grandfather of these appellants to act as guardian on behalf of any of them, nor is it clear what authority he had to dispose of the property of any of his minor grandsons by mortgage or sale. The mortgage-money under this deed was Rs. 14,000 and possession was given to the mortgagee for a period of ten years. As to the way in which the mortgage-money received under this deed was applied the evidence goes to show that about Rs. 7,000 of it was paid on account of a mortgage-debt due to the wives of one Sher Khan in respect of a mortgage executed in their favour on the 23rd July 1897. That mortgage it may be noted was executed by Wazir Ali alone. A further sum of Rs. 6,990 is said to have been applied to the discharge of two debts due to one Ram Ghulam—one under a mortgage executed on the 7th March 1898 and the other under a bond dated the 9th March of the same year. Both this mortgage-deed and this bond were executed by Wazir Ali and his son Mehdi Husain. The result, therefore, seems to be that out of this sum of Rs. 14,000 all but Rs. 12,000 was applied to satisfy debts which were due either from Wazir Ali alone or from Wazir Ali and his son Mehdi Husain. We may also note here that the first defendant Mehdi Husain who was examined as a witness in the case, deposed that the balance of this mortgage-money was spent by his father Wazir Ali himself. Coming now to the mortgage-deed in suit which as we have already said is alleged to have been executed on the 23rd July 1902, we find that the effect of it is to do away with the previous possessory mortgage executed in favour of Balbhaddar Singh and to substitute therefor a simple mortgage containing a clause authorizing the mortgagee to take possession under certain circumstances. According to the plaintiff in this suit these circumstances have come into existence and his prayer is, therefore, for an enforcement of possession in accordance with the clause just mentioned. The consideration for the deed of mortgage now in suit is expressed to be Rs. 16,000 made up of the following items:—

(1) Rupees 14,000 due on account of the mortgage-deed dated the 18th July 1900;

(2) a sum of Rs. 400 due under a pro-note executed by the first defendant, Mehdi Husain;

(3) a sum of Rs. 100 on account

of stamp and registration expenses; and

(4) a sum of Rs. 1,500 stated to have been paid in cash at the time the deed was registered.

According to the terms of the deed which purports to have been executed by Mehdi Husain, Muhammad Husain and Ali Husain on their own behalf and also by Mehdi Husain on behalf of his minor son Hadi Husain, the two appellants in this case ,Muhammad Husain and Ali Husain, were of full age (*baligha*n). We have already stated that the two appellants now before us have denied execution of the deed in suit. The lower Court found against them on this point and held that execution by them was proved. In dealing with this question the learned Subordinate Judge who tried the case states in his judgment that the second defendant, that is to say, Muhammad Husain, admitted execution of the deed although he pleaded that he was a minor at the time of execution. In support of this statement the Subordinate Judge refers to paragraphs 12 and 13 of the written statement filed by Muhammad Husain. Similarly he has stated that execution was admitted in the same way by the defendant-appellant Ali Husain. In this connection he refers to paragraph 13 of the written statement filed on behalf of this defendant. We do not think that the learned Subordinate Judge has correctly described the nature of the defence which was set up by these defendants-appellants. To deal first with the written statement of the defendant-appellant Muhammad Husain, we find in paragraph 11 of his written statement the following plea :—"The answering defendant never took any loan from the father of the plaintiff nor did he ever execute any deed in his favour nor was there any necessity to execute such deed." In paragraph 12 of the written statement to which the Subordinate Judge refers, Muhammad Husain does say that if his father (that is Mehdi Husain) ever got him to sign any deed by the exercise of undue influence then such execution is invalid and void. In paragraph 13 he went on to say that even if execution of any deed was proved the contract was void by reason of his being a minor at the time, that is to say, about 17 or 18 years old. With regard to the written statement put in by the defendant-appellant Ali Husain, we note that Ali Husain and his brother, Hadi Husain, filed a joint written statement. In paragraph 10 of that joint written statement the plea taken reads as follows :—"The answering defendants never executed any mortgage-deed in favour of the plaintiff or his father nor have they ever taken any loan." In paragraph 12 it is further stated that in the year 1902 when the deed in suit purports to have been executed the defendant No. 3, that is Ali Husain, was at the most 15 or 16 years old. In paragraph 13 Ali Husain did state that so far as he could recollect his father, the defendant No. 1, took advantage of his tender age and got him to sign a paper. He went on to say that if the deed now before the Court was that paper, then it was not binding upon him because he received no consideration and execution on his behalf was obtained by the exercise of undue influence upon him while he was still of tender age. We are clearly of opinion that on these pleadings it must be taken that both the defendants-appellants did positively deny execution of the deed in suit ; and even if it be taken that the pleadings as they stand leave any doubt in the matter, that doubt is removed by what took place in the proceedings in the Court below held before the issues were framed. The record shows that the Subordinate Judge after reading the pleadings called upon the Pleaders for the parties to make certain statements in connection with the nature of their respective cases. The Pleader who appeared on behalf of the defendants Nos. 2, 3 and 4, Mr. Saiyed Ishaq Husain, stated definitely that he denied the execution of the mortgage-deed in suit by the defendants Nos. 2, 3 and 4. We have already referred to the statements of these defendants-appellants as to their minority at the time when the mortgage-deed in suit was executed and we may also state here that their Pleader, the gentleman whose name we have just mentioned, also stated quite clearly before the Court that at the time when the deed in suit was executed the second defendant, that is Muhammad Husain, was a minor. It being admitted that Ali Husain is younger than Muhammad Husain it follows that if it be found that Muhammad Husain was a minor at the date of the alleged execution his younger brother, Ali Husain, must also have been a minor. The first point which is raised in appeal before us is that

the lower Court was wrong in holding that the execution of the mortgage-deed by the two defendants-appellants had been proved. The first question, therefore, which we are called upon to decide is whether this ground is a valid one. The deed being a deed of mortgage is one which the law requires to be attested, and consequently under the provisions of section 68 of the Indian Evidence Act execution of the deed must be proved by the evidence of at least one attesting witness. There is on record the evidence of three witnesses who swear to having attested the deed in suit. The first of these is one Har Prasad. In his examination-in-chief he stated that both the appellants, namely, Muhammad Husain and Ali Husain, signed the document in his presence. In cross-examination he admitted that he had refreshed his memory by looking at the deed before he went into the witness-box, and he also admitted that but for seeing the document he would not have been able to say who signed the deed or whether in fact the appellants had signed it. However he does not appear to have modified the first statement he made to the effect that both these appellants did in fact execute the deed. The second attesting witness is Ram Narayan. His recollection of the matter appears to be distinctly hazy. He says he cannot remember whether the executants signed in his presence or not. He was unable to say whether any of them had signed before or after him. He wound up by saying that the executants were Mehdi Husain and his sons, but he was unable to say which of the sons. The third attesting witness called was one Akbar Shah (P. W. No. 6). He began by saying that the deed was executed in his presence, that he attested it and signed his name after the executants had signed theirs. He qualified this statement then by saying that Mehdi Husain, Muhammad Husain and Ali Husain had signed it, but he could not remember exactly. He remembered that these persons were present at the time of registration. In cross-examination he summed up his recollection of the matter by saying that Mehdi Husain had asked him to get him money by way of loan, that in consequence he went to see Ramadhin, the uncle of Balbhaddar Singh, that finally this document was executed and that he signed it and it was registered. He concluded by saying that Mehdi Husain signed the deed in his presence, but that he could not remember about the signatures of the others. There is a curiously uncertain note about the evidence of all these attesting witnesses and particularly about the evidence of the two witnesses last named. It would seem that these persons were not very comfortable under cross-examination and if the evidence of execution consisted merely of the statements of these last two witnesses, we think that it could not possibly be held to be established beyond all reasonable doubt that the two defendants-appellants did, as a matter of fact, execute the deed. However we must take it that Har Prasad, the first witness, called in this connection did adhere to his statement that the deed was executed by these appellants and we also note that the first defendant, Mehdi Husain who was examined as a witness, has sworn that he made the two appellants sign the deed although he goes on to say that they were both minors at the time. It is doubtful whether implicit reliance can be placed upon the statement of Mehdi Husain whose conduct throughout the whole of the transaction culminating in the mortgage now in suit is of a very suspicious character. But on the whole we are unable to say that the finding by the lower Court that the deed in suit was executed by these appellants, is incorrect though we do not at all agree, as we have already said, with the Subordinate Judge when he states that execution by these defendants was admitted. We decide, therefore, that execution by the appellants was proved.

The next point for our decision is whether or not the appellants were minors on the 23rd July 1902 when the deed in suit was executed. The finding of the Court below is that they were of age on the date in question. In this connection the first point to be discussed is with reference to the burden of proof. The second issue as framed in the Court below reads as follows: "Whether the defendants Nos. 2 and 3 were minors at the time of the execution of the mortgage-deed." According to the language in which this issue is framed it would appear that the Court below was of opinion that the

burden of proving minority lay upon the defendants-appellants; and it is argued in appeal here that this view of the Court below was incorrect. In support of this argument the learned Counsel for the appellants relied upon the decision of the Allahabad High Court in the case of *Kanhaya Lal* v. *Girdhari Lal* (1). This ruling follows a previous ruling of the same Court, *Gaya Din* v. *Musammat Dulari* (2). According to these rulings the burden of proving that a contract was a valid contract when it was made, lies upon the plaintiff; and when in a suit upon a contract a plea of minority is raised by the defendant it is laid down that the burden of proving that the defendant was of age when the contract was entered into, lies upon the plaintiff who seeks to enforce the contract. On behalf of the respondents it has been contended that these rulings are wrong and should not be followed, but we are unable to accept this argument. It is now well settled—even if it can be said that the matter was ever in doubt—that an agreement entered into by a minor is absolutely void and unenforceable at law. Before a plaintiff can ask a Court for any relief on the strength of a contract which he sets up, he must of necessity show that the agreement is a valid one which the law will enforce; and consequently if the validity of the agreement sued upon is denied by the defendant it is for the plaintiff to establish that the agreement is a binding contract. We have no doubt whatever, therefore, that in the present case it lay upon the plaintiff to establish affirmatively that the appellants were of age at the time when the deed was executed. Now so far as the plaintiff's evidence is concerned it is true that in their examination-in-chief his witnesses were not called upon to make any statement as to the ages of the two appellants at the time of execution; but they were cross-examined on the point and the statements made in cross-examination demonstrated in the clearest possible manner that these defendants-appellants must have been under age at the time when this mortgage-deed was executed. We would refer to the evidence of the plaintiff's witnesses on this point in detail. We have first the evidence of Har Prasad. It is apparent that Har Prasad knows Mehdi Husain and the members of his family. In his cross-examination he stated that Mehdi Husain had four sons and four daughters. The eldest of these he said was a daughter 26 or 27 years of age. Muhammad Husain he described as being the eldest son and he stated positively that he was 24 or 25 years of age, that is to say, on the 22nd April 1911, the date upon which the witness was being examined. It follows from this that in 1902 Muhammad Husain could not have been more than 15 or 16 years of age. He was, therefore, according to this evidence a minor on that date, not being of the age of 18 years. The next witness to whose statement we would refer is that of Roshan Lal (P. W. No. 3) who was a *mukhtar* of Balbhaddar Singh and of the plaintiff. He states in his evidence that he has been a *mukhtar* in the Ramkot Estate for about 19 years and there can be no doubt that he knows Mehdi Husain and his family very well. In his cross-examination Roshan Lal stated that he knew the four sons of Mehdi Husain, that the youngest (that is, Hadi Husain) was 15 or 16 years of age, and that the next in age to him Ali Husain was 22 or 23 years of age. Roshan Lal's evidence was taken on the 22nd April 1911 and it would, therefore, appear that Ali Husain in the year 1902 could only have been 13 or 14 years of age. Another witness in this connection is P. W. No. 4, Amanat-ullah. This witness was called to prove the execution of a deed in 1899 by the defendant Muhammad Husain, the object being to make out that Muhammad Husain at that date was of full age. The deed in question is said to be a *zamanatnamah* or deed of surety which Muhammad Husain is said to have executed in order to secure the payment of the rent reserved by a lease which his father, Mehdi Husain, had taken from a *talukdar*. The original *zamanatnamah* was not produced in Court, though it would appear that some attempt had been made to call the original from the possession of one or other of the defendants. Amanat-ullah has sworn that he attested the original deed (*zamanatnamah*) of which Exhibit 7 is copy. The plaintiff relied upon this deed in proof of the age of Muhammad Husain. There is nothing, how-

(1) 13 Ind. Cas. 956; 9 A. L. J. 103.
(2) 2 Ind. Cas. 839; 6 A. L. J. 693.

ever, in the body of the document from which any inference can be made as to the age of Muhammad Husain on the date when he executed it. From the endorsement made on this document at the time of registration it appears that Muhammad Husain described himself as being twenty years of age and much stress is laid upon this circumstance by the respondents' Counsel. We do not think that any statement of this kind contained in an endorsement made by a Registering Officer can be put forward as proof of age, for under the provisions of the Registration Act there is nothing which authorises a Registering Officer to put on record any note of the age of a person presenting a document for registration. It is true that under section 35 of the Registration Act a Registering Officer may refuse to register a deed if the person who claims to have executed it appears to him to be a minor. But there seems to be no authority for the proposition that a Registering Officer is obliged to make any record of the age of any person who appears before him. Apart from this the evidence of Amanat-ullah himself disposes completely of the case which the plaintiff attempted to set up on the strength of this endorsement. Amanat-ullah is on his showing a man who knows Mehdi Husain and his family very well. In cross-examination this witness stated that Muhammad Husain did, in fact, execute the deed in question. He described Muhammad Husain as being the eldest son of Chaudhri Mehdi Husain. He goes on to say that at the time when he was giving his evidence Muhammad Husain was about 25 or 26 years of age. That was on the 22nd April 1911. He further stated that the deed was written 11 or 12 years ago. As we have already pointed out the deed purports to have been executed in 1899. The witness then stated definitely that when Muhammad Husain executed this deed he was only 13 or 14 years old. He says most positively that Muhammad Husain executed the deed under the orders of his father and that there was a dispute between the father and the son for about three days before the son consented to execute the deed. The witness also refers to Ali Husain, the other son whom he knows. He describes him as being 22 or 23 years of age. Amanat-ullah's statement, therefore, shows quite clearly that neither Muhammad Husain nor Ali Husain could have been of the full age of 18 years in 1902 when the deed in suit was executed. As regards this *zamanatnamah* we may also point to the evidence of the first defendant Mehdi Husain. Mehdi Husain states that he took several villages in farm from a *talukdar* named Karim Bakhsh and that his son Muhammad Husain stood surety for him to secure the payment of the rent reserved by the *talukdar*. He says that he told Karim Bakhsh, the *talukdar*, that his son was a minor and that his security would be ineffectual. The evidence of the plaintiff's own witness Amanat-ullah, therefore, is a very strong corroboration of this statement made by the defendant No. 1 in the course of his examination and so far as this document is concerned, we hold that it affords no proof whatever that Muhammad Husain was of age in 1899. We may next refer to the evidence of the attesting witness, Akbar Shah (P. W. No. 6). This man in his cross-examination deposed that Mehdi Husain's eldest son was Muhammad Husain and that he was 25 or 26 years old. On this statement, therefore, Muhammad Husain could not have been more than 17 years of age in 1902. Akbar Shah, it may also be noted, was an attesting witness to the *zamanatnamah* referred to in the evidence of the witness Amanat-ullah. He says that Muhammad Husain executed this *zamanatnamah* in favour of his (witness's) master. In re-examination he said that some one might have given Muhammad Husain's age as 20 years at the time when this deed was executed, that is to say, on the 4th September 1899, but his statement in cross-examination proves quite clearly that Muhammad Husain could not have been of that age in 1899. From this review of the evidence offered by the plaintiff it is perfectly plain that the plaintiff cannot be said to have established positively that the two appellants were of full age when the deed was executed in the year 1902. The respondents' learned Counsel, however, as has already been noted, contended that even if the burden of proof lay upon him it was necessary for him to give only very slight evidence in order to shift the burden on to the

defendant. He claimed in his argument that sufficient evidence had been given on his side in order to shift the burden on to the other side. It cannot be contended as we have already pointed out that any statement made in the endorsements of registered deeds can be put forward as evidence to show that one or other of the appellants was of a particular age at the time of the registration of one or other of the deeds. It is argued, however, that the recitals contained in the mortgage-deeds of 1900 and 1902 show that the defendants-appellants were of age at the time when the deed in suit was executed. We are not disposed to attach any great importance to the recitals in these two deeds one of which, *viz.*, the deed in suit, is impeached by the defendants as being nothing short of a fraudulent transaction. It is true that in the first mortgage of the 18th July 1900 Muhammad Husain is described as *baligh*. We are not prepared to allow that this statement creates any presumption in favour of the plaintiff's case which suffices to throw the burden of proof upon the other side. In the first place it is a most unusual circumstance in our experience for any party to a contract who is in fact of full age to be described as *baligh*. In the deed to which we are referring, the first executant, Saiyed Wazir Ali, the grandfather of the appellants, was no doubt of full age on the date on which this document was executed. He, however, is not described as *baligh* and it is not explained why in these circumstances it was considered necessary to set out that Muhammad Husain in particular was of full age. As for the document now in suit it would be absurd to attribute any weight to recitals contained in it which purport to show that both Muhammad Husain and Ali Husain were of full age on the date when it was executed. Here again we find the same curious circumstance. Mehdi Husain, one of the executants, who was undoubtedly of full age is not described as *baligh* and again no explanation is offered as to why Muhammad Husain and Ali Husain if they were really of full age on the date in question were described as being so by the addition of the expression *baligh*. However after a careful consideration of the case we are of opinion that even if it be conceded that the burden of proof of minority lay upon the defendants-appellants it was fully discharged. We have the evidence of Mehdi Husain himself who is the father of these appellants and if we believe his story, Muhammad Husain and Ali Husain the appellants were not of full age in 1902. He swears that in 1900 Muhammad Husain was only 14 or 15 years of age and that in the same year Ali Husain's age was 10 or 11 years. Another witness of the defendant No. 2 is Muhammad Sher Khan. This witness is a *talukdar* who pays Government revenue of Rs. 8,500 and is presumably a person of some position and character. It is true he is related to the appellants whom he describes as being his nephews, their mother being his sister. Muhammad Sher Khan states positively that Muhammad Husain is 25 or 26 years of age. This statement it may be noted fits in exactly with the statements made in cross-examination by the plaintiff's own witnesses. A third witness is Kudratullah, a *zemindar* who pays Rs. 800 Goverment revenue, and who knows Mehdi Husain and his family very well. He describes himself as being the maternal uncle of Muhammad Husain and he deposes to having remembered the time when Muhammad Husain was born. He was able to fix the year of Muhammad Husain's birth, for he says that one year after the date of Muhammad Husain's birth there was the Queen's Jubilee. The witness is obviously referring to the first Jubilee of 1887 and according to his evidence, therefore, it appears that Muhammad Husain must have been born somewhere about June 1886. Accordingly in 1902, when the deed in suit was executed, Muhammad Husain's age was only 16. Apart from this evidence if the burden of proof is to be laid upon the defendants in this case, it can hardly be denied that in considering the question whether or not the burden of proof has been discharged, the defendants are entitled to have taken into consideration the statements which were elicited from the plaintiff's witnesses in their cross-examination. We have already pointed out that every witness for the plaintiff who professes to have any knowledge of the ages of the defendants-appellants made admissions which prove that in 1902 neither of them could have been of the

full age of 18 years. These statements in cross-examination fit in exactly with the statements made by the defendants' own witnesses and taking the two together we consider we are justified in saying that assuming that the burden of proving minority lay in this case upon the defendants-appellants, that burden has been amply discharged by them. It was suggested in the course of argument on behalf of the respondents that if it were held in this Court that the Subordinate Judge had laid the burden of proving minority upon the wrong party, an opportunity should be afforded to the plaintiff to produce evidence to discharge the burden of proof if it properly lay upon him. We do not think that any suggestion of this kind can possibly be entertained at the present stage. The plaintiff-respondent cannot be heard to say that he has been put to any disadvantage or has in any way been taken by surprise in this matter. The question of minority was distinctly raised in the pleadings as also in the statement of the defendants' Counsel which was made in Court previous to the framing of the issues. The plaintiff must have been well aware that these appellants were trying to escape liability by pleading minority and although it may be said that the plaintiff did not directly offer any evidence as to the age of these defendants, it is nevertheless obvious that his witnesses in cross-examination made out the case which these defendants-appellants were seeking to prove. Again the plaintiff could not fail to be aware that the three witnesses who were examined for the defence also gave evidence to show that these two appellants were minors at the date of the mortgage in suit. In these circumstances if the plaintiff was not content to abide by the evidence already given and if he had at his command any evidence which might have rebutted the statements already made, it was his duty to ask the Court for an opportunity to put that evidence before it. Nothing of this sort appears to have been done and the plaintiff cannot now take shelter under a plea that he was placed at a disadvantage by reason of the second issue in the case not having been cast in the proper form. In this connection we may refer to a decision of their Lordships of the Privy Council reported as *Chandra Kunwar* v. *Chaudhri Narpat Singh* (1), a case which was referred to in the course of arguments by the respondents' learned Counsel. In that case one of the matters in dispute was whether one of the plaintiffs, Raja Makund Singh, was or was not the adopted son of Raja Kishen Singh. The Court of first instance had held that he was the adopted son of Kishen Singh. On appeal the High Court reversed this decision and one of the questions before their Lordships of the Privy Council was as to whether or not the burden of proof in this matter of adoption had been properly allocated. On behalf of Makund Singh it was pleaded before their Lordships that the question of adoption had not been properly tried and that no specific issue had been framed on the point. It was suggested, therefore, that if their Lordships were of opinion that the decision of the High Court was erroneous, the case should be remanded to allow of a decision on the question of adoption under an issue raised for that particular purpose. Their Lordships declined to accede to this suggestion on the ground that the plaintiff, Makund Singh, was well aware that the question of adoption would be raised and that documents had been put forward in the course of the trial the only object of the production of which could have been to establish the fact of adoption. Notwithstanding, therefore, the fact that no specific issue on the question of adoption had been raised their Lordships declined to send the case back for further inquiry on this point; and similarly in the case now before us we are satisfied that it would be most improper now that the case has been through two Courts * to give the plaintiff any further opportunity of proving that the defendants-appellants were of age at the date when the contract in suit was entered into. As we have pointed out this matter was brought plainly to the plaintiff's notice in the pleadings and in the preliminary proceedings before the lower Court and he had every opportunity if he so chose to put forward

(3) 29 A. 184 (P. C.); 11 C. W. N. 321; 4 A. L. J. 102; 5 C. L. J. 115; 17 M. L. J. 103; 2 M. L. T. 109; 9 Bom. L. R. 267.

* This decision being one on a first appeal the words "two Courts" appear to be simply a clerical mistake.—*Ed.*

any evidence which was available to him to prove that the appellants were of full age. We decline, therefore, to allow any further inquiry to take place on this point. Our finding is that the defendants-appellants were at the date of the execution of the mortgage-deed in suit minors and that so far as they are concerned, the contract in suit is not binding upon them. This finding is sufficient to dispose of this appeal.

We allow the appeal and modify the decree of the Court below by declaring that the mortgage of the 23rd July 1902 is not binding upon the defendants-appellants' shares in the property specified in the mortgage-deed and that consequently so far as these defendants-appellants are concerned, the plaintiff's suit must be dismissed with costs. The respondent No. 1 will pay the costs of this appeal.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 467 OF 1913.

September 9, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

RAJAMMAL AND ANOTHER—DEFENDANTS NOS. 2 AND 3—APPELLANTS

versus

MAHADEVA YOGI AND ANOTHER—PLAINTIFF AND DEFENDANT No. 1—RESPONDENTS.

Possession, suit for—Trespasser, ejectment of—Trespasser can question plaintiff's title — Consideration—Pleadings.

A person in possession can resist a suit for ejectment against all but the true owner. In other words, it is always open to a person sued in ejectment, even though his possession is that of a trespasser and without title, to show that the assignment to the plaintiff was only a sham transaction and to resist the suit on this ground.

Mulji Govindji v. *Nathubhai Hirachand*, 15 B. 1, relied upon.

Trimbak Bhikaji v. *Shankar Sham Rao*, 12 Ind. Cas. 532; 36 B. 37; 13 Bom. L. R. 947, explained.

Second appeal against the decree of the Court of the Subordinate Judge of Tanjore, in Appeal Suit No. 1024 of 1911, preferred against that of the District Munsif of Tiruvadi, in Original Suit No. 106 of 1911.

Mr. *T. V. Muthukrishna Aiyar*, for the Appellants.

Messrs. *C. V. Ananthakrishna Aiyar* and *P. S. Vydyanatha Aiyar*, for the Respondents.

JUDGMENT.—The plaintiff (respondent) sued for possession of a house which he purchased from a widow Balasundari Ammal (deceased before suit) by a registered sale-deed (Exhibit B). Appellants were the contesting defendants (Nos. 2 and 3). They impugned Balasundari Ammal's right to alienate the property and further contended that the sale by Exhibit B was a purely nominal transaction.

The District Munsif found that Balasundari Ammal had only a widow's estate in the property, and further that Exhibit B did not evidence a real sale and plaintiff obtained no title to the property under it. He, therefore, dismissed the suit.

The Subordinate Judge on appeal set aside the dismissal and gave plaintiff a decree. He found (therein agreeing with the Munsif) that an adoption set up by appellants was invalid and that they were not the reversioners to Balasundri's husband. He, therefore, held that it was not open to them to question the alienation (Exhibit B) and its consideration.

In so far as the transaction was attacked on the ground that it was in excess of a widow's powers of alienation, the Subordinate Judge is quite correct; but he appears to have overlooked the fact that this is not the only plea set up by the appellants and found in their favour by the District Munsif. The general principle is that a person in possession can resist a suit for ejectment against all but the true owners and whether appellants are reversioners or not, it is open to them to show if they can that respondent's sale-deed is a purely nominal transaction, never intended to be given effect to and absolutely void in law.

Respondent's Vakil argues that a person in possession without title cannot question the real nature of a registered document relied on as title by a plaintiff in an ejectment suit, and he relies on *Trimbak Bhikaji* v. *Shankar Sham Rao* (1). We have carefully considered the judgment

(1) 12 Ind. Cas. 532; 36 B. 37; 13 Bom. L. R. 947.

in that case. It contains one passage which certainly lends support to respondent's contention, but reading the judgment as a whole we doubt if the learned Judges intended their remarks to cover a case like the present. They were considering the view of the lower Appellate Court in that case, which had held that it was open to the first defendant therein (a mere trespasser as in the present case) to avail himself of all such grounds of attack as might have been raised by the plaintiff's alienor if she had sued to set aside the sale. They pointed out the fallacy of this view: and in this we respectfully agree. But we are not satisfied that they intended to lay down that it was not open to the 1st defendant to show that the alienation to plaintiff was an absolute nullity: if they did, we must equally respectfully dissent. We may refer to an earlier case of the same Court *Mulji Govindji* v. *Nathubai Hirachand* (2) in which Sargent, C. J., and Bayley, J., clearly said that it was always open to a person sued in ejectment to show that the assignment to the plaintiff was only a sham transaction and to resist the suit on this ground. In this view we agree.

We must, therefore, set aside the decree of the lower Appellate Court and rmand the appeal for re-hearing and disposal in the light of the above remarks. Cost will abide the result.

Appeal allowed.

(2) 15 B. 1.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 341 OF 1910.

April 27, 1914.

Present:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal.

HIRA LAL—PLAINTIFF—APPELLANT

versus

CHANAN KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration—Notice—Civil Procedure Code (Act V of 1908), s. 34—Interest after date of suit—Discretion.

The mere fact that a person resides at the place where a deed is registered is insufficient to fix him with notice of the deed.

Where the delay in the decision of a case is wholly due to some erroneous action of the plaintiff, the Court is justified in not awarding, under section 34 Civil Procedure Code, 1908, further interest after the institution of the suit upto the date of the realization of the decretal money.

Second appeal from the decree of the Divisional Judge, Amballa Division, dated the 27th October 1909, affirming that of the District Judge, Amballa, dated the 29th August 1906, dismissing the claim.

FACTS.—Plaintiff sues to recover Rs. 1,024 from defendants with a lien on the properties mentioned in the plaint. The facts are briefly these: Defendant No. 1 is a contractor in the Canal Department and took advances of money from plaintiff from time to time in a current account, which he opened with plaintiff on 19th February 1904. Shortly after this defendant No. 1 executed a registered agreement on 28th February 1904, binding himself that he would pay to plaintiff all cheques and other payments received from the Canal Department in respect of contract work done by him (defendant No. 1). The agreement also provided that defendant No. 1's moveable and immoveable property will be subject to a charge of the money then due, or which may hereafter become due to plaintiff. On 11th May 1905 defendant No. 1 made up accounts with plaintiff and signed a balance for Rs. 799-6-0 in favour of plaintiff, payable with interest at Re. 1-9-0 per cent. per month.

Defendant No. 1 executed a mortgage-deed in favour of defendants Nos. 2 and 3 on 20th August 1904 to whom he owed money, hypothecating his three houses, two boats and cattle, and also paid defendants Nos. 2 and 3 certain monies which he obtained from the Canal Department for contracts done by him.

Plaintiff alleges that defendant No. 1 had no right to execute this mortgage-deed or give the money he received by cheques from the Canal Department to defendants Nos. 2 and 3 contrary to his agreement with plaintiff, which created a prior lien in the latter's favour. Plaintiff accordingly sues to recover Rs. 799-6-0 principal, with Rs. 124-9-0 interest and Rs. 100 as damages provided for in the agreement in case of its terms being disregarded, from three houses in Rupar,

two boats Nos. 9 and 11 and a cheque for Rs. 377 payable to defendant No. 1 by the Canal Department and other moveable and immoveable properties of defendants.

Defendant No. 1 did not appear to defend the suit, though served with summons, and the case proceeded *ex parte* against him. However, he had put in a written reply before the suit was dismissed in default of plaintiff under section 102, Civil Procedure Code, supporting the pleas of other defendants, but did not come forward again after the case was restored to file.

Defendants Nos. 2 and 3 raised the following pleas :—

1. Plaintiff cannot sue alone without joining his brothers, Ralli Ram and Madho Ram, who constitute a joint Hindu family with him.

2. Defendants Nos. 2 and 3 have no knowledge of defendant No. 1 having dealings with plaintiff or executing the agreement in plaintiff's favour.

3. The alleged agreement cannot be admitted in evidence, nor does it create any charge on the property mentioned in the plaint, and plaintiff cannot recover his money from the property which is mortgaged in good faith to defendants Nos. 2 and 3 by mortgage-deed, dated 20th August 1904, to secure debts due to them.

4. Defendants Nos. 2 and 3 got the cheque for Rs. 337 attached in execution of their decrees against defendant No. 1. Two of the houses were previously mortgaged and other money was paid by defendant No. 1 to defendants Nos. 2 and 3 in satisfaction of debts.

5. Plaintiff had no cause of action against defendants Nos. 2 and 3.

JUDGMENT.—The facts of this case are fully given in the judgments of the lower Courts and need not be repeated here. The two points which require determination are (1) what amount, if any, is the plaintiff entitled to recover from Chanan, defendant No. 1; and (2) whether the defendants Nos. 2 and 3 are liable to refund to the plaintiff the money which they have recovered from the common debtor ?

On the first point it is not disputed by Mr. Sham Lal who appeared for Chanan that the lower Courts found, and that finding was upheld by the Chief Court, that defendant No. 1 had settled his account with the plaintiff on the 11th May 1905, and struck a balance for Rs. 799-7 with interest at Re. 1-9 per cent. per mensem. The plaintiff is, therefore, clearly entitled to a decree against Chanan for that amount and interest from the date of the balance to the date of the institution of the suit which comes to Rs. 124-9. We cannot, however, decree the claim for damages, nor do we see any sufficient reason for allowing interest after the date of the suit. The delay in the decision of the case is wholly due to the erroneous action of the plaintiff in impleading defendants Nos. 2 and 3, and this conduct on his part must militate against the prayer for the award of interest. We, therefore, decline to exercise our discretion under section 34, Civil Procedure Code, and refuse to grant the interest after the date of the institution of the suit.

As to the liability of the defendants Nos. 2 and 3, an elaborate argument has been addressed to us on the point of law which can only arise if the finding on the question of notice is in favour of the plaintiff. It appears from the remarks at page 8, lines 10 to 12 and 28 to 35 of the paper-book, that the learned Divisional Judge intended to hold that the plaintiff had failed to establish his contention as to the defendants Nos. 2 and 3 having notice of the deed in his favour before they recovered their debt from the debtor. If there had been a clear finding on this point we would have been precluded from disturbing it in this further appeal which has been admitted under section 70 (1) (*b*) of the Punjab Courts Act. In the absence of such a finding, we have allowed the appellant's Counsel to attempt to satisfy us by evidence on the record that his client had discharged the onus of proving that defendants Nos. 2 and 3 had notice of the contents of the deed on which the plaintiff's case is based. The only evidence which was relied upon in this connection is the statement of Lachman Singh, a witness for the plaintiff, to the effect that he mentioned the existence of the deed to one Chajju, an agent of the defendants. This statement coupled with the fact that the

deed was registered at Rupar where all the parties reside, is the only material upon which we are asked to give an affirmative finding in favour of the plaintiff. We have no hesitation in holding that this is wholly insufficient to discharge the onus and that the plaintiff has failed to fix defendants Nos. 2 and 3 with the knowledge of the contents of this deed. It is clear that in the face of this adverse finding the plaintiff has no case, and the question of law argued before us does not arise. We, accordingly, dismiss the appeal of the plaintiff against defendants Nos. 2 and 3 with costs.

The appeal of the plaintiff is accepted to this extent that he is granted a decree against Chanan for Rs. 799-7 *plus* 124-9, total Rs. 924, with proportionate costs in the three Courts.

Appeal partly accepted.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

CIVIL RIVISION PETITION No. 125 OF 1912-13 OF FYZABAD DISTRICT.

April 10, 1914.

Present:—Sir Duncan Colvin Baillie, S. M., and Mr. Tweedy, J. M.

GAYA PRASAD PANDE—DEFENDANT—APPELLANT

versus

Musammat ABBAS BANDI BIBI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Appeal—Second appeal on question of fact, when admissible—Law, error of—Witnesses discredited for general reasons—Credit of individual deponent not impeached—Relation of party or patwari, *depositions of, weight of—Special means of knowledge—Oral evidence, whether to be regarded with suspicion.*

A second appeal would lie on a question of fact in a case where evidence is disbelieved simply because the witness is a *Patwari* or a relative of the party producing him, for to discredit witnesses merely for general reasons not affecting the particular credit of any individual deponent is to commit an error of law.

Where the witnesses are respectable aged persons whose distant relationship to the party producing them gives them special means of knowledge of the matters they depose to, their evidence ought not to be necessarily disbelieved, nor should verbal evidence be necessarily regarded with suspicion in cases where only verbal evidence is ordinarily procurable.

Appeal from the decree of the Commissioner, Fyzabad, dated 18th July 1913.

JUDGMENT.

BAILLIE, S. M.—(*April 1st*, 1914).—The suit is for resumption of a *muafi*. The lower Courts have concurrently found that 50 years' possession and two predecessors-in-interest of the present *muafidar* have not been proved. Appellant has shown that the *muafi* was recorded in his father's name at the First Regular Settlement, 45 years before the date of the suit. He also produced three witnesses who gave evidence that the *muafi* was of 80 years' standing and had been held by appellant's grandfather, and, one witness said, by his great-grandfather. The Court of first instance considered that the verbal evidence was insufficient on the grounds that two of the witnesses were related to the appellant, and that the third witness was a "very chance witness." The Deputy Commissioner in first appeal laid down that verbal evidence must be regarded with suspicion unless the witnesses are of an unusually trustworthy character. The Commissioner held that no second appeal lay. The case is one of a type in which only verbal evidence would ordinarily be procurable for the period preceding the First Regular Settlement. What the appellant had to prove by verbal evidence was simply that the *muafi* had been in existence five years before it was recorded at Settlement, and that his grandfather had held it. It has been held in a succession of cases that to discredit witnesses merely for general reasons not affecting the particular credit of any individual deponent is to commit an error of law, which can be subject of a special appeal.

Thus second appeals were allowed on questions of fact, when evidence was disbelieved, simply because the witness was a relative of plaintiff; also where a witness was disbelieved simply because he was a *Patwari*. It appears to me that the grounds on which the evidence for the appellant has, in this case, been rejected, are of the character referred to in these rulings. The witnesses were respectable aged Brahmans whose distant relationship to the appellant

gave them special means of knowledge of the matters to which they deposed. The Deputy Commissioner expressly lays down that verbal evidence is to be regarded with suspicion, and, in so doing has, in my opinion, committed an error of law which allows a superior Court to interfere in second or third appeal. I do not think that there was any reasonable ground for the objection from consideration of the evidence for the appellant in this case. There does not appear to me to be the slightest doubt that it is a fact that appellant's grandfather held this land rent-free, and that the grant was given before annexation. In these circumstances, I would hold that section 107 H applies, cancel the orders of the lower Courts and direct that the appellant should hold as an under-proprietor on payment of the revenue *plus* 50 per cent. *malikana*. Appellant should get his costs, as from the first he admitted his liability to payment of rent under section 107 H.

TWEEDY, J.M.—I concur.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2589 OF 1912.

August 19, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

KANDURU VENKATA SESHAYYA, MINOR, BY NEXT FRIEND, ITTYALA SESHAYYA —PLAINTIFF—APPELLANT

versus

ADAM SAIB AND OTHERS—DEFENDANTS —RESPONDENTS.

Registration Act (XVI of 1908), s. 49—Evidence Act (I of 1872) s. 65 (b)—Unregistered lease—Essential term of tenancy—Proof—Evidence.

If a deed of lease is inadmissible in evidence for want of registration, it cannot be received in evidence to prove an obligation contained therein to remove reeds from the leased land when the obligation was a condition of the tenancy and a consideration for fixing a low rent, nor can secondary evidence be adduced to prove the obligation.

Second appeal against the decree of the Court of the Subordinate Judge of Kurnool, in Appeal Suit No. 232 of 1911, preferred against that of the District Munsif of Kurnool, in Original Suit No. 180 of 1911.

Mr. *K. Ramanath Shenai*, for the Appellant.

JUDGMENT.—There is no admission by defendants in the pleadings of any obligation to remove the *nattu* reeds and it cannot be held that the existence of this obligation is not in issue between the parties. The ruling in *Chedambaram Chetty* v. *Kurunalyavalangopuly Taver* (1) has, therefore, no application.

It is contended for appellant that the lease-deed, though inadmissible as a lease-deed for want of registration, may nevertheless be received in evidence to prove a contract on the part of defendants to remove the reeds. It is clear from the plaint that this alleged obligation was a condition of the tenancy in consideration of which a low rent was fixed; and that the obligation cannot be dissociated from the other terms of the lease. To allow the lease-deed to be adduced in proof of this obligation, would be to contravene the provisions of section 49 of the Registration Act.

We have considered also whether secondary evidence might be adduced under section 65 (*b*) of the Evidence Act in proof of the alleged admission in Exhibit A. It has, however, been explicitly laid down by this Court that such an evasion of the provisions of the Registration Act cannot be permitted. Vide *Divethi Varada* v. *Krishnasawmi* (2) and *Sambayya* v. *Gangayya* (3).

We must dismiss the appeal.

Appeal dismissed.

(1) 3 M. H. C. R. 342.
(2) 6 M. 117; 7 Ind. Jur. 76.
(3) 13 M. 308 at p. 312.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 71 OF 1913.

July 29, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Banerji.

Saiyed ABUL HASAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Saiyed AZIZ AHMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92, whether applies to private trusts.

ABUL HASAN *v.* AZIZ AHMAD.

The provisions of section 92, Civil Procedure Code, apply only to a trust for a public purpose and a suit relating to a private trust is not maintainable under those provisions in the Court of a District Judge, but in an ordinary Civil Court.

First appeal from the decision of he District Judge of Aligarh, dated 9th October 1912.

Mr. *A. Haider*, for the Appellants.

The Hon'ble Dr. *Sundar Lal* and Mr. *Vishnu Ram Mehta*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiffs sought a declaration that certain sale-deeds and leases should be declared null and void and cancelled and that the plaintiffs or some other persons should be appointed *mutwallis* to manage the property specified in the plaint and therein called *Mauza* Satpura, *Pergunah* Bilram, and that the defendants of the third party should be dispossessed. There is a further prayer that the defendants of the second party should be removed from their office as *mutwallis*.

The suit was brought in the Court of the District Judge under the provisions of section 92 of the Code of Civil Procedure. It is alleged that the property in question was dedicated to the expenses of the tomb of one Salah-ud-Din Chisty, that the plaintiffs and the defendants of the first and second party were the descendants of the saint, that the defendants of the second party had made the leases and sale-deeds in contravention of the trust and had thereby proved themselves unworthy of being any longer *mutwallis*. The real object of the suit is to get back the property sold and as might be expected the defendants of the first and second party take very little interest in the matter. Having got the money which was payable under the leases and sale-deeds the defendants of the second party would probably not be displeased if their transferees were dispossessed. Even the plaintiffs themselves have not always treated the property as *wakf*. It is said, however, that they have repented and would in future be good and faithful trustees.

Section 92 of the Code of Civil Procedure provides that "in the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature * * * * the Advocate-General" (in these Provinces the Legal Remembrancer) "or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General (the Legal Remembrancer) may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction, or in any other Court empowered in that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree", amongst other things, for the removal of trustees and the appointment of new trustees and the vesting of the trust property in the new trustees so appointed.

It is necessary in order that the plaintiffs should maintain the present suit that they should establish the existence of a trust for "public purposes of a charitable or religious nature." Very little evidence was given as to the origin of the alleged trust. The learned District Judge at page 17 of his judgment says: "There is a paper which I found on the file received from the office of the Collector of Etah. It is clearly a translation of an ancient document. It appears to be a *sanad* of some Emperor. It relates in terms to the village of Satpura and is headed with a reference to Salah-ud-Din Chisty. It says: 'Be it known that *Mauza* Satpura was granted to Hafiz Amirullah for the *dargah* without any co-sharer with effect from 1174 *Fasli* and, therefore, having given the said village to the possession of and for the expenses of Hafiz Amirullah it is ordered that no one should in any way interfere with it, and that the grantee above named should perform the services of the same *dargah*, spend the income on his subsistence expenses as well as in the maintenance of the said *dargah*.'" This document was not apparently proved, but the learned Judge was prepared to act upon it and we are disposed to do the same. There is further the fact that the village in question has always been revenue free, which, no doubt, suggests that it has always been held at least for a "religious purpose." The oral evidence shows that

for many years a small sum has been expended in connection with the shrine, but far the larger portion of the income has been expended by the descendants of the saint upon themselves. There is also some evidence that food is distributed and alms given at the shrine on occasions. We think it is quite unnecessary for us in the present suit to determine whether or not a valid trust under the Muhammadan Law was created. What we have to do is to see whether or not it has been established that there was a trust for a public purpose. If there was no such trust then the provisions of section 92 of the Code of Civil Procedure do not apply. A suit, relating to rights as the plaintiffs or any other persons may have, to enforce the private trust would not be brought under the provisions of section 92 in the Court of the District Judge, but in the ordinary Civil Court. In our opinion it is impossible to hold upon the evidence that the existence of any trust for a public purpose has been established. There is no evidence that there was even a mosque at the time of the grant. The absence of mention of mosque suggests that none existed. The grant was in fact to a descendant of a pious Musalman for his own expenses and the up-keep of the tomb of his ancestor. We wish to say that we express no opinion one way or another on the question of the existence of a valid *wakf* under the Muhammadan Law.

Under these circumstances the appeal fails and is dismissed with costs, including fees on the higher scale.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

PETITION No. 69 OF 1912-13 OF GONDA DISTRICT.

April 10, 1914.

Present:—Sir Duncan Colvin Baillie, S. M., and Mr. Tweedy, J. M.

RAM LOTAN—PLAINTIFF—APPELLANT

versus

COURT OF THE WARDS, AJODHYA ESTATE, AND OTHERS—DEFENDANTS—RESPONDENTS.

Oudh Rent Act (XXII of 1886), ss. 61 and 108 (10)—Ejectment of tenant for non-payment of arrears of rent as decreed by first Court—Rent, amount of, subsequently reduced in appeal—Decree of first Court not final—Illegal ejectment—Recovery of possession, tenant entitled to sue for.

The ejectment of a tenant under section 61 of the Oudh Rent Act for non-payment of arrears of rent as decreed by the first Court is illegal if the amount so decreed is subsequently reduced, however slightly, by the Appellate Court, inasmuch as the decree of the first Court is not final. The tenant, if so ejected, is, therefore, entitled to recover possession under section 108 (10).

Appeal from the decree of the Commissioner, Fyzabad, dated 14th April 1913.

JUDGMENT.

BAILLIE, S. M.—(*March 28th*, 1914).—This is a suit for recovery of possession under section 108 (10) by a person who was ejected under section 61 for non-payment of decreed arrears of rent. The claim that appellant has under-proprietary rights and was, therefore, improperly ejected has not been pressed before me, and it appears to be rightly abandoned. It is claimed, however, that the ejectment was improper on the ground that the decreed rent for which ejectment took place was subsequently in appeal reduced in amount by the District Judge. The decree in respect of which the notice under section 61 issued was for Rs. 1,589-5-11. The Judicial Commissioner subsequently reduced the amount by Rs. 195-15-9, so that the amount which was finally found to be due from the appellant was only Rs. 1,393-6-2. A judgment by Mr. J. B. Thomson (Petition No. 5 of 1904-05 of Gonda District, decided on 10th January 1905), when Member of the Board, is produced before me, and Mr. Thomson found that an ejectment under section 61 was improper when it was subsequently found that the entire amount demanded was not due from the judgment-debtor. With this opinion I agree. It is urged that the reduction made by the District Judge was not of a very large amount and that appellant has paid nothing; but the fact remains that the demand made from him was more than the sum found to be really due from him, and more than the landholder was entitled to demand. Appellant raised this objection in the section 61 case, and asked that the proceedings should be held over till the decision of the District Judge. When this was refused, the decree-holder took the responsibility of upholding the decree in its entirety. I think that

the ejectment for a sum larger than was really due was an illegal one. Appellant was on this ground entitled to recover possession.

I would allow this appeal, cancel the orders of the lower Courts and decree the claim of the appellant with costs throughout.

TWEEDY, J. M.—(*April 10th*, 1914.)—I quite agree. If the decree under section 61 (1) is not a *final* decree, the landholder takes the risk of having the ejectment proceedings set aside and the case re-opened if the decree is altered in appeal.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 563 OF 1912.

March 31, 1914.

Present:—Mr. Justice Tyabji and Mr. Justice Spencer.

Sri Sri Sri BRUNDAVANA CHANDRA HARISHCHANDANA JAGADDUVA RAJAH BAHADUR—PLAINTIFF—APPELLANT

versus

PRAGADA RAMMAYYA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (*I of* 1908), *ss.* 3, 6 *and* 161—Banjar *land granted on* mokhasa *tenure by life-tenant—Tenant in possession on date, Estates Land Act came into force, right of—Presumption—"Old waste", definition of.*

The presumption of an occupancy right raised in favour of a *ryot* in a *zemindari* should also be extended to a *ryot* to whom *banjar* lands (situated in a *zemindari*) were let at a favourable rate of rent for bringing them into cultivation.

Cheekati Zemindar v. *Ranasooru Dhora*, 23 M. 318, followed.

Such a *ryot*, if in possession on the date the Estates Land Act came into force, acquires by virtue of section 6 of the Estates Land Act an occupancy right in such land.

To legalise such acquisition, it is enough if the land granted formed part of a *zemindari*, and it does not cease to be such merely because it was obtained on *mokhasa* tenure from a female who had merely life-interest in the *zemindari*.

Modhu Sudan Singh v. *Rooke*, 25 C. 1 (P. C.); 1 C. W. N. 433; 24 I. A. 164, distinguished.

Land continually under cultivation since 1884 cannot be classed as "old waste" within the meaning of section 3 (7) of the Estates Land Act.

Second appeal against the decree of the District Court of Ganjam at Berhampore, in Appeal Suit No. 32 of 1907, preferred against that of the Court of the District Munsif of Sompeta, in Original Suit No. 617 of 1901.

FACTS.—One Radhika Patta Mahadevi, *zemindarni* of Tekkali, granted certain *banjar* lands on *mokhasa* tenure to her brother, one Viswanadha Singh, on 14th December 1874. These lands were leased by him to one P. Rammayya Naidu for bringing them into cultivation on 11th November 1884. He in turn granted them to certain tenants for improving them, and they executed to him what is called an *abadani muchalika*. The *zemindarni* subsequently died leaving behind her two daughters, the plaintiffs in the suit. Viswanadha Singh, the *mokkasadar*, relinquished all his rights in favour of the plaintiffs *i.e.*, his sister's daughters. The present suit is by the plaintiffs to eject the tenants let into the lands by Viswanadha Singh. The 2nd defendant pleaded that he acquired a right of permanent occupancy in the land and he cannot be ejected therefrom. The District Munsif held that the suit land was an immemorial waste leased out for bringing it under fit cultivation and that such leasing is beneficial to the estate, and is binding on the plaintiffs. He accordingly dismissed the suit. On appeal by the plaintiffs to the District Court, the District Judge held that as the 2nd defendant was let into possession of *zemindari* land for cultivation purposes, the presumption is that he acquired the ordinary incident of *ryotwari* tenure and that apart from it he acquired permanent rights of occupancy in the land by virtue of section 6 of the Estates Land Act, and no case of ejectment was made out; but he decreed in modification of the decree of the lower Court rent for twelve years, and in other respects dismissed the appeal. The plaintiffs then filed the present second appeal to the High Court.

Dr. *S. Swaminathan*, for the Appellant.

Mr. *V. Ramesam*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for ejectment. It is argued before us that the learned District Judge was wrong in proceeding on the basis that the 2nd defendant had occupancy rights in the lands from which the plaintiffs wish to eject him: that there is no ground on which the 2nd defendant could have been held to be a *ryot* under section 3 (15) of the Madras Estates Land Act: that assuming that the second defendant could have acquired the

status of *ryot*, he has not been admitted as such by the landholder under section 163 (1), and that in the event of any of these contentions being upheld the plaintiffs would be entitled to eject the 2nd defendant from the land.

All these arguments so far as the present appeal is concerned centre round one question: whether a person who is admitted into the possession of waste lands in 1884 can claim the rights and rely upon the presumptions in favour of *ryots* contained in the Estates Land Act.

Section 3 (15) of the Estates Land Act is in the following terms: "*Ryot*" means a person who holds for the purpose of agriculture *ryoti* land in an estate on condition of paying to the landholder the rent which is legally due upon it.

It is argued that it does not apply because there is no condition for payment of rent accepted by the 1st or 2nd defendant. There is, however, an agreement to pay Re. 1 per acre (under Exhibit A). This payment has been evidently considered to have been by way of rent. It is not within our province to consider in second appeal whether or not the payment of this sum ought to be otherwise considered. But we feel difficulty in understanding under what other description it could have been held to fall.

Another ground taken in argument was that section 6 of the Madras Estates Land Act cannot apply. For this purpose it was contended, *first*, that the grantor of Exhibit A was not a landholder as defined in section 3 (15). The grantor was the first defendant. He traced his right from Exhibit N which refers to itself as a *patta* granted as *mokhasa*. It is true that Exhibit M purported to be for an indefinite period and the grantor of Exhibit M was the widow of the *zemindar* who had herself only a life-interest and could, therefore, not have made a grant for a period extending beyond her life, *Modhu Sudan Singh* v. *Rooke* (1). But, in our opinion, that does not affect the question whether it is a grant. During the continuance of Exhibit M no other person could have admitted any tenant into the land except the grantee under Exhibit M.

Secondly, it was contended that section 6 could not apply because of the second sub-section requiring (1) that the holder should be a landholder and (2) that the land should be an estate: it may, therefore, be (so it was argued) that the grantor may be a landholder, and that the land in question may not fall within the definition of an estate in section 3 (2): that in such a case section 6 would not apply. For this purpose it was argued that the land in question could fall only under clause (*c*) of section 3 (2) and that it was not a permanent under-tenure. This argument seems to us to be incapable of being supported. The clause that seems to us to apply is clause (*a*). It was argued that clause (*a*) could not apply, as if it is taken to include the land in question, it would imply that clause (*c*) is unnecessary. We are unable to accede to this argument. Then it was argued that clause (*a*) could not apply to parts of a *zemindari*. In this connection it is necessary to advert to the nature of the question with which we are now concerned. The question is whether a person in occupation is to be presumed to hold the land on such terms as tenants of *zemindari* lands generally hold them. That presumption is based on the well-recognised fact that the *zemindar* has primarily the right merely to collect the tax on the land and to retain a part of it, which part is now represented by the *melvaram*. The presumption arises from the history of land-tenures and of cultivation in the past and from the nature of the rights of the *zemindar*. Considered in this light the argument is deprived of all point. We are of opinion that clause (*a*) is applicable.

Finally, it was argued before us that the case *Cheekati Zemindar* v. *Ranasooru Dhora* (2) is not applicable inasmuch as the decision in that case proceeds on the ground (page 322) that where the generality of tenants in the *zemindari* have occupancy rights it is a fair presumption to raise that newly admitted tenants are admitted on the same terms. It was argued that there is no evidence in this case that the generality of the tenants in the particular *zemindari* have rights of permanent occupancy. This argument omits to take into considaration the gist of the decision in *Cheekati Zemindar* v.

(1) 25 C. 1 (P. C.); 1 C. W. N. 433; 24 I. A. 164.

(2) 23 M. 318.

Ranasooru Dhora(2). That decision establishes that by virtue of repeated proof of the fact that in *zemindaris* the prevailing terms of tenancy include the right of permanent occupancy in favour of the tenant, the Courts are in a position to take judicial notice of the existence of such terms and to presume that they exist. If as is suggested before us it is the case of the appellant that in the particular *zemindari* in question the prevailing terms of tenancy do not include the right of permanent occupancy, it was for the appellant to have adduced evidence on the point. It is not suggested that any such evidence was tendered and rejected. It is not even now stated to us that the appellant is desirous of adducing any such evidence.

In connection with the point with which we have last dealt, it was argued that the presumption referred to is not applicable inasmuch as the land was waste at the time of the original grant. Two circumstances may be alluded to in reference to this argument: *first*, if the presumption (based on conformitty with general experience no less than on the policy of law and the history of land tenures) is that a *ryot* who comes into possession of land ready for cultivation is let in on terms of permanent occupancy, then the presumption would be stronger in the case of one which is let in on the understanding that he will make lands cultivable which were previously incapable of being cultivated. In such a case principles of even wider applicability form the support of the presumption. The *other* consideration is the terms in which old waste is defined in section 3 (7). The terms of that section are clearly inapplicable to the land in question. This had to be conceded when it was pointed out that under section 3 (7) (*i*) land cannot be called old waste unless it is shown (*a*) that the land has been owned and possessed by the landholder or his predecessor-in-title for a continuous period of not less than ten years;

(*b*) that during the said period of ten years the land has continuously remained uncultivated;

(*c*) that the said period consists of a period

(*i*) after 1908, or

(*ii*) partly before and partly after 1908, or

(*iii*) within 20 years before the passing of the Act, *i. e.*, since 1888.

It is the last requirement of the clause (*iii*) as stated above that is fatal to the land now in question being considered waste. For though the land was uncultivated in 1874, it has been continuously in cultivation since 1884. Hence it is clear that the land cannot be considered old waste.

The result is that the appeal must be dismissed with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION NO. 103 OF 1913.

January 29, 1914.

Present:—Mr. Lindsay, J. C.

SADIQ HUSAIN—DEFENDANT—APPLICANT

versus

SECRETARY OF STATE FOR INDIA —PLAINTIFF—OPPOSITE-PARTY.

Provincial Small Cause Courts Act (*IX of* 1887), *Sch. II, cl* 8—*Jurisdiction of Small Cause Court*—*Fishery and collection of produce, rights of,* theka *as to*—*Lease*—*License*—*Rent* - *Fee.*

A *theka* of a right to fish and to collect produce is not a lease but merely a license, and the money that the *thekadar* is bound to pay is not rent, but fee. Hence, a suit for money due under the *theka* is not exempted from the cognizance of a Small Cause Court.

Appeal against the order of the Judge of the Court of Small Causes, Lucknow, dated 7th April 1913.

Babu *Sidheswar Banerji*, for the Applicant.

The *Government Pleader*, for the Opposite Party.

ORDER.—This is an application in revision against a decree of the Judge of the Small Cause Court, Lucknow, under section 25 of the Provincial Small Cause Courts Act. The facts are as follows:—Sadiq Husain took from the *Nazul* Officer of Lucknow, as representing the Secretary of State for India, a *theka* of a right of fishery in the Gomti and also of a right to collect certain produce from certain *nazul* lands situated close to the city of Lucknow. The produce included *sentha*, *patwar*, *lac* of *pipal* trees and the fruits of *babul* trees growing on *nazul* land. The rights to

fish and collect produce were put up to auction and were purchased by the applicant for a sum of Rs. 900. The rights were to extend from the 1st April 1911 to the end of March 1912. It was alleged in the plaint that the defendant had paid up Rs. 514-10 out of this amount and that a balance of Rs. 385-6-0 was still due by him. Various pleas were raised by way of defence. One plea taken was that the Court of Small Causes had no jurisdiction to entertain the suit. Another plea was that defendant was entitled to a set-off. He complained that he had been prevented from taking the produce from certain portions of the land referred to in his *theka*.

He set out the total amount of loss sustained by him as Rs. 1,500. The Judge of the Small Cause Court was of opinion that he had jurisdiction to entertain the suit. The argument before him was that under clause 8 of the second Schedule to the Provincial Small Cause Courts Act the suit should be deemed a suit for the recovery of rent other than house rent. The learned Judge got over this plea by holding that the suit was not really one for rent, but for what he called "contract-money."

In this form the finding of the learned Judge is no answer to the plea put forward by the defendant, for rent is just as much contract-money as any other sum respecting the payment of which parties have come to an agreement. However I am not disposed to hold in favour of the applicant that the suit was really one for rent. The *theka* which was given to the applicant was not, in my opinion, a lease but merely a license which gave him the right to collect certain produce from *nazul* land belonging to Government. This being so, the money which he was bound to pay in accordance with his contract was not rent, but a fee which was due from him in respect of the license granted to him. In this view, therefore, it cannot be held in the applicant's favour that the suit was one for rent so as to be exempted from the cognizance of the Small Cause Court.

It has also been argued here in support of the application that the learned Judge ought to have gone into the question of set-off. Once it is conceded that the Small Cause Court had jurisdiction to entertain the suit the question of set-off is at once decided, for the amount which had been claimed by way of set-off exceeded the pecuniary limits of the jurisdiction of the Court.

I can see no reason, therefore, for interfering in the case. I direct that the application be dismissed with costs.

Application rejected.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 92 OF 1914.

August 4, 1914.

Present:—Mr. Justice Rafique.

Lala BARU MAL—PLAINTIFF—APPELLANT

versus

DWARKA DASS—DEFENDANT—RESPONDENT.

Material alteration—Unsuccessful attempt, effect of.

An unsuccessful attempt to gain by a material alteration in a document should not put the party making the alteration in the same situation in which that party would have stood had no alteration been made.

Therefore, where the plaintiff in a suit based on a promissory note is proved to have altered the principal sum as well as the rate of interest in the note, the Court would not grant him a decree even for the amount which the defendant admits to be due.

Moti Lal Saha v. Monmohan Gossami, 5 C. W. N. 56, distinguished.

Mangal Sen v. Shankar Sahai, 25 A. 580 (F. B.); A. W. N. (1903) 122, not followed.

Civil revision against the decree of the Small Cause Court Judge of Saharanpur, dated the 31st of March 1914.

Messrs. *Haribans Sahai* and *Mohan Lal Sandal*, for the Appellant.

Messrs. *Nihal Chand* and *Durga Charan Banerji*, for the Respondent.

JUDGMENT.—This is an application in revision from a decree of the Small Cause Court Judge of Saharanpur dismissing the claim of the applicant. The latter brought a suit for the recovery of Rs. 362-8 on the basis of a promissory note dated the 23rd of March 1911. It was alleged in the plaint that the defendant had borrowed a sum of Rs. 250 on the 23rd of March 1911 from the plaintiff at Re. 1-8 per cent. per mensem interest and had given a promissory note. The defend-

ant contested the claim. He said that he had borrowed Rs. 150 at Re. 1 per cent. per mensem interest and had given a promissory note for that sum. He denied having given any promissory note for Rs. 250 bearing interest at Re. 1-8 per cent. per mensem to the plaintiff. He added that probably the plaintiff who bore enmity had altered the principal sum and the rate of interest in the promissory note. The learned Judge held that the promissory note had been tampered with by the plaintiff and that the latter was not entitled to get any relief in respect of it. The claim was accordingly dismissed. The plaintiff in his application in revision to this Court has taken two grounds. He challenges the finding of the Court below as to the alteration in the promissory note in suit and further contends that in any case his claim to the extent of the defendant's admission should have been decreed. Apart from the oral evidence in the case the forgery on the promissory note is patent on the face of it. The figure 1 in 150 has obviously been changed into 2 and the rate of interest from Re. 1 per cent. to Re. 1-8 per cent. The forgery is so clumsy that one can detect it without the help of a magnifying glass. The first ground, therefore, fails.

An elaborate and learned argument has been advanced on behalf of the applicant in support of the second plea to the effect that a decree in terms of the admission of the defendant should have been passed in the applicant's favour. It is argued that the promissory note is only a piece of evidence in support of the transaction entered into between the parties on the 23rd of March 1911. If that evidence is tainted or unworthy of belief, the plaintiff should be allowed to fall back upon the original transaction and to obtain a relief on proof of it or to the extent of the admission of the defendant. In support of this contention reliance is placed on the following cases: *Moti Lal Saha* v. *Monmohan Gossami* (1) and *Mangal Sen* v. *Shankar Sahai* (2). The last-mentioned case is of no assistance to the applicant because it related to a transaction of mortgage. The case of Moti Lal is also distinguishable inasmuch as in that case it was held that the plaint of Moti Lal Saha did not show that he had based his claim upon the promissory note in suit. In the present case the claim is based on the promissory note of 23rd March 1911. Besides the case of Moti Lal Saha was subsequently considered by a Bench of the same Court in *Gour Chandra Dass* v. *Prasanna Kumar Chandra* (3). The principle of law applicable to cases like the present is discussed at length by the learned Judges who decided the case of Das. The principle is that an unsuccessful attempt to gain by an alteration in a document should not put the party in the same situation in which he would have at first stood. If that were not so, attempts at forgery would be safe and frequent. Taylor in his book on Evidence says that the grounds of this principle are two fold. The *first* is that of public policy, which dictates that no man should be permitted to take the chance of committing a fraud without any risk of losing by the event in case of detection. The *other* is to insure the identity of the instrument and prevent the substitution of another without the privity of the party concerned. In view of this principle the 2nd contention for the applicant, *i. e.*, that his claim to the extent of the defendant's admission should be decreed, fails.

The application is, therefore, dismissed with costs.

Application dismissed.

(1) 5 C. W. N. 56.
(2) 25 A. 580 (F. B.); A. W. N. (1903) 122.
(3) 33 C. 812; 3 C. L. J. 363; 10 C. W. N. 788.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 65 OF 1913.
April 14, 1914.

Present:—Mr. Lindsay, J. C.

SANKATHA PRASAD—DECREE-HOLDER—APPELLANT

versus

RAJA KRISHNA DAT SINGH—JUDGMENT-DEBTOR—RESPONDENT.

U. P. Court of Wards Act (IV of 1912), s. 55—Application for execution of decree against person of ward, whether maintainable—Procedure—Vested right.

An application for execution of a decree against the person of a Ward of Court after the U. P. Court

of Wards Act, 1912, came into force, is barred by section 55 of the Act.

As no one has a vested right in an older form of procedure prescribed in a previous Act, the rules relating to the new procedure prescribed in the new Act must be strictly followed.

Appeal against the order of the District Judge, Sitapur, dated 18th August 1913, upholding that of the Subordinate Judge, Kheri, dated 3rd May 1913.

Mr. *A. P. Sen* and Babu *Salig Ram*, for the Appellant.

Babu *Sita Ram*, for the Respondent.

JUDGMENT.—This is a second appeal in the Execution Department. The facts may be shortly stated. The appellant here is the assignee of the decree which was obtained against Raja Krishna Dat Singh, *Taluqdar* of Oel, in the year 1904. It appears that the *Taluqdar's* estate was taken under the Court of Wards as far back as 1896, and there is no dispute that it is still under the Court of Wards. Various applications in execution were made from time to time. We are here concerned with an application which was made on the 15th of February 1913. This application was directed against Krishna Dat Singh in person. It was prayed that a notice might issue to the Raja to show cause why execution of a decree should not be allowed to proceed against him. The judgment-debtor appeared and objected to the proceedings on the ground that under section 55 of the United Provinces Court of Wards Act (U.P. Act IV of 1912) the application could not be entertained, inasmuch as that section lays down that no ward shall sue or be sued, nor shall any proceedings be taken in the Civil Courts, otherwise than by and in the name of the Collector in charge of his property, or such other person as the Court of Wards may appoint in this behalf. The Subordinate Judge gave effect to this objection and held that section 55 applied to the case and that the application in the form in which it was presented could not be entertained by him. An appeal was taken to the District Judge. Various pleas were raised there, all of which were decided adversely to the decree-holder. The decree-holder comes here again in second appeal and the same pleas are taken here which were taken in the Court of the District Judge.

It seems to me that the matter can be disposed of in a few words. Section 55 of the new Court of Wards Act lays down a rule of procedure which must be held applicable to all proceedings taken in the Civil Courts after the date on which the Act came into force. U. P. Court of Wards Act, 1912, came into force on the 1st of June 1912 and this application by way of execution of decree was made to the Subordinate Judge on 15th of February 1913.

It follows, therefore, that section 55 governs this application. It cannot be pleaded that by reason of the saving clause of the Act the applicant decree-holder has some vested right in some older form of procedure which may have been prescribed in some previous Act. There is no vested right in procedure and the rules relating to procedure must be strictly followed. This being the case, it necessarily follows that the decision of the Subordinate Judge was right. The applicant for execution of decree was bound to take his proceedings in the name of the Collector in charge of the property of the ward. As he failed to do so the application was rightly dismissed. This appeal fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1567 OF 1913.

September 8, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Napier.

KRISHNA IYER—PLAINTIFF—APPELLANT

versus

RAMASWAMI IYER AND ANOTHER—DEFENDANTS—RESPONDENTS.

Chit *fund—Manager's discretion to accept security—Test.*

Where according to the rules of a *chit* fund the prize winner had to furnish security to the satisfaction of the *karaiswans* or managers for the due payment of the future instalments, and where the plaintiff, a subscriber, having drawn a prize and having in consequence to give security for Rs. 2,700, offered properties worth Rs. 3,000 for the same, which the managers refused to accept as sufficient:

Held, that so long as the managers were not shown to have acted unreasonably and capriciously, they were perfectly within their rights in refusing to accept the security offered.

KRISHNA IYER v. RAMASWAMY IYER.

Braunstein v. *Accidental Death Insurance Co.*, 121 Eng. Rep. 904; 1 B. & S. 782; 31 L. J. Q. B. 17; 8 Jur. (N. S.) 506; 5 L. T. 550; 124 R. R. 745, followed.

Dallman v. *King*, 4 Bing. (N. C.) 105; 5 Scott, 382; 3 Hodges, 283, 7 L. J. C. P. 6; 44 R. R. 661; 132 Eng. Rep. 729, distinguished.

Second appeal against the decree of the District Court of Trichinopoly, in Appeal Suit No. 584 of 1912, preferred against that of the District Munsif of Srirangam, in Original Suit No. 310 of 1911.

FACTS.—The plaintiff was a subscriber to a Chit Fund conducted by the defendants who were its managers. Under the rules of the Chit Fund the managers were to pay the successful bidder at the auction held periodically the amount of the bid "on the successful bidder furnishing security to the satisfaction of the managers for the due payment of future instalments." If the prize amount was not paid within a week of the bidder's complying with this rule, the managers were liable to pay interest at the rate of 36 per cent. The plaintiff, a successful bidder, brought this present suit to enforce, as against the managers, the payment of the prize together with interest at the said rate, alleging that properties worth far more than Rs. 2,700 for which the security had to be furnished, had been offered. The defendants pleaded that the security offered was not suffcient and so was not accepted by them and besides contended that they had an arbitrary discretion in accepting the security tendered. The District Munsif, holding that the properties offered were sufficient security, decreed the plaintiff's suit. On appeal, the District Judge, while holding that the managers had no arbitrary discretion in the matter, was of opinion that Courts would not interfere if the managers acted as reasonable men in the position of trustees in declining to accept the security. Applying the principle of the Trusts Act with regard to investment by trustees, he held that the properties which he found were worth Rs. 3,000 were still insufficient as security. The plaintiff thereupon preferred the second appeal to the High Court.

Messrs. *T. R. Venkatrama Sastriar* and *K. S. Ganesa Iyer*, for the Appellant:—The discretion vested in the managers under the Chit agreement was not arbitrary and capricious. The Courts were entitled to interfere if the discretion was not properly exercised. *Braunstien* v. *Accidental Death Insurance Co.* (1) and *Dallman* v. *King* (2). On the facts of this case the defendants had acted capriciously in rejecting the security tendered. Properties worth Rs. 3,000 were sufficient security for Rs. 2,700. The District Judge was wrong in holding that the principle of the Trusts Act applied.

Mr. *T. V. Muthukrishna Iyer*, for the Respondents:—Whatever might be the view which a Court of Law would take as to the sufficiency of the security, it should not interfere with the discretion vested in the manager by the Chit Fund rules unless it was proved that such discretion was exercised capriciously. The District Judge had held that the exercise of discretion in this case was *bona fide* and reasonable. The High Court should not interfere.

JUDGMENT.—The question raised in this second appeal is, whether the defendants, managers of a Chit Fund, were entitled to refuse certain security offered by the plaintiff in respect of his purchase of a second instalment. The amount for which he was liable to give security was Rs. 2,700. The lower Appellate Court has valued the security at Rs. 3,000 and holding that the defendants acted as reasonable men in the position of trustees in declining to accept the security, dismissed the suit. The suit was to recover from the defendants personally interest on the Chit amount at the rate of 3 per cent. per mensem. The amount itself was deposited in Court with the written statement and the security accepted, as by that time the liability of the plaintiff had been decreased and the defendants were, therefore, then prepared to accept the security as sufficient.

In his able argument before us Mr. T. R. Venkatarama Sastri put the case as one in which under the agreement the only requisite was that the security should be satisfactory. But on our pointing out that under its terms the security had to be to the satisfaction of the agents, he endeavoured to establish that the agents were bound to accept what a Court would think a reasonable man should accept and that the lower Appellate Court having applied a wrong test of sufficiency, this Court should itself decide on the propriety of

(1) 121 Eng. Rep. 904; 1 B. & S. 782; 31 L. J. Q. B. 17; 8 Jur. (N. S.) 506; 5 L. T. 550; 124 R. R. 745.

(2) 4 Bing. (N. C.) 105; 5 Scott. 382; 3 Hodges, 283; 7 L. J. C. P. 6; 44 R. R. 661; 132 Eng. Rep. 729.

the agents' action. We are not satisfied that the lower Appellate Court has applied a wrong test. The Court does not say that the Trusts Act applies to the case, although the learned Judge does speak of the defendants as trustees. The language used is, "applying the principle of the Trusts Act", and we are not clear that he was not entitled to do so. This appeal might, therefore, be dismissed on the ground that his finding on the question of the propriety of the agents' action was a finding of fact with which this Court would not interfere. We have, however, heard the case fully argued on the supposition that we could interfere; and we are satisfied that it is not for the Courts to decide what was in their opinion 'reasonable' in the circumstances, but whether there is evidence that the agents acted capriciously and unreasonably. It was argued that the agents had not an arbitrary power of rejection and that that being so, the Courts could interfere. We accept the first proposition, but that does not carry with it the alternative put forward.

The leading case on the point is *Braunstein* v. *Accidental Death Insurance Co.* (1). This authority was relied upon by the appellant in support of his proposition, but, in our opinion, it does not help him. In that case proof of death had to be given to the satisfaction of the Directors of the Company. The plaintiffs pleaded that the Directors acted capriciously in rejecting the proof offered and the defendants demurred to that plea. The Court held the demurer was bad, stating the law to be that if they unreasonably and capriciously required evidence that was not necessary to satisfy them on any reasonable view of the case, that was not justified by the clause (*vide* page 909).

Reference is made in that case to *Dallman* v. *King* (2), which was also relied upon by the appellants. This was a case of a repairing lease containing a clause that the reparis were to be inspected and approved of by the lessor and to be done in a substantial manner. The Court held that the gist of the agreement was that the work should be done in a substantial manner and that the other words of the clause could not be read so as to impose a higher liability, bu tshould be treated as a clause enabling the lessor to ascertain whether the work had been so done. That case is, therefore, no authority in favour of the appellant. Accepting the authority of *Braunstein* v. *Accidental Death Insurance Co.* (1), we hold that the true test is whether the defendants have been shown to have acted capriciously.

The appellant, as a second line of argument, asked the Court to return the case for a specific finding on this point, urging the District Munsif had given a finding against the defendants on this, while the lower Appellate Court said nothing about it. We are not prepared to take this course. We have no doubt that the District Munsif's view was sought to be supported in the lower Appellate Court and we must read the District Judge's finding as negativing it. Further than that the finding of the District Munsif was clearly based on facts which were not alleged in the plaint and have been misunderstood by the District Munsif. We agree with the lower Appellate Court that it has not been shown that the defendants did not act reasonably, still less did they act capriciously; and it is immaterial whether a Court might have thought the security offered reasonable in the circumstances urged by the appellant. In this view the appeal must be dismissed.

On the question of costs we cannot accept the view of the lower Appellate Court that the defendants should be deprived of their costs because the agreement contains unsatisfactory clauses. Such clauses are not uncommon as appears from the decisions, and that is no ground for saddling the defendants, who are sought to be made personally liable, with costs.

The appeal will, therefore, be dismissed with defendants' costs throughout. On the memorandum of objections we are clearly of opinion that the District Judge was in error in treating the defendants' claim of part discharge to the extent of Rs. 200 as a set-off. We accept his finding that the amount thus paid was Rs. 117, not Rs. 200. This amount must be deducted from the amount decreed, and the memorandum allowed with costs.

Appeal dismissed; Objection allowed.

LACHHMAN SINGH *v.* LIQUIDATORS OF THE INDUSTRIAL EAST CO. LD.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 1114 OF 1912.
April 15, 1914.

Present:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal.

Rai LACHHMAN SINGH—DEFENDANT—APPELLANT

versus

THE LIQUIDATORS OF THE INDUSTRIAL EAST COMPANY, LTD.,—PLAINTIFFS—RESPONDENTS.

Companies Act (VI of 1882), s. 28—Contract to take shares—Company, winding-up of—Share-holder, liability of—Payment in cash, what constitutes—Agreement not to pay price of shares in cash, when valid.

If, before a contract to take shares is rescinded, a winding-up be commenced or a concern cease to be a going concern, the shareholder can no longer be relieved, but will be liable to be a contributory.

The setting off of a debt due from the Company against future calls on shares can only be considered a payment in cash within the meaning of section 28 of the Indian Companies Act if the debt be due *in præsenti*.

An arrangement that a registered Company's purchased shares are not to be paid for in cash but are to be issued to the purchaser as fully paid-up shares as part of an advance which the Company has undertaken to make, is illegal if it is not made in writing and filed with the Registrar of the Joint Stock Companies as laid down under section 28 of Act VI of 1882.

First appeal from the order of the District Judge, Lahore, dated the 18th June 1912, directing that the name of the appellant be settled on the list of contributories as holding 500 shares in the Industrial East Company, Limited.

Mr. *C. Bevan Petman*, for the Appellant.

Mr. *Obedullah*, for the Respondent.

JUDGMENT.—This appeal was originally set down for hearing along with Civil Appeal No. 1060 of 1912, as both arose out of orders of the District Judge in the liquidation proceedings relating to the Industrial East Company, Limited. Appellant Rai Lachhman Singh objected to his name being settled on the list of contributories, but the District Judge disallowed his objections and directed that his name be settled on the list as holder of 500 shares. From this order he has appealed.

His objections, though lengthy, were really only two in number ;

(1) That he was induced to take the shares by fraud and misrepresentation ;

(2) that the shares were not to be paid for in cash, but were to be issued to him as fully paid up as part of an advance of two lakhs of rupees which the Company had undertaken to make to him.

The District Judge held :—

(1) That the allotment of shares to appellant was not void on the ground of fraud or misrepresentation, and that no such fraud or misrepresentation was proved.

(2) That the alleged arrangment *re* payment for the shares, not having been determined by a contract duly made in writing and filed with the Registrar of Joint Stock Companies at or before the issue of the shares, as laid down in section 28 of the Companies Act VI of 1882, was illegal and could not be pleaded.

The whole history of the Company and appellant's connection with it are given in full detail in the District Judge's judgment in the other case, that of Mr. West, in which the appeal was disposed of by another Bench of this Court on 22nd January 1914.

Appellant's agreement with the Company dated 16th December 1908, marked L2, is on the record. It makes no mention of an advance of the two lakhs to appellant. The draft agreement of July 1908, marked L1, does mention this advance, and it was to be made in cash by instalments. Though nothing is said about this advance in the formal agreement we have no doubt that he stipulated for it, and eventually obtained it in promissory notes for Rs. 1,92,500 and by a set-off against his shares of a sum of Rs. 7,500. On the 16th December he applied for 500 shares in the Company and these were allotted to him at a meeting of the Directors on 22nd December 1908, at which Mr. Enever and Mr. Vaughan only were present. The promissory notes were issued to him on the 16th December 1908.

Some of the other Directors raised objections to this advance and on 28th January 1909 there was another meeting of the Directors at which the advance to appellant to the extent of Rs. 1,40,000 was confirmed and promissory notes to the value of Rs. 60,000 were handed back by him, and were cancelled. The resolution of the Directors runs as follows : "In considera-

ation of Rai Lachhman Singh meeting our wishes regarding extension of the lease and the return of *hundis* for Rs. 60,000 out of Rs. 2,00,000 advanced to him as a loan, the Directors agree to meet the calls on his 500 shares, debiting him Rs. 7 per cent. for the accommodation in his general account."

Now these proceedings show that the shares were not originally issued to appellant as part of the advance of two lakhs. He applied for and obtained the shares in addition to getting the promissory notes, except that Rs. 7,500 were deducted from the latter and shown as credited to him on the shares.

Thus on 28th January 1909 the amount of the loan was reduced by Rs. 60,000 and the Directors agreed to meet the calls on appellant's shares as they were made, charging him Rs. 7 per cent. presumably by way of interest. Appellant has himself stated that the shares were not given to him as a present, and that he was to pay for them eventually one way or another. We understand that the amount due on each call was to be debited to him in the general account and would eventually be re-paid, in the same way as the loans made to him, out of the profits of the Company.

As regards the appellant's allegation that he was induced to take the shares through fraud or misrepresentation, we do not consider that either is proved. We have only his own uncorroborated statement as to representations made to him by Mr. Enever regarding the condition of the Company. Appellant was in debt and was anxious for his coal mine to be worked. He probably thought it a valuable property and that it was well worth his while to take shares in the Company which was going to work it.

There is absolutely no evidence to show that the taking of shares by him was any part of the agreement between him and the Company and probably when he applied for them, he intended to meet the calls on them out of the money realised by him on the promissory notes. Subsequent irregularities in Mr. Enever's proceedings, and the fact that the promissory notes were not paid when due, are not evidence of any fraud or misrepresentation having been practised to induce him to apply for the shares.

Moreover, even if there was any such, his agreement to take shares was voidable and not void, and he took no proper steps to rescind or repudiate it. He admitted in the lower Court that he never even wrote to the Company repudiating the shares. He might have moved the District Judge under section 58 of the Companies Act for removal of his name from the list of shareholders or he might have brought a regular suit. He did nothing of the sort and we consider that it is too late for him to avoid the contract now that the Company has gone into liquidation. There was a similar point before the Bench which decided *Alister West* v. *Beni Pershad* (1), and there certain authorities were quoted in which it was laid down that if before a contract to take shares be rescinded, a winding up be commenced or a concern cease to be a going concern, the shareholder can no longer be relieved, but will be liable to be a contributory.

Appellant applied for his shares in December 1908, and the application for winding-up of the Company was not made till 7th October 1910. We think, having regard to the authorities cited in the judgment of this Court in *Alister West* v. *Beni Pershad* (1) and to the interest of the creditors of the Company, that appellant cannot now be allowed to avoid his contract on the ground of fraud or misrepresentation.

Mr. Petman laid far more stress upon the other part of his argument which was that appellant had really paid for his shares in full in cash.

His argument was that appellant's return of promissory notes worth Rs. 60,000 on the 28th January 1909 was equivalent to a payment in cash within the meaning of section 28 of the Companies Act.

The English authorities are admittedly applicable to this case as section 28 of the Companies Act is taken *verbatim* from

(1) 24 Ind. Cas. 236; 165 P. L. R, 1914; 69 P. R. 1914; 113 P. W. R. 1914.

the Act of Parliament (30 and 31 Vic., C. 131).

The first authority cited by Mr. Petman was *In re Potter and Brown's cases*; *British Farmers Pure Linseed Cake Company* (2). In that case the shares had been issued as fully paid up shares by virtue of a contract not registered as required by the Companies Act, section 25 (corresponding to section 28 of the Indian Act). The Company issued certificates of those shares as fully paid-up shares. Some of them were afterwards transferred for value to a person who had no notice of any irregularity in their issue, and took them as fully paid-up on the faith of the certificates. The Company having been ordered to be wound-up, the Official Liquidator sought to make the transferee liable as the holder of shares on which nothing had been paid. The Lords Justice of Appeal held that as against a transferee who took the shares without notice that they had not been paid up in cash, the Company was estopped by the certificates from saying they had not been so paid up, and that the Official Liquidator was in the same position.

Now this case is clearly distinguishable from the present one. Here there are no certificates that the shares are fully paid up, and the resolution of 28th January 1909, already quoted, shows that they were not fully paid up, but that the calls were to be met by the Company. The agreement by the Company might perhaps debar them from suing Rai Lachhman Singh for moneys due on the shares, but that is quite a different matter.

In support of his argument that appellant set off the debt due from the Company on the promissory notes against future calls on his shares and that this was equivalent to payment in cash, Mr. Petman relies upon *In re Jones Lloyd and Company Limited*; *Jone's* case (3), in which it was held that an agreement by a shareholder in the Company with the Company to set-off against future calls on his shares any present liability of the Company to pay cash to him, is payment of the calls in cash within the meaning of section 25 of the Companies Act.

We have read this authority very carefully and we find that what it and other authorities referred to in it lay down is that if there is a debt payable *immediately* by the Company to the shareholder, and that be set-off against the debt due on the shares, then the shares shall be deemed to have been paid for in cash. In *In re Jones Lloyd and Company Limited* (3), *Kent's* case; *In re Land Development Association* (4) was referred to and distinguished.

In *Kent's* case (4) it was held that as neither the debt purchased nor the calls unpaid were debts payable *in præsenti* the transaction was not equivalent to, and would not support, a plea of payment in cash on the shares within the principles of *Spargo's* case; *In re Harmony and Montague Tin and Copper Mining Co.* (5) and *White's* case; *In re Government Security Fire Insurance Co.* (6) and, therefore, Kent was liable for calls made in the winding-up in respect of the shares.

Similarly, in the present case the promissory notes were not payable at once, but at different periods up to 11 months.

We have no hesitation in holding that the setting off of a debt due from the Company against future calls on shares can only be considered a payment in cash within the meaning of section 28 of the Indian Companies Act if the debt be due *in præsenti*.

In discussing this part of the argument we have adopted Mr. Petman's theory that by the resolution of 28th January 1909 a debt due by the Company to appellant, was set-off against future calls on appellant's shares. In our opinion, however, that is not the correct way of viewing what took place. There was not in fact any debt due by the Company to the appellant. They had agreed to give him an advance of 2 lakhs of rupees as a loan, but being short of cash substituted promissory notes payable at different dates for cash. Subsequently some of the Directors objected to this advance, and the arrangement was modified and the advance was only con-

(2) 7 Ch. D. 533; 48 L. J. Ch. 56; 38 L. T. 757; 26 W. R. 839.

(3) 41 Ch. D. 159; 58 L. J. Ch. 582; 61 L. T. 219; 37 W. R. 615; 1 Meg. 161.

(4) 39 Ch. D. 259; 57 L. J. Ch. 977; 59 L. T. 449; 36 W. R. 818; 1 Meg. 69.

(5) 8 Ch. 407; 42 L. J. Ch. 488; 28 L. T. 153; 21 W. R. 306.

(6) 12 Ch. D. 511; 48 L. J. Ch. 820; 41 L. T. 333; 27 W. R. 895.

firmed to the extent of Rs. 1,40,000 and promissory notes to the value of Rs. 60,000 were handed back and cancelled. Instead of a loan of two lakhs he received promissory notes for Rs. 1,32,500 (Rs. 7,500 having been deducted at the very outset as advance payment upon application for shares) and an undertaking by the Company to meet the future calls on his 500 shares, the Company, of course, debiting him in his general account with the amount and charging him Rs. 7 per cent. interest. In our opinion then appellant made no cash payment for the shares within the meaning of section 28 of the Act, and it is worthy of note that he never pleaded any such payment, but relied upon the agreement between himself and the Company under which he was to receive fully paid-up shares, or rather as now explained, shares on which the Company itself was to meet the calls. The argument put forward so ingeniously by Mr. Petman seems to have been urged before us for the first time. The arrangement as to payment for the shares was of the nature referred to in section 28, and cannot be considered valid as it was not in writing and was not filed with the Registrar of Joint Stock Companies.

The result is that the order of the District Judge settling appellant's name on the list of contributories as holding 500 shares is correct, and we dismiss the appeal, leaving the parties to bear their own costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1375 OF 1912.

August 21, 1913.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

A. L. A. R. R. M. ARUNACHELLAM CHETTIAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

M. MUTHAYANAI THAVEN—DEFENDANT—RESPONDENT.

Madras Estates Land Act (Mad. Act I of 1908), ss. 4, 27 - Custom—Rent payable on cultivated area.

An immemorial custom that no rent should be charged for lands left fallow, in other words, the rent for the whole holding in any particular *fasli* should be calculated only on the cultivated area, is not against the statutory provision in section 4 of the Estates Land Act, which must be read subject to the provisions of section 27 of the Act.

Second appeal from the decree of the District Court of Ramnad at Madura, in Appeal Suit No. 851 of 1911, preferred against that of the Court of the Sub-Collector of Ramnad, in Second Appeal No. 760 of 1911.

Mr. *S. Sundara Raja Aiyangar*, for the Appellants.

Mr. *T. Vardeppa Naikar*, for the Respondent.

JUDGMENT.—We think that section 4 of the Estates Land Act must be read subject to the provisions of section 27, which states that the amount of rent must be presumed to be affected by the condition which appertained to the holding in the preceding revenue year.

But the lower Courts found that by immemorial custom the condition appertaining to the holdings in the plaint *mittah* is that no rent should be charged for lands left fallow, in other words, the rent for the whole holding in any particular *fasli* should be calculated only on the cultivated area. We think that condition is not against the statutory provision in section 4 of the Estates Land Act, as section 4 by its opening clause saves such and similar conditions. Our view, we think, is supported by the judgment of this Court in Second Appeal No. 2034 of 1900. We, therefore, dismiss this second appeal (the plaintiffs *mittadars* being the second appellants before us) with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 11 OF 1913.

April 22, 1914.

Present:—Mr. Stuart, A. J. C., and Mr. Kanhaiya Lal, A. J. C.

Raja RAMESHAR BAKHSH SINGH—PLAINTIFF—APPELLANT

versus

SANKATA BAKHSH SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Under-proprietor, definition, status and rights of—Re-entry, right of proprietor as to, effect of—Proprietor

RAMESHAR BAKHSH SINGH v. SANKATA BAKHSH SINGH.

and under-proprietor, distinction between—Oudh Rent Act (XXII of 1886), s 3 (8)—Lease, interpretation of.

The right of an under-proprietor is not exhaustively defined in section 3 (8) of the Oudh Rent Act.

In addition to the elements of heritability and transferability there is one essential factor in under-proprietary rights, *viz.*, that in no circumstances is the proprietor afforded a right of re-entry against the under-proprietor.

Where an under-proprietary right exists the position of the under-proprietor is that he holds rights almost as great as those of the superior proprietor, subject to the limitation that he has to pay the land revenue and the cesses and usually something by way of *malikana* to the superior proprietor.

Where a lease imposed upon the lessee certain conditions to be fulfilled by him and provided for the lessor resuming the lease-hold in case the lessee failed to satisfy any of those conditions:

Held, that the lease did not confer an under-proprietary right on the lessee.

Appeal from the decree of the Subordinate Judge, Rae Bareli, dated 31st October 1912.

Pandit *Gokaran Nath Misra*, for the Appellant.

Mirza *Samiullah Beg*, for the Respondents.

JUDGMENT.—The plaintiff in this suit is the *Talukdar* of Samarpaha. The *Taluka* was owned and possessed by Basant Singh who died on 12th November 1857, leaving as his heir his widow, Thakurain Daryao Kunwar, in whose favour, after the proclamation of March 1858, the Second Summary Settlement was made. A *sanad* was subsequently granted to this lady in respect of the *Taluka*. On preparation of the lists of *Talukdars* under the provisions of section 8, Act I of 1869, her name was entered in lists I and II. She admittedly became *talukdar* in her own right and not in the right of her husband. Daryao Kunwar died on the 13th November 1893 and was succeeded by Sher Bahadur Singh, who alleged that he was her adopted son. The present appellant instituted on 27th May 1899 a suit for possession of the *taluka* on the ground that he was entitled to succeed as next heir, he being the grandson of a brother of the Thakurain. His suit was decreed by the Subordinate Judge, whose decision was upheld by the Court of the Judicial Commissioner and finally by their Lordships of the Privy Council by an order dated the 27th July 1906. On the 27th June 1867, Thakurain Daryao Kunwar executed a deed in favour of a certain *Musammat* Sheoraj Kunwar with respect to the village Risalpur Lotanha. Under the terms of this deed *Musammat* Sheoraj Kunwar, the wife of Indarjit Singh, *Trilokchandi Bais*, was placed in possession of the village of Risalpur Lotanha on the following conditions: She paid Rs. 462 land revenue, Rs. 30 *Patwari*-fund cess, and Rs. 36 *chaukidari*-fund cess, making a total of Rs. 528 to the *Talukdar*. She further paid out of the profits of the village an annuity of Rs. 100 to a certain Mahipal Singh, an annuity of Rs. 100 to a certain Sheopal Singh and an annuity of Rs. 100 to a certain Sheo Prasad Singh and defrayed costs of worship estimated to amount to Rs. 62 a year. The deed stated that the letting value of the village amounted to Rs. 990. The amounts payable to the annuitants and the costs of worship came to Rs. 362 which added to the land revenue and cesses raised the total to Rs. 890, and under the terms of the deed the remaining Rs. 100 were retained by Sheoraj Kunwar for her own use. The deed contained other conditions which will be discussed later. *Musammat* Sheoraj Kunwar died about the year 1891. She predeceased her husband Indarjit Singh, who is still alive. At the time of her death Sat Narain Singh, Hardeo Bakhsh Singh and Mahadeo Bakhsh Singh, sons of Indarjit Singh and Sheoraj Kunwar were alive. On the death of Sheoraj Kunwar, her son, Sat Narain Singh, took possession of the village. The Settlement of the Rae Bareli District was being made in 1894, and in that year Sat Narain Singh made an application for the entry of his name alone in place of that of his deceased mother, on the allegation that he and his mother had been in possession of Risalpur Lotanha under a perpetual lease, that his mother had died three years before and that under the terms of the deed mutation should be effected in his favour. Notice of this application was given to Sher Bahadur Singh who was then *Talukdar* in possession. The *Talukdar* opposed the entry of the name of Sat Narain Singh. The Settlement Officer, by an order dated the 7th May 1895, entered the name of Sat Narain Singh as perpetual *Thekadar* of the village. The Settlement Commissioner on appeal slightly modified this entry by an order dated 9th August 1895, and under the order of the Settlement Commissioner the entry stated the payments of land revenue, cesses, annuities

and expenses of worship to be defrayed by the lessee which have already been detailed. In the year 1896 Sat Narain Singh applied for the addition of the name of Bije Bahadur Singh, a grandson of Sheo Prasad Singh, one of the annuitants already mentioned, as a co-lessee in the village. That application was granted. The entries of the names of the co-lessees in the revenue papers now stand as follows. The co-lessees recorded are (1) Sankata Bakhsh Singh and Kalka Bakhsh Singh, sons of Sat Narain Singh, and (2) Trilok Bahadur Singh, Fateh Bahadur Singh and Maharaj Bahadur Singh, sons of Bije Bahadur Singh, deceased. These five persons are the defendants in the present suit. It is to be noted that the names so recorded are (1) the names of the descendants of one of the three sons of Sheoraj Kunwar lessee, and (2) the descendants of one of the two sons of Beni Bahadur Singh, the son of Sheo Prasad Singh, one of the annuitants. Hardeo Bakhsh Singh, son of Sheoraj Kunwar who is apparently one of her heirs and who is still alive, is not entered as a lessee. Bhawani Bakhsh Singh, son of Mahadeo Bakhsh Singh, son of Sheoraj Kunwar, is also not entered as a lessee. Kunwar Bahadur Singh, who is still alive, brother of Bije Bahadur Singh, is not entered as a lessee. The heir of Sheopal Singh annuitant is not entered as a lessee. Mahipal Singh annuitant was the father of Indarjit Singh, husband of Sheoraj Kunwar, Indarjit is not entered as a lessee. Thus the present entry in the revenue papers does not give the names of all the heirs of Sheoraj Kunwar or of all the heirs of the annuitants. It gives the names of certain of the heirs selected upon no principle that has been explained to us. The present appellant sought to eject the present defendants in the year 1320 *Fasli*. The defendants contested the notice of ejectment in the Revenue Court, which by an order dated 9th April 1912 cancelled the notice of ejectment. The Revenue Court in this order did not confine itself to a finding that the lessees held under a perpetual lease. It went further, and suggested that they were under-proprietors. The plaintiff then sought a declaration in the present suit by a plaint dated the 15th and 17th May 1912 to the effect that the defendants do not possess any proprietary or under-proprietary rights in respect of the village save the rights of ordinary *thekadars*. In the course of hearing the plaintiff withdrew the claim to the declaration that the defendants only possessed the right of ordinary *thekadars*, and confined himself to seeking a declaration that they are not proprietors or under-proprietors. The learned Subordinate Judge dismissed his suit, and the present appeal is preferred.

We desire to make it clear that the point for decision in this appeal is, whether the defendants possess proprietary or under-proprietary rights in the village. We have not to decide, whether, if they are lessees of the village, their rights are the rights of ordinary *thekadars*. We are only concerned with the determination of the question, whether they have or have not proprietary or under-proprietary rights. The learned Counsel for the respondents does not suggest that they have proprietary rights, and the question for our decision is thus narrowed down to the one point, whether they do or do not possess under-proprietary rights.

The deed of 27th June 1867 is before us and it is now admitted by the learned Counsel for the appellant that the finding of the learned Subordinate Judge to the effect that this deed was executed by Thakurain Daryao Kunwar who as *talukdar* in her own right had complete power of transfer, is a correct finding. The deed is not such a deed as would have been prepared by a skilled conveyancer. It contains many omissions and leaves undecided a large number of points of importance. Although at the end of the deed the instrument is declared to be an instrument of perpetual lease, there is no provision stating that the benefits under the deed are to accrue after the death of Sheoraj Kunwar to her heirs. The deed contains provisions as to the payments of annuities to certain specified persons, but there is no provision as to the continuance of these annuities to the heirs of those persons after their deaths. It commences by reciting that a lease is executed in favour of Sheoraj Kunwar on condition that the amounts already detailed shall be paid in due season without ob-

jection or dispute, that Sheoraj Kunwar shall treat the tenants properly and kindly, that she shall undertake to increase the income of the village by diligent management, and that she shall not claim exemption of payment of the sums due under the deed by reason of seasonal calamities. It is then stated that these conditions shall hold good during the life-time of Daryao Kunwar, and that during that lady's life-time Sheoraj Kunwar shall hold possession of the village as a *thekadar*. A provision is then enacted that, after the death of Daryao Kunwar, Sheoraj Kunwar shall obtain full powers over the said village on the condition that she pays the Government land revenue and the village expenses, and that she shall take the entire village with rights of wood and water and all rights appurtenant, great and small, into her proprietary possession and use, and that no right or claim against Sheoraj Kunwar shall remain with the heirs of Daryao Kunwar, the only right of claim against Sheoraj Kunwar being vested in Daryao Kunwar herself. The deed continues that the lessee shall ever remain faithful to Thakurain Daryao Kunwar with heart and soul, and that she shall offer oblations of cakes and water to the ancestors of Daryao Kunwar. Then follows a clause that, in the event of Sheoraj Kunwar not complying with the terms of the deed and in the event of there being any failure in the condition of the aforesaid lease or any breach of fidelity or loyalty, Thakurain Daryao Kunwar shall have the power to resume and assume direct management of the village, and that Sheoraj Kunwar shall have no right to make any objection to such resumption. In addition to the omissions already mentioned, it is to be observed that in that portion of the deed which relates to the contingency of the occurrence of the death of Thakurain Daryao Kunwar, no provision is made for the payments of the annuities to Mahipal Singh, Sheopal Singh and Sheo Parsad Singh. The terms of the deed do not make it clear whether Thakurain Daryao Kunwar intended these annuities to be paid after her death. In consequence of the obscurity of the terms of this document, there has been a large amount of argument devoted to its provisions. The learned Counsel for the appellant has argued that the deed is in effect a lease on favourable terms granted to Sheoraj Kunwar for her life-time alone, that the word "perpetual" is meaningless, and that on the death of Sheoraj Kunwar all rights under the deed terminated. He has further argued that in view of the fact that Sheoraj Kunwar predeceased Thakurain Daryao Kunwar, the contingencies providing for the event of Thakurain Daryao Kunwar's death need not be considered. He, therefore, urges that in no circumstances can the deed be considered to have conferred under-proprietary rights upon Sheoraj Kunwar. The learned Counsel for the respondents has asked us to interpret the provisions for this deed as conferring under-proprietary rights upon Sheoraj Kunwar and her heirs, subject to the condition that these under-proprietary rights, although vested in Sheoraj Kunwar and her heirs from the date of the execution of the deed, remained dormant and did not come into effect until the death of Thakurain Daryao Kunwar. We do not propose to decide whether the rights conferred upon Sheoraj Kunwar were inherited by her heirs. We are able to decide this appeal without arriving at a finding upon that point; and in view of the fact that the terms of the deed may have to be considered subsequently in a Rent Court and not in a Civil Court, we consider it advisable to express no opinion which may be utilized to affect the decision of such a Court. The right of an under-proprietor in Oudh is not exhaustively defined in Act XXII of 1886. Section 3, clause 8, of that Act states that an under-proprietor means any person possessing a heritable and transferable right of property in land for which he is liable to pay rent. *Musammat* Sheoraj Kunwar certainly possessed a right of property in the village, for which she was liable to pay rent. We do not propose to decide whether that right was heritable, and, for the purpose of the decision of this appeal, it is not even necessary to decide whether that right was transferable; but in addition to the elements of heritability and transferability there is one essential factor in under-proprietary right in Oudh, which we find to be absent in the right possessed by *Musammat* Sheoraj Kunwar. In no circum-

stances is a proprietor afforded a right of re-entry against an under-proprietor in Oudh. Where under-proprietary right exists, the position of the under-proprietor is that he holds rights almost as great as those of the superior proprietor, subject to the limitation that he has to pay the land revenue and the cesses and usually something by way of *malikana* to the superior proprietor. It is not absolutely essential that there should be a condition to pay *malikana* and, if it were essential, that condition would be fulfilled in the present instance, owing to the provision in the deed that *Musammat* Sheoraj Kunwar should pay certain annuities on behalf of Thakurain Daryao Kunwar and should also pay the expenses of religious worship offered to the latter's ancestors. But the proprietor cannot, even if land revenue and cesses be not paid under the terms of the agreement by the under-proprietor, eject the under-proprietor. Section 152, Act XXII of 1886, provides that in the event of the existence of a decree against the under-proprietor for arrears of rent due in respect of an under-proprietary right, the interest of the judgment-debtor in that right may, subject to the provisions of the Act, be sold in execution of the decree. But the remedy is not given that, in the event of the existence of such a decree, the under-proprietor may be ejected from his rights as under-proprietor. The fact that this deed contains a right of re-entry, is sufficient in itself to show that *Musammat* Sheoraj Kunwar was not an under-proprietor, whatever else she may have been.

The learned Counsel for the respondents has urged in the course of his address that the question of limitation should have been decided in his favour. We find against him upon this point. The suit as it is before us is a suit simply for a declaration that the defendants possess no under-proprietary rights and there was no determination to the effect that they did possess under-proprietary rights until the year 1912.

For the above reasons we find that the defendants have no proprietary or under-proprietary rights in the village. The plaintiff has asked solely for a declaration to the effect that they have no proprietary or under-proprietary rights. The defendants have asserted that they have under-proprietary rights, and the plaintiff is, therefore, entitled to a decree to the effect that they have no proprietary or under-proprietary rights.

We accordingly allow this appeal and direct that such a decree be passed. The respondents will pay their own costs and those of the appellant in both Courts.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 477 OF 1913.

April 17, 1914.

Present:—Mr. Justice Seshagiri Aiyar.

MUTHUSAMY AIYAR—PLAINTIFF—PETITIONER

versus

SOLAI KONAN *alias* RAMIAH KONAN—DEFENDANT—RESPONDENT.

Landlord and tenant—Rent paid to real owner—Benamidar, suit by—Tenant, liability of.

Rent paid to the real owner absolves the tenant from liability to the *benamidar*.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Valangiman, in Small Cause Suit No. 1072 of 1912.

Mr. *C. A Seshagiri Sastri*, for the Appellant.

Mr. *K. V. Krishnasami Aiyar*, for the Respondent.

JUDGMENT.—The finding in this case is that the plaintiff was a *benamidar* for Kamakshi Ammal. The issue raised in the case covers this question and there is evidence upon which the Court below was entitled to come to the conclusion that the defendant executed the document to the plaintiff at the instance of Kamakshi and on her behalf. I accept this finding. Then Mr. Seshagiri Sastri argues that as the rent-deed was executed to the plaintiff, payment to Kamakshi Ammal cannot absolve the defendant from liability to him and he relies upon the authority of *Jainarayan Bose* v. *Kadimbini Dasi* (1) for that position. There has been a conflict of views in regard to this question and so far as this High Court is concerned, in *Kuthaperumal Rajali* v. *Secretary of State for India* (2)

(1) 7 B. L. R. 723, *Foot-note*.
(2) 30 M. 245; 17 M. L. J. 174.

the learned Judges have come to the conclusion that the real owner is entitled to maintain a suit in his own name for recovery of property or money. Following that decision Mr. Justice Wallis in *Kuppukonan* v. *Thirugnana Sammandam Pillai* (3) has held that the plea of estoppel available against a tenant is only in favour of the real owner and not in favour of the *benamidar*. I entirely agree with this view. The money having been paid to Kamakshi Ammal, the defendant is discharged from liability to the plaintiff and the suit was rightly dismissed by the District Munsif and I dismiss the petition with costs.

Appeal dismissed.

(3) 31 M. 461.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 141 OF 1912.

April 30, 1914.

Present:—Mr. Stuart, A. J. C., and Mr. Kanhaiya Lal, A. J. C.

MUHAMMAD ABDUL RAQIB KHAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

SALAMAT BIBI—PLAINTIFF—RESPONDENT.

Custom, proof of—Alizai Pathans *settled in United Provinces*—*Daughters, exclusion of custom relating to*—*Accretion to* taluka *or grant when considered to be*—*Intention, proof of, necessary to constitute accretion*—*Waste land rules, land purchased under.*

The custom of exclusion of daughters amongst *Alizai Pathans* settled in the United Provinces is not established by the evidence in the case. The facts that such a custom exists in Baluchistan and Waziristan amongst *Alizai Pathans* does not justify the presumption that the same custom exists in a family settled in the United Provinces for the last 300 years.

Bhaiya Janki Pershad Singh v. *Bhaiya Dwarka Pershad Singh*, 20 Ind. Cas. 73; 35 A. 391 at p. 401; 17 C. W. N. 1029; 14 M. L. T. 110; 25 M. L. J. 34; (1913) M. W. N. 630; 18 C. L. J. 200; 11 A. L. J. 818; 15 Bom. L. R. 853; 16 O. C. 216; 40 I. A. 170 (P. C.), followed.

The determination of the question whether property subsequently acquired by a *Talukdar* or a grantee is to be considered as a portion of his *taluka* or grant, depends upon the proof of his intention to incorporate the acquisiton with the *taluka* or grant.

The land purchased under the Oudh Waste Land Rules is not a grant and any terms in the deed of such a sale could not enable a person to devise the property conveyed therein in derogation of the provisions of his own personal law.

Appeal from the decree of the Subordinate Judge of Sitapore, dated 3rd July 1912.

Mr. *F. Lincoln* and Babu *Ishri Prasad*, for the Appellants.

Mr. *St. G. Jackson* and Babu *Basdev Lal*, for the Respondent.

JUDGMENT.—The plaintiff-respondent is the daughter of a certain Muhammad Ibrahim Khan. She sued for a share in the property of her deceased father. Her claim was resisted on the ground that a portion of the property which she claimed was devisable under the provisions of the grants under which it was held, and that in any circumstances she was excluded from inheriting landed property under a binding custom affecting her family. The learned Subordinate Judge found that a portion of the property affected by the decree was property which the plaintiff-respondent's deceased father had a legal right to devise. He dismissed the claim with regard to that property, but awarded the plaintiff-respondent a decree with respect to the remaining property. The validity of that decree is contested in appeal upon the grounds that a binding custom has been proved, that certain portions of the property affected by the decree are accretions to a Government grant and as such devisable, and that the property Rahimnagar was obtained by the plaintiff-respondent's father under a grant from the Crown which enabled him to devise it. The plaintiff-respondent claims to inherit in accordance with the provisions of the Muhammadan Law applicable to the *Sunnis*. Her right is contested on the ground that the provisions of that law cannot be invoked in her favour. Muhammad Ibrahim Khan was admittedly a *Sunni*, and it is for the appellants to show that any portion of his property is devisable contrary to the provisions of the law binding *Sunnis*. They have endeavoured to prove a custom in the following manner:—

Muhammd Ibrahim Khan was an *Alizai Pathan*. His family, according to the appellants' own assertion, has been settled in India for the last three centuries. They are said to have come originally from Waziristan, and the *Alizais* are asserted to be a sub-division of the *Mahsud* tribe who are themselves a sub-division of the *Waziris*. While it is quite possible that the *Alizais* who reside in Waziristan have customs regulating the succession to landed property in Waziristan

in which succession follows lines not directed in the provisions of the law governing the succession of *Sunni* Muhammadans, there is nothing to show that such customs in derogation of the ordinary provisions of the law were preserved and enforced by this family on settlement in Hindustan and affect this particular case. They have endeavoured to prove this by evidence of an assertion made by Muhammad Ibrahim Khan himself in document B1, which was a Will executed by him in 1880. The mere assertion by Muhammad Ibrahim, that a certain custom as to the devolution of landed property has been in existence in his family for 300 years, is of very little weight. From the statements made by the learned Counsel for the appellants, and from certain evidence which appears upon the record, we find that Muhammad Ibrahim Khan was a soldier. His ancestors had come originally from Afghanistan, and had finally settled in the Bulandshahar District. They appear to have had little or no landed property, and there is nothing to show that anything had ever occurred during the three centuries that they had resided in Hindustan which called for an assertion of a custom of succession different from that laid down in the rules of Muhammadan Law. Obviously if they had had little or no landed property, they would have been less likely to have considered whether daughters were or were not excluded from succeeding to a share in such property. After the events of 1857 Muhammad Ibrahim Khan, as a reward for good services rendered to the British Authorities during that period, obtained a grant of certaim villages in Oudh, and his name was entered among the petty grantees as No. 89 in List 6 prepared under the provisions of Act I of 1869. He added to the property granted to him by purchase. There is no reliable evidence to prove whence he obtained the funds from which he purchased the latter property. He died at an advanced age leaving fairly considerable landed property. He may or may not have been honest in his statement that there was a custom in his family that daughters did not succeed to landed property. But there is nothing to show that he had such materials upon which to base his statement as to make his declaration of weight. Further we must not overlook the consideration that as he is proved to have desired to leave the whole of his landed property to his sons, he had a distinct motive to assert the existence of such a custom even if it did not exist. The learned Counsel for the appellants has read us various extracts from books which, he urges, support the existence of the custom which he alleges. These extracts are from Tupper's Customary Law of the Punjab, Volume II, at pages 145, 233 and 236; Burnes' Travels, page 142; the Baluchistan Gazatteer, Volume I, referring to the Zhob Valley at page 65, and a Volume referring to Sibi at page 47, and the North-West Frontier Province Report for 1903. The extracts from Tupper's Customary Law refer in the main to the customs of *Pathans* residing in the Punjab, and there is nothing in the volume which can shed any light on the existence of a custom of a family which has resided for 300 years in the territories now known as the United Provinces of Agra and Oudh. The extract from Burnes' Travels refers to conversations between the writer and Dost Muhammad Khan, then Amir of Afghanistan. We have some doubts whether this extract can be admissible in evidence. But in any circumstances the opinion of the Amir of Afghanistan as to the exclusion of daughters amongst Afghans generally cannot have any weight with regard to the existence of a cutsom in this particular family. The Baluchistan Gazetteers have even less force, for customs in Baluchistan cannot be invoked as evidence to support the existence of a custom in a family in these Provinces which originally came from Afghanistan. Similarly, we find nothing in the North-West Frontier Province Reports which can help us in the matter. The appellants further relied upon the oral evidence of Arazi Bibi, Faiz Bibi, Muhammad Rahim Khan, Jiwan Khan, Sahebdad Khan, Muhammad Karim and Nur Muhammad Khan. The learned Subordinate Judge considered all this evidence and found it of no value. Arazi Bibi and Faiz Bibi were daughters. They gave evidence on behalf of the appellants. Each had received Rs. 1,500 from Muhammad Ibrahim Khan in his life-time. The other witnesses displayed in some instances apparent bias and in no case were persons whose statements carried weight. We have considered this evidence and we are

of opinion that the depositions of these witnesses cannot possibly afford ground for a finding that such a custom exists. Against this evidence we find in Exhibit 16, the *Wajib-ul-arz* of the village of Gesupur where the family of Muhammad Ibrahim Khan resided, a statement that succession in this family is governed by the provisions of the Muhammadan Law subject to the fact that adoption, which is unknown to the Muhammadan Law, is under certain conditions recognized in the family. But this *Wajib-ul-arz* does not state that exclusion of daughters from inheritance in landed property is also recognized in the family. There are also entries in the *khewat* in mutation proceedings which show that females, belonging to this family in the Agra Province, have succeeded to landed property. The evidence afforded by these latter entries is not of great weight owing to the fact that until recently the High Court having jurisdiction in the Province of Agra did not recognize customs of succession amongst Muhammadans in derogation of the principles of Muhammadan Law. In conclusion it is necessary for the appellants to prove affirmatively that the custom which they set up exists, and we are satisfied, after examining the evidence and hearing the able arguments of their learned Counsel, that the appellants have absolutely failed to prove the existence of such a custom.

We have next to consider whether the appellants have been able to prove that certain additions to the landed estate of Muhammad Ibrahim Khan are to be considered as accretions to his grant devisable by him. It has been decided by their Lordships of the Privy Council in *Bhaiya Janki Pershad Singh* v. *Bhaiya Dwarka Pershad Singh* (1) that the determination of the question whether property subsequently acquired by a *Talukdar* or grantee is to be considered as a portion of his *taluka* or grant, depends upon proof of intention to incorporate the acquisitions with the *taluka* or grant. We find nothing in the evidence to justify a conclusion that the additions in question were obtained by Muhammad Ibrahim Khan with the intention that they should be incorporated in his grant. We find on the contrary that the circumstance that he purchased in many instances such property in the names of his sons, although he enjoyed proprietary possession over the property himself, goes to show that he did not intend the additional property to be incorporated in his grant. We find on this point against the appellants.

There remains for consideration the determination of the point, whether the village Rahimnagar was acquired by Muhammad Ibrahim Khan in a manner that enabled him to devise it by his testamentary disposition irrespective of the provisions of the Muhammadan Law relating to *Sunnis*. The deed with regard to the transfer of this village is filed, Exhibit 2. It was purchased under the Oudh Waste Land Rules, and the form of the deed is that given at page 53 of the Oudh Waste Land Rules. The deed in question is a translation in Urdu of the Form there given in English and is a deed of sale. The property was purchased at auction and although it is referred to in the Urdu translation as a grant, it is referred to in the English as a lot. The deed conveys full hereditary and transferable proprietary rights and is in effect a conveyance between a vendor and a vendee different to the ordinary deed of sale in the solitary part that it contains provisions that, if the vendee fails to fulfil any of the conditions entered in the deed, the area affected will be liable to penalties defined in the rules for the sale of waste lands. There is nothing in the terms of the deed which enables a *Sunni* Muhammadan to devise the property conveyed thereby in derogation of the provisions of Muhammadan Law.

These are all the points upon which the appeal has been argued before us. We find against the appellants upon all of them. This appeal, therefore, fails and is dismissed. The appellants will pay their own costs and those of the plaintiff-respondent.

Appeal dismissed.

(1) 20 Ind. Cas. 73; 35 A. 391 at p. 401; 17 C. W. N. 1029; 14 M. L. T. 110; 25 M. L. J. 34; (1913) M. W. N. 630; 18 C. L. J. 200; 11 A. L. J. 818; 15 Bom. L. R. 853 16 O. C. 216; 40 I. A. 170 (P. C.)

RAJAGOPALA NAIDU *v.* VIJAYARAGHAVALU NAIDU.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 401 OF 1913.

September 16, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

RAJAGOPALA NAIDU—DEFENDANT—PETITIONER

versus

N. R. VIJAYARAGHAVALU NAIDU AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Court Fees Act (VII of 1870), ss. 7 (iv) (c) and 7 (v) —Suits Valuation Act (VII of 1887), s. 8—Valuation of suit—Jurisdiction—Court-fees — Declaration and possession, suit for—Declaration, whether ancillary to prayer for possession.

A suit for (1) a declaration that a certain decree was of no legal effect against the plaintiffs or the various properties in their hands and (2) possession of a portion of those properties which had been sold, in execution of the decree, is a suit for declaration with possession as a consequential relief, inasmuch as possession is not asked for on any other ground than that the decree in execution of which it was lost should be declared invalid. Therefore, Court-fee is payable only for the relief regarding possession, and no separate *ad valorem* fee is payable on the amount of the decree in respect of which the declaration is sought.

Scope of sections 7 (*iv*) (*c*) and 7 (*v*), Court Fees Act (VII of 1870), discussed.

Chinnammal v. *Madura Rowther*, 27 M. 480; 14 M. L. J. 343 and *Zinnatunnessa Khatun* v. *Girindra Nath Mukerjee*, 30 C. 788, referred to.

Krishnasami Naidu v. *Somasundaram Chettiar*, 30 M. 335; 17 M. L. J. 95; 2 M. L. T. 116 (F. B.), distinguished.

Petition, under section 115 of Act V of 1908, to revise the order of the District Court of Tanjore, dated the 8th February 1913, in Civil Miscellaneous Appeal No. 18 of 1912, preferred against that of the District Munsif of Shiyali, in Original Suit No. 139 of 1910.

FACTS.—The plaintiffs sued in the District Munsif's Court of Shiyali for a declaration that a certian decree was of no legal effect against them or the properties in their hands, and for possession of part of those properties which had been sold in execution of the said decree. The defendant contended that under section 7 of the Court Fees Act an *ad valorem* fee was payable on Rs. 2,995, made up of the amount of the decree in respect of which the declaration was prayed for and also the value of the properties sold, as the two prayers were independent and that in consequence it was not competent to the District Munsif to try the suit, as it was beyond the limits of his pecuniary jurisdiction. The District Munsif returned the plaint for presentation to the proper Court. Against this order the plaintiffs preferred a civil miscellaneous appeal to the District Court of Tanjore which held that the suit was governed by section 7 (*iv*), clause (*c*), of the Court Fees Act and the District Munsif had jurisdiction to try the suit. The plaint was, therefore, ordered to be re-presented to the District Munsif. The defendant thereupon preferred this civil revision petition to the High Court under section 115 of the Civil Procedure Code.

Mr. *R. Kuppuswami Iyer*, for the Petitioner:—The District Judge clearly erred in reversing the order of the District Munsif. The Court-fee was payable *ad valorem* on the amount of the decree and on the value of the property sold. Section 8 of the Suits Valuation Act has no application. See *Krishnasami Naidu* v. *Somasundaram Chettiar* (1). The two prayers are not interdependent, but independent.

Mr. *G. S. Ramachandra Iyer*, for the Respondents;—The prayer for possession is not independent of, but depended on, the prayer for declaration. Court-fee is, therefore, payable only for the relief regarding possession. *Zinnatunnessa Khatun* v. *Girindra Nath Mukerjee* (2).

JUDGMENT.—The plaintiffs sued for (1) a declaration that a certain decree was of no legal effect against them or the various properties in their hands, (2) possession of part of those properties, which had been sold in execution of the decree. No distinction need be drawn between the rights of each of the plaintiffs to these reliefs, since they sued for them jointly without objection from the defendants. The learned District Judge held that section 7 (*iv*) (*c*) of the Court Fees Act applied and that, therefore, the valuation for purposes of jurisdiction was identical with the valuation for Court-fee and the plaintiffs' presentation of the plaint in the District Munsif's Court was proper. The District Munsif had held that the valuation should be based on the value of the property sold in addition to the amount of the decree in respect of which declaration was asked for, in all Rs. 2,995.

The learned District Judge was clearly

(1) 30 M. 335; 17 M. L. J. 95; 2 M. L. T. 116 (F. B.).

(2) 30 C. 788.

mistaken in his statement that section 7 (*iv*) (*c*) regulated the valuation of the whole suit, since part of the relief claimed was possession and it had to be valued in accordance with section 7 (*v*), notwithstanding that a declaration also was asked for. That is recognised in one of the cases cited by the learned District Judge, *Chinnammal* v. *Madarsa Rowther* (3). In the circumstances it cannot be argued that section 8, Suits Valuation Act, applies to more than the remainder of the relief claimed. The defendant contends here and the District Munsif has held that it is inapplicable even to that extent and that the remainder also is subject to *ad valorem* valuation on the amount of the decree in respect of which declaration is asked for. The questions then are whether the two reliefs asked for are to be taken together, the one as consequential on the other, or, as the District Munsif took them, as independent of each other, and in the latter alternative whether the declaration is to be valued with reference to the amount of the decree.

Firstly, in the latter case it has not, in our opinion, been shown how such a valuation can be justified. The defendant's argument requires that the claim to declaration shall be valued without reference to its inclusion in a suit for another relief also. It has not been shown how, so regarded, the claim can be treated as involving a claim to further consequential relief also or what such further relief could be; and the case must on that ground be distinguised from *Malikka Meladathil Kelutchammal* v. *Malikka Meladethil Kamavan Kuji Achammal* (4). It is not suggested that it is covered directly by any section imposing an *ad valorem* valuation. The defendant contends for the application of some principle analogous to that relied on in the Full Bench decision, *Krishnasami Naidu* v. *Samasundaram Chettiar* (1), with reference either to the amount of the decree or the value of the property claimed, whichever is the less. But though the order of reference in that case assumed that section 7 (*viii*) was inapplicable, it is clear that the opinion given was based on its application, since there is no other provision for such an alternative valuation. There the question was only whether the suit property was liable to attachment as the property of the judgment-debtor and the clause was in terms applicable. Here it is not, since an attachment is not in question. And there is no reason here for attempting to apply any analogous principle when the dispute between the parties is different, relating only to the validity of the decree under execution. If the prayer for a declaration is to be regarded for the present purpose independently of that for possession, *Zinnatunnessa Khatun* v. *Girindra Nath Mukerjee* (2) is clear authority against the defendant's contention.

But in fact we agree with the learned District Judge that the two prayers cannot be regarded separately. As he observes, the plaintiff's failure to insert a prayer for a combined valuation is not conclusive, the Court's duty being to see whether they are connected. We think that they were so. Possession is not asked for on any other ground than that the decree in execution of which it was lost, should be declared invalid ; and it is, therefore, asked for consequentially on the grant of declaration.

It is conceded that unless the two reliefs claimed can be valued independently and the prayer for declaration can be valued *ad valorem*, the petition must fail. Deciding against both these contentions, we dismiss the petition with costs.

Petition dismissed.

(3) 27 M. 480; 14 M. L. J. 343.
(4) 5 Ind. Cas. 927; 20 M. L. J. 791; 7 M. L. T. 177.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL NO. 70 OF 1913.
July 24, 1914.

Present:—Mr. Lindsay, J. C.

MUNESHAR BAKHSH SINGH—
JUDGMENT-DEBTOR—APPELLANT
versus
Musammat PHUL KUAR—DECREE-HOLDER
AND RAMESHAR BAKHSH SINGH—
JUDGMENT-DEBTOR—RESPONDENTS.

Maintenance decree, whether merely declaratory decree—Enforcement of such decree on execution side.

Where a decree for maintenance provides for the realization of the money due from the person and property of the defendants, the decree cannot be considered merely a declaratory one but the decree-holder has the right to enforce the recovery of the sum due under the decree by process in execution.

Appeal against the order of the Officiating Subordinate Judge, Hardoi, dated 22nd November 1913.

Pandit *Gokaran Nath Misra*, for the Appellant.

Babu *Jiban Krishna Banerji*, for Respondent No. 1.

JUDGMENT.—The facts of this case are as follows: A suit was brought by *Musammat* Phul Kuar, the decree-holder, against her sons, Muneshar Bakhsh and Rameshar Bakhsh. This suit was for a declaration that she was entitled to receive maintenance at the rate of Rs. 50 a month from Muneshar Bakhsh. The other son Rameshar Bakhsh appears to have been made more or less a *pro forma* party. The suit was compromised on the 4th of June 1912 by an agreement by which these two sons undertook to pay Rs. 66 a month in equal shares to their mother by way of maintenance. The money was to be payable in six monthly instalments. A decree was prepared in accordance with these terms, and in this decree it was expressly stated that the maintenance money was to constitute a charge on certain immoveable property specified in a list. It was also declared that in default of payment of the instalments of maintenance *Musammat* Phul Kuar would be entitled to realise money due from the person and property of the defendants. A default having occurred in payment, *Musammat* Phul Kuar has taken out execution of her decree. In the lower Court her application was opposed on behalf of Muneshar Bakhsh who is the appellant here. His objection was to the effect that *Musammat* Phul Kuar had no right to take out execution of the decree she had obtained. It was contended that the decree was a declaratory decree and that the only way in which she could recover sums owing to her was by a regular suit. The Subordinate Judge upheld this contention and allowed execution.

In appeal here it is again contended that the decree is a purely declaratory decree and, therefore, incapable of execution. I am unable to accept this argument, for, on the face of it, it seems to be more than a pure declaratory decree. It gives the decree-holder the right to enforce the recovery of sums due to her under the decree by process in execution. Another point which has been taken here is, namely, that as certain immoveable property has been charged with the payment of this maintenance the decree-holder cannot realise what is due to her by sale of the property so charged. It is argued that in order to realise a debt which is charged on property there must be a suit for sale just as in the case of a mortgage. That question, however, does not arise in the present instance and need not be discussed, for the application for execution which was put in by *Musammat* Phul Kuar was for attachment and sale of the moveable property belonging to the appellant Muneshar Bakhsh. In my opinion *Musammat* Phul Kuar was entitled to make this application. No other point arises for decision.

The appeal fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 369 OF 1913.

September 1, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Napier.

VUSA CHANDRAKANTAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

VUSA SUBBARAYUDU—PLAINTIFF—RESPONDENT.

Hindu Law—Dancing girls—Fanning service, whether can be performed by males—Service inam—Alienation—Adverse possession of office, if confers title to emoluments.

By reason of his sex a Hindu male is incapacitated from performing 'fanning' service in a temple, which is usually done by dancing girls.

An alienation of an *inam* granted for the performance of fanning service in a temple in favour of a person not next in succession is invalid, even though it is made in favour of a member of the family to which the *inam* belongs.

Minakshisundaram Pillai v. *Chockalinga Royer*, 15 M. L. J. 10; *Pakkiam Pillay* v. *Seetharama Vadhyar* 14 M. L. J. 134 and *Narayana* v. *Ranga*, 15 M. 183, 2 M. L. J. 19, followed.

Joint possession of an office, even if adverse, does not confer a title to a share of the income of the lands attached thereto.

Bhaiaji Thakur v. *Jharula Das*, 24 Ind. Cas. 501; 1 L. W. 549; 18 C. W. N. 1020; 27 M. L. J. 100; 16 M. L. T. 210; (1914) M. W. N. 636 (P. C.), referred to.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Rajamundry, in Appeal Suit No. 152 of 1912 (Referred Appeal Suit No. 149 of 1911 on the file of the Court of the Subordinate

Judge of Cocoanada), preferred against that of the District Munsif of Peddapuram, in Original Suit No. 847 of 1909.

FACTS.—The lands in suit are appurtenant to the fanning service to be performed by certain dancing girls in the Sri Visveswara Swami temple in the village of Peddapuram. They were originally held by one Syamala, who died in 1854 leaving two daughters (whose respective descendants are the 1st and 2nd defendants) and the plaintiff, the son of another predeceased daughter of hers. During her life-time Syamala executed a *kararnama* dated 17th February 1854, whereby she made over all her properties, including the service *inam* lands in suit, to the surviving daughters and the grandson, with the condition superimposed that the two daughters should continue to perform the fanning service. Ever since 1854 the plaintiff and his aunts and after them defendants Nos. 1 and 2 continued in joint enjoyment of the property, the daughters and their descendants having continued to do the service. In 1909 defendants Nos. 1 and 2 alienated the suit properties, whereupon the plaintiff sued for a declaration of his title to a third share of the same and for a partition thereof by metes and bounds, or, if that was not possible, for a decree for joint possession along with 1st and 2nd defendants. The defendants contended *inter alia* that the service in question could be performed only by women, that the *karar* relied by the plaintiff was invalid and conveyed no right to plaintiff as it was not competent to Syamala to alienate the emoluments of the office and that the suit lands were neither alienable nor divisible.

The District Munsif gave a decree for partition, but, on a construction of the suit *karar*, limited the interest of the plaintiff to his life-time. On appeal the Subordinate Judge modified the decree of the Court below and held that plaintiff was entitled to a third share absolutely. Against this decree the defendants preferred the above second appeal.

Mr. *Patanjali Sastri*, for Mr. *P. Narayanamurti*, for the Appellants:—The *karar* is not binding on the defendants. The *inam* being a hereditary service *inam*, can only be enjoyed by the holder of the office without any power of alienation. *Pakkiam Pillay* v. *Seetharama Vadhyar* (1). Any alienation by him cannot be binding on his successors-in-office. *Minakshisundaram Pillai* v. *Chockalinga Royer* (2). The emoluments always follow the office. *Bhaiaji Thakur* v. *Jharula Das* (3).

So far as the alienation of emoluments is concerned the distinction that has been made as regards the alienations of offices to members of the family and strangers, does not apply and alienation in favour of a member of the family is equally bad as one in favour of a stranger.

The *karar* cannot be construed as a disposition of the office or of joint interest therein, as it enjoins the performance of the services by the surviving daughters of Syamala. Even if so construed, it is still invalid as not in favour of the person next in the line of succession. *Narayana* v. *Ranga* (4), *Alagappa Mudaliar* v. *Sivaramasundara Mudaliar* (5).

Further the plaintiff in this case is disqualified by his sex from performing the services which can only be preformed by dancing girls. It could not be contended that the services could be performed by a proxy. Compare *Sundarambal Ammael* v. *Yogavanagurukkal* (6). Such a practice, if countenanced, will lead to the office being alienated in favour of a person belonging to a different caste or religion. Vide *Mancharam* v. *Pranshankar* (7): *Rajaram* v. *Ganesh* (8) and *Iyyadurai Gurukkal* v. *Ramasawmy Gurukkal* (9).

Mr. *P. Nagabushanam*, for the Respondent:—The defendants themselves having acted according to the terms of the *karar* and recognised the plaintiff's right, they are now estopped from disputing the latter's title. The plaintiff must be held to have acquired a valid title by adverse possession. The case in *Bhaiaji Thakur* v. *Jhurula Das* (3) related to the alienation of the office in favour of an absolute stranger and their Lordships only held that it was void.

(1) 14 M. L. J. 134.
(2) 15 M. L. J. 10.
(3) 24 Ind. Cas. 501; 18 C. W. N. 1020 at pp. 1035, 1036; 1 L. W. 549; 27 M. L. J. 100; 16 M. L. T. 210; (1914) M. W. N. 636 (P. C.)
(4) 15 M. 183; 2 M. L. J. 19.
(5) 19 M. 211.
(6) 23 Ind. Cas. 72; 26 M. L. J. 315; (1914) M. W. N. 286; 1 L. W. 276.
(7) 6 B. 298.
(8) 23 B. 131.
(9) 18 Ind. Cas. 475.

VUSA CHANDRAKANTAM *v.* VUSA SUBBARAYUDU.

JUDGMENT.— This is a suit to establish respondent's (plaintiff's) right to, and to recover possession (after partition) of, a one-third share in certain *inam* lands attached as emoluments to a "fanning service" performed by dancing girls to the god Sri Visweswara Swami in the village of Peddapuram. The District Munsif gave a decree for recovery of possession and for a declaration of plaintiff's title during his life-time. The Subordinate Judge has amended the decree by removal of the limitation and has given a decree practically as sued for.

Plaintiff's title rests on a *kararnama*, Exhibit A, executed in 1854 by one Syamala, who then held the office and emoluments. She had at the time two daughters (from whom appellants Nos. 1 and 2 are descended) and a son of a deceased daughter (the present plaintiff). To these three persons jointly she made over all her properties (including the service *inam* lands), directing at the same time (according to the plaint) that the two daughters should continue to perform the service. Shortly afterwards she died ; and from that time till 1909 plaintiff claims to have been in joint enjoyment of the suit property along with his aunts and after them their female descendants who were actually performing the service. In 1909 appellants Nos. 1 and 2, who had then succeeded to the service, effected a mortgage of the suit lands. Thereupon plaintiff sued to establish his title and recover possession of a one-third share.

It is beyond dispute that the suit lands are service lands and attached to the "fanning service" and are strictly speaking inalienable ; that is to say, any alienation by an office holder is invalid after that office holder's life-time, and does not bind his or her successor (vide *Minakshisundaram Pillai* v. *Chockalinga Royer* (2) and *Pakkiam Pillay* v. *Seetharama Vadhyar* (1).

It is, however, contended that plaintiff being a member of the family, this rule does not apply. We cannot accept such a contention. The Munsif says (and we do not understand the Subordinate Judge to differ from him) that the suit land is *inam* attached to service which is usually rendered only by *dasi* women in Hindu temples. We have no doubt that plaintiff is by reason of his sex incapacitated from performing the service. The Subordinate Judge says the service can be performed by proxy: but there is no suggestion in the plaint that plaintiff has arranged for a proxy to do the service on his behalf. In fact after setting out that Syamala directed that her daughters Venkatachellam and Nilachellam should do service, the plaint contains no further reference to the performance of service, but deals simply with the enjoyment of the *inam* lands.

We must take it, then, that plaintiff never did, nor could have done, the service to which the emoluments are attached.

We may add that in any case Syamala's daughters were the next immediate heirs to the office on her death : and that she could not transfer the office to plaintiff, even if he was not disqualified from holding it [vide *Narayana* v. *Ranga* (4)].

In these circumstances, the fact that plaintiff was a close relation of the office holders does not affect the invalidity of the alienation in his favour.

Even if his alleged joint possession with the office holders were regarded as adverse, this would not give him a title even to a share of the income of the lands [*vide* the remarks of the Privy Council in *Bhaiaji Thakur* v. *Jharula Das* (3)]; but as a matter of fact, it is clear that his enjoyment was permissive. At the time of Exhibit A, he was a child and even after he grew up, his aunts and their immediate successors raised no objection to his participating in the income of the service *inam* lands. The present office holders are less complaisant.

It has been suggested before us that appellants Nos. 1 and 2 are personally estopped from contesting his claim, but we find nothing to this effect in the plaint and no issue which covers such a plea.

We must set aside the decree of the lower Appellate Court and dismiss the suit with costs throughout.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 4 OF 1914.

June 1, 1914.

Present:—Mr. Kendall, A. J. C.

DURGA AND OTHERS—DEFENDANTS—APPELLANTS

versus

MAN—PLAINTIFF—RESPONDENT.

Oudh Laws Act (XVIII of 1876), s 9—Relationship, meaning of—Pre-emption—Illegitimate sons, whether preferred to legitimate collaterals.

The relationship contemplated in section 9 of the Oudh Laws Act is a legitimate relationship.

Therefore, such persons as illegitimate sons who are entitled to maintenance and not to inheritance, have not a better right to pre-emption than a legitimate collateral relation.

Appeal against the order of the Additional Judge of Lucknow, dated 13th January 1914, reversing that of the Munsif, South Lucknow, dated 25th June 1913.

Mr. *Zahur Ahmad*, holding brief of Mr. *Saimullah Beg*, for the Appellants.

Mr. *M. Wasim*, for the Respondent.

JUDGMENT.—The appellants are the illegitimate sons of one Sital Prasad. The respondent is the son of Har Parshad, Sital Prasad's first cousin. Sital Prasad executed a deed of sale of a share in favour of the appellants who were at the time co-sharers by virtue of some former deed in their favour. Man, respondent, thereupon brought this suit for pre-emption, claiming a better title as a sharer nearer in relationship.

The first Court dismissed the suit on the ground that illegitimate sons had preference to collateral relations, because the word "relationship" in section 9 of Act XVIII of 1876 was not confined to legitimate relationship only.

The lower Appellate Court reversed this finding and found that an illegitimate son was a *filius nullius* and returned the case under Order XLI, rule 23, for decision on the merits. Hence this appeal in which this is the only question to be decided. The question does not seem to have been before this Court on any previous occasion. In *Muhammad Ayub Khan* v. *Musammat Kaniz Fatima Bibi* (1) it was ruled that the relationship referred to in section 9 of the Oudh Laws Act means consanguinity from a common stock as opposed to affinity or relationship by marriage, and that it was not confined to relationship through males. The learned Judicial Commissioner also held that the test was nearness in point of relationship; and the right to pre-empt accrued in accordance with the nearness in degree, and not in accordance with the position of parties in the line of inheritance. Relying on this ruling the appellants argue that as it has been therein laid down that nearness in the line of inheritance is not to be considered, therefore, an illegitimate son, who is nearer in point of relationship to his father than is the collateral, must be held entitled to pre-empt. It is admitted that an illegitimate son cannot be considered an heir, and that an illegitimate son is not a member of a joint Hindu family so as to be entitled to claim a share on partition, but *Pandaiya Telaver* v. *Puli Telaver* (2) is quoted as also *Ram Kali* v. *Jamma*(3), in both of which rulings it is said that the Hindu Law does not treat an illegitimate son as *filius nullius*. Illegitimate children are looked upon in Hindu Law as the children of their mother, and are entitled to maintenance only. They do not constitute a component part of a family as do legitimate sons and collaterals. They are in a lower grade, in the estimation of the Hindu Law, than those excluded for some defect but entitled to be maintained, whose legitimate sons will be entitled to inherit and their daughters and childless widows to maintenance; for the right to maintenance of illegitimate sons is a *personal* right, which does not descend to their offspring. I notice that in *Mata Pershad* v. *Bhawarati* (4) the Board of Revenue found that illegitimate sons were not collateral relations of their father's brother.

It would be a most dangerous precedent and one opposed to the spirit of the Act to lay down that persons entitled to maintenance and not to inheritance, and in this category are included illegitimate sons, have a better right to pre-emption than a legitimate collateral relation.

For the above reasons I hold that the relationship contemplated in section 9 of the Oudh Laws Act is a legitimate relationship.

This appeal, therefore, fails and is dismissed. Respondent may have his costs.

Appeal dismissed.

(1) 11 Ind. Cas. 919; 14 O. C. 193.

(2) 1 M. H. C. R. 478.

(3) 30 A. 508; 5 A. L. J. 629; A. W. N. (1908) 229.

(4) S. D. B. R. File No. 1395 of 1886.

Musammat MENDANA *v.* JAGAN NATH BAKHSH.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 152 OF 1912.

April 15, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C.

Musammat MENDANA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Lala JAGAN NATH BAKHSH AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Disruption of unity of joint Hindu family—Presumption as to date of disruption—Presumption as to unity of other members where one member separates.

Where a disruption of the unity of a joint family has once taken place and is proved or admitted to have taken place, no presumption can be raised as to the date of that disruption.

Where one co-parcener separates himself from the others, there is no presumption that the remaining members remain united.

Balabux v. *Rukhmabai*, 30 C. 725 (P. C.); 30 I. A. 130; 7 C. W. N. 642; 5 Bom. L. R. 469; *Bannoo* v. *Kashee Ram*, 3 C. 315 (P. C.); 3 Sar. P. C. J. 781; 3 Suth. P. C. J. 490; Rafique and Jackson's (P. C.) No. 49; 2 Ind. Jur. 151; *Obhoy Churn Ghose* v. *Gobind Chunder Dey*, 9 C. 237; 7 Ind. Jur. 361; 5 Shome L. R. 51; *Ram Ghulam Singh* v. *Ram Behary Singh*, 18 A. 90; A. W. N. (1895) 234, referred to.

Appeal against the decree of the Additional Judge of Hardoi, dated 20th August 1912.

Mr. *A. P. Sen*, for the Appellants.

Mr. *Nabiullah*, for the Respondents.

JUDGMENT.—The dispute in this case relates to the property of Ram Sahai, who died early in 1879, leaving a widow, *Musammat* Dulari, a daughter, *Musammat* Mendana, a brother, Sheo Sahai, and two nephews, Jagannath Bakhsh and Ram Ratan, by a predeceased brother, named Anandidin. On the death of Ram Sahai mutation of names was effected in respect of his property in favour of Sheo Sahai, Jagannath Bakhsh and Ram Ratan under an arrangement made by them with *Musammat* Dulari on the 17th December 1879, whereby 19 *bighas* 6 *biswas* of land in *Mauza* Kallianpur were made over to *Musammat* Dulari for her maintenance and support and the rest of the property was made over to Sheo Sahai, Jagannath Bakhsh and Ram Ratan on the condition that they were to pay the debts due by the deceased.

Musammat Dulari died on the 4th October 1909. The present suit was brought by *Musammat* Mendana and her transferee, Sheopal Singh, for the recovery of possession of the *zemindari* property left by Ram Sahai deceased and Rs. 300 on account of mesne profits for 1318 *Fasli*. The main questions for consideration in the case were whether Ram Sahai was living jointly with or separately from Sheo Sahai, Jagannath Bakhsh and Ram Ratan on the date of his death and whether *Musammat* Mendana was entitled to succeed to the property of Ram Sahai on the death of his widow.

Sheo Sahai died sometime in 1881 without leaving any issue. His property was entered on his death in the names of his nephews, Jagannath Bakhsh and Ram Ratan. The learned Subordinate Judge laid the onus of proving separation on the plaintiffs and came to the conclusion that the alleged separation of Ram Sahai from Sheo Sahai, Jagannath Bakhsh and Ram Ratan was not established.

It is admitted, however, by the defendants-respondents that Jagannath Bakhsh and Ram Ratan are living separately from 22 years. No presumption can, therefore, be raised of jointness. Where a disruption of the unity of the joint family has once taken place and is either proved or admitted, no presumption can be raised as to the date of that disruption. Where one co-parcener separates himself from the others, there is no presumption that the remaining members remain united [*Balabux* v. *Rukhmabai* (1)]. It is for the party who alleges that the other members remained joint to establish that fact. If it is admitted or proved that the members of a family were not in a complete state of union at the time of the institution of suit, no presumption can be raised as to the date of separation or as to the previous jointness of the family on the happening of a particular event prior to the suit. In *Bannoo* v. *Kashee Ram* (2) their Lordships of the Privy Council held that the presumption of jointness did not arise when it appeared that there had been a division of the family property and a separation in the family, all the members of which were living separately. In *Obhoy Churn Ghose* v. *Gobind Chunder Dey* (3) Garth, C. J., and Mitter, J., observed that the general principle that

(1) 30 C. 725 (P. C.); 30 I. A. 130; 7 C. W. N. 642; 5 Bom. L. R. 469.

(2) 3 C. 315 (P. C.); 3 Sar. P. C. J. 781; 3 Suth. P. C. J. 490; Rafique and Jackson's (P. C.) No. 49; 2 Ind. Jur. 151.

(3) 9 C. 237; 7 Ind. Jur. 361; 5 Shome L. R. 51.

when a Hindu family was proved to have been joint that state of things should be presumed to continue until the contrary was shown, would not be applicable where it was admitted that at the time when the suit was brought the plaintiff and the defendant were not members of a joint family. In *Ram Ghulam Singh* v. *Ram Behary Singh* (4) where it was admitted by some of the plaintiffs' witnesses that there had been a separation of the family after the death of one of the members and the allegation of the defendants was that the separation had taken place much earlier, it was held that the case of the plaintiff being inconsistent with the presumption of the family remaining joint it was for him to prove that the separation took place at the time he alleged.

The evidence adduced by the plaintiffs in this case establishes that Ram Sahai was not living jointly with the other members of the family on the date of his death. It appears from the documentary evidence on the record that at the time of the Regular Settlement Anandidin, Ram Sahai and Sheo Sahai were living jointly and that while Anandidin was looking after *Mauzas* Raman Umrapur and Mirzapur Sumhari, of which he was the *lambardar*, Ram Sahai was acting as the *lambardar* of *Mauza* Kallianpur and looking after that village. At that time some claimants turned up to demand a share in some of those villages, but their claims were resisted in each instance by the *lambardar* who was supported by his brothers. Jawaher Lal, the uncle of Anandidin, Ram Sahai and Sheo Sahai, was then recorded as the owner of a 10-*biswas* share in each of those villages and Anandidin, Ram Sahai and Sheo Sahai were recorded as owners of the remaining 10 *biswas* in equal shares. It is difficult to say whether Jawaher Lal was also living jointly or not. He had no issue and had made a gift of his entire share in favour of Jagannath Bakhsh and Ram Ratan, sons of Anandidin, on the 2nd October 1871 (Exhibit 62). In that deed of gift he stated that Jagannath Bakhsh and Ram Ratan were looking after him and attending to him like offspring and that he was joint (*sharik hal*) with them from before and also at that time. Ram Sahai and the other members of the family also appear to have been then joint, because as far back as the 19th July 1863 a mortgage was made by Anandidin and Ram Sahai jointly in lieu of Rs. 400 in favour of Lala wherein the entire *Mauza* Kallianpur, in which Jawaher Lal had a half share and Anandidin, Ram Sahai and Sheo Sahai had each a one-sixth share, was mortgaged (Exhibit C 33). On the 20th June 1865 a similar mortgage was made by Jawaher Lal, Anandidin, Ram Sahai and Sheo Sahai jointly (Exhibit B 16). On the 3rd July 1866 a joint *kabuliat* of the *theka* of Bhikhampur was taken by the said persons from Babu Ram Sahai (Exhibit C. 33). In 1867 they executed bonds in favour of Babu Ram Sahai, the *Talukdar* of Bhikhampur, rendering themselves jointly and severally liable for their re-payment. On the 15th September 1870 a *gonda* (cattle-shed) was purchased by the family from a person named Nandi, the sale-deed of which was taken in the name of Sheo Sahai (Exhibit B 17). Ram Sahai subsequently mortgaged his share in the same with his share in the other property in favour of Bhagwandin in 1878 (Exhibit 22). On the 12th July 1872 Ram Sahai mortgaged the entire *Mauza* Kallianpur with Sheo Prasad (Exhibit C 25) and on the 26th June 1873 he re-mortgaged the same describing himself as the *lambardar* of the village (Exhibit C 26). Similarly on the 30th March 1872 Jagannath Bakhsh mortgaged the entire *Mauza* Mirzapur Sumhari with Bhairon Prasad (Exhibit C 27) and on the 17th July 1875 he re-mortgaged the same with Mani Ram (Exhibit C 29). Some disputes meanwhile appear to have cropped up between the members of the family, for after 1873 we find separate mortgages made by different members of the family in respect of their separate shares and in one instance when a joint mortgage was attempted to be made by them to pay off certain prior debts and to take a fresh loan of Rs. 1,000, the transaction fell through and the deed could not be registered.

There are certain circumstances which render a disruption of the family at or about that time pretty certain. Anandidin died sometime in 1870 or 1871. In 1873 a suit was filed by Jawaher Lal, Sheo Sahai,

(4) 18 A. 90; A. W. N. (1895) 234.

Jagannath Bakhsh and Ram Ratan against Sheo Shankar and Gauri Shankar claiming certain property as the reversionary heirs of *Musammat* Gulaba Kuar (Exhibit 91). Ram Sahai did not join them as a co-plaintiff and the allegation in the pedigree filed with the plaint was that he had colluded with the defendants (Exhibit 92). A decree was passed in that suit in favour of Jawaher Lal, Sheo Sahai, Jagannath Bakhsh and Ram Ratan on the 15th June 1875, (Exhibit 95) and that decree was confirmed on appeal on the 19th February 1876 (Exhibit 96). It does not appear from the *khewats* (Exhibits 97 and 98), which gave effect to that decree, that Ram Sahai was allowed any share in the property decreed. Suits for profits were also filed at or about that time by Ram Sahai against Jagannath Bakhsh in regard to *Mauza* Mirzapur Sumhari, of which the latter was the *lambardar*, and by Jagannath Bakhsh against Ram Sahai in respect of *Mauza* Kallianpur, the *lambardari* of which stood in the name of Ram Sahai. The records of those cases have been destroyed, but it is clear from the extracts of the registers filed, in which the date of weeding is noted, that those suits were filed and decided in 1877 and it has not been seriously contended in appeal that the persons, who figure as parties to those suits, were or could be different men. The learned Subordinate Judge accepted the statement of Ram Ratan and allowed himself to believe that Ram Sahai, whose name figures as a party in both those cases, was a different person. But it is admitted by Ram Ratan himself that there was no other co-sharer in *Mauza* Kallianpur or *Mauza* Mirzapur Sumhari bearing the name of Ram Sahai other than the man whose property is now in dispute. The registers specifically state that the suits were for arrears of profits and if the statement of Ram Ratan that there was no other co-sharer of the name of Ram Sahai be accepted, the theory adopted by the learned Subordinate Judge that the above suits related to other matters and were fought between other persons falls to the ground. Separate mortgages made by different members of the family of their respective shares and the suits for profits fought between the members of the family *inter se* read with the statement made in the suit filed in regard to *Musammat* Gulaba Kuar's estate, conclusively establish that Ram Sahai separated from the other members of the family some time in or about 1873 after the death of Anandidin and that he was not living jointly with Sheo Sahai, Jagannath and Ram Ratan on the date of his death. The evidence produced by the defendants-respondents to the contrary cannot be accepted.

The plaintiffs-appellants offered in the plaint to pay any debts due by Ram Sahai, which the defendants-respondents might have liquidated in pursuance of the arrangement made by them with *Musammat* Dulari. It appears that Sheo Prasad obtained a decree on account of a mortgage effected by Ram Sahai and in execution of the said decree realized Rs. 800 from Jagannath Bakhsh and Ram Ratan in satisfaction of that decree (Exhibit 42). Debidin similarly obtained a decree on a bond executed by Ram Sahai and in execution of it realized Rs. 51 from Jagannath Bakhsh, who paid the money by executing a deed of mortgage in his favour (Exhibit 57). The original petition of compromise filed in the Revenue Court by *Musammat* Dulari, Sheo Sahai, Jagannath Bakhsh and Ram Ratan has been weeded out, but the contents of the said petition are amply proved by a report of the Tahsildar in another case, dated the 6th May 1882 (Exhibit 90). The findings of the Court below on the other matters raised in the pleadings have not been impeached by either party.

The appeal is therefore, allowed and the plaintiff's claim for possession of the property in dispute decreed subject to the payment of Rs. 800 to Jagannath Bakhsh and Ram Ratan and Rs. 51 to Jagannath Bakhsh on account of the debts due by Ram Sahai which they liquidated. The plaintiffs will get their costs in both the Courts from the defendants, who will under the circumstances bear their own costs throughout.

Appeal allowed.

KANCHARLA VENKATARATNAM *v.* KOGANTI VENKATARAMIAH.

MADRAS HIGH COURT.

CIVIL APPEAL No. 129 OF 1913.

September 22, 1914.

Present:—Sir John Edward Power Wallis, Offg. Chief Justice, and Mr. Justice Seshagiri Aiyar.

KANCHARLA VENKATARATNAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

KOGANTI VENKATARAMIAH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 144—Suit by adopted son—Adverse possession against mother, whether effectual against adopted son—Prescription, right acquired by.

An adopted son is entitled under Article 144 of the Limitation Act to sue for possession of immoveable property within 12 years from the date of his adoption, inasmuch as like a reversioner his right is not lost to the property by adverse possession against his mother.

Ordinarily the right acquired by the person prescribing is the right of the person in possession, that is to say, ordinarily no one can prescribe for more than what the person against whom he is prescribing is entitled to.

Sreeramulu v. *Kristamma*, 26 M. 143; 12 M. L. J. 197; *Moro Narayan Joshi* v. *Balaji Raghunath*, 19 B. 809, *Hari* v. *Wamon*, 2 Bom L. R. 411, *Harek Chand Babu* v. *Bejoy Chand Mahatab*, 9 C. W. N. 795; 2 C. L. J. 87 and *Runchordas* v. *Parvati Bai*, 23 B. 725; 26 I. A. 71; 3 C. W. N. 621 (P. C.), followed.

Amritolal Mitter v. *Rojoneekant Mitter*, 15 B. L R. 10; 23 W.R. 214; 2 I. A. 113 (P. C.); *Krishnaji Janardhan* v. *Marbhat*, 13 B 276 and *Atchamma* v. *Subba Rayudu* 5 M. H. C. R. 428, referred to.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Masulipatam, in Original Suit No. 13 of 1912 (District Court of Kistna).

Messrs. *P. Nagabushanam* and *T. R. Venkatarama Sastri*, for the Appellants.

Mr. *V. Ramadoss*, for the Respondents.

JUDGMENT.

WALLIS, Offg. C. J.—We see no reason to differ from the clear and well-reasoned judgment of the Subordinate Judge. The question is whether the suit properties belonged to Bapayya who died about 1859, or to his wife Kannamma who died in 1875. From at least 1827 to 1875 when Ramachandrudu, Bapayya's son died, the suit lands are shown to have been cultivated by them. After Bapayya's death part of the lands was alienated by Ramachandrudu's guardian. After Ramachandrudu's death there were disputes between his young widow, who many years later adopted the plaintiff, and his mother Kannamma, and eventually it was agreed to divide the properties between them. The lands which fell to Kannamma are now in possession of the descendants of her daughters. The plaintiff suggests that the grant to Kannamma was for her maintenance and that after her death Kotamma failed to recover the properties and that on his adoption in 1904 he acquired a good cause of action.

We think the long possession of Bapayya and his son raises the presumption that the lands were their property. On the other hand the defendants have altogether failed to prove that the properties ever belonged to Kannamma's father who is said to have borne the name of Akkayya. The *zemindari* accounts show that one Akkayya owned some of the suit lands in 1802, but there is no reliable evidence that he was Kannamma's father, and as Bapayya and Ramachandrudu acquired lands, it may well be, as observed by the Subordinate Judge, that these particular lands were acquired from strangers.

The probability is that on the death of Ramachandrudu leaving a childless widow, his mother Kannamma who had her daughters' children living with her ordered Kotamma to allow her to have half of the properties. Such an arrangement would not be unnatural and is, we think, borne out by the evidence. Subsequently the grant to Kannamma was referred to by Kotamma as made for her maintenance. It is, of course, clear that such an arrangement could not bind the reversioners or a subsequently adopted son. The Subordinate Judge has held that the suit was not barred, following the judgment of Bhasyam Iyanger, J., in *Sreeramulu* v. *Kristaamma* (1). Though the observations of that learned Judge were *obiter*, they were in accordance with the decision of Farran, C. J., and Candy, J., in *Moro Narayan Joshi* v. *Balaji Raghunath* (2) which was followed by Jenkins, C. J., and Candy, J., in *Hari* v. *Wamon* (3) and by Harrington and Mookerjee, JJ., in *Harek Chand Babu* v. *Bejoy Chand Mahatab* (4). In these decisions it has been held that an adopted son is entitled under Article 144 to sue for immoveable property within twelve years from the date of adoption. We have also been referred to the decision

(1) 26 M. 143; 12 M. L. J. 197.
(2) 19 B. 809.
(3) 2 Bom. L. R. 411.
(4) 9 C. W. N. 795; 2 C. L. J. 87.

of the Privy Council in *Runchordas* v. *Parvati Bai* (5), that a reversioner's right to sue for moveable property accrues on the death of the widow and that consequently he has six years under Article 120, which supports the same view.

For these reasons I am of opinion that the appeal fails and must be dismissed with costs. The memorandum of objections is dismissed with costs.

SESHAGIRI AIYAR, J.—The learned Chief Justice has found on the facts. I entirely agree. The point which arises for decision is whether the adopted son's right is lost by the defendants having acquired title to the property by adverse possession against his mother. Under the Limitation Act (XIV of 1859), it was settled law that adverse possession against a widow in possession as limited owner bound the reversioners as well as the adopted sons. See *Amirtolal Bose* v. *Rajoneecdnt Mitter* (6), *Krishnaji Janardhan* v. *Marbhat* (7) and *Atchamma* v. *Subba Rayadu* (8). The principle of these decisions seems to be that as a widow in possession represented the estate for the time being, prescription against her affected the estate and not only her limited interest in it.

A distinction was, however, made in the case of alienations by a widow. In such cases it was held that the act of the widow only affected her interest in the property. See *Gya Persad* alias *Lal Persad* v. *Heet Narain* (9) and *Srinath Koer* v. *Prosunno Kumar Ghose* (10). In this state of the law, Act IX of 1871 was introduced. Articles 141 to 145 correspond to Articles 140 to 144 in the Acts of 1877 and 1908. It is clear that the Legislature intended by these new Articles to introduce a radical change regarding the starting point of limitation. Article 141 (I shall refer to the Act of 1908 hereafter) gives the reversioner a period of twelve years to recover the property of the last male owner from the death of the widow, thereby indicating that acquisitions of rights against her are of no avail against reversioners. The position is made clearer by section 28 of the Limitation Act which was introduced for the first time in the Act of 1871 (section 29 of that Act). By that section the right extinguished and consequently the right acquired by the person prescribing, is the right of the person in possession. This is giving effect to the principle mentioned by Muttusawmi Ayyar and Shephard, JJ., in *Sambasiva* v. *Ragava* (11), where they say "that it has been repeatedly held that the title acquired by adverse possession for twelve years is only equivalent to that given by a parliamentary grant of the interest vesting in the party affected by the adverse possession". The party affected in the first instance being the widow, it is only her interest that is acquired. It seems to me, therefore, obvious that the Legislation of 1871 proceeded on the ground that no one can ordinarily prescribe for more than what the person against whom he is prescribing is entitled to. But the matter has been complicated by introducing a special Article in the case of reversioners and by not providing in a similar way for the case of adopted sons. Further, Article 134 by making it possible for a stranger to bind the whole estate by taking a conveyance from a limited owner shows that the principle I have been referring to is not of universal application. As pointed out by Mr. Justice Bashyam Aiyangar in *Sreeramulu* v. *Kristamma* (1), there is no justification for placing an adopted son in a worse position than that of a reversioner. It may be a case of omission on the part of the Legislature to safeguard his interests in the same way as it has done in the case of a reversioner. We have, therefore, to see whether the existing provisions are not sufficient to protect him. If Article 144 applies to the case of an adopted son, he will practically be in the same position as a reversioner. This can be done on the analogy of the decision of the Judicial Committee in *Runchordas* v. *Parvati Bai* (5). There it was held that when a reversioner seeks to recover the moveable property of the last male owner, he has six years from the death of the widow to sue. It was pointed out that there is nothing corresponding to Article 141 regarding moveables. Their Lordships held that the cause of action to sue arises, on general principles, on the death of the widow in the case of a rever-

(5) 23 B. 725; 26 I. A. 71 (P. C.); 3 C. W. N. 621.
(6) 15 B. L. R. 10; 23 W. R. 214; 2 1. A. 113 (P. C.).
(7) 13 B. 276.
(8) 5 M. H. C. R. 428.
(9) 9 C. 93; 5 Shome L. R. 84.
(10) 9 C. 934 (F. B.); 13 C. L. R. 372.
(11) 13 M. 512.

sioner. The same rule *a fortiori* governs the right of an adopted son. The principle of the decision is that until the plaintiff's right to immediate possession accrues, his right to possession is not barred. In the case of a reversioner the cause of action will accrue on the death of the widow, in the case of an adopted son, on his adoption. As the Judicial Committee held that the residuary Article 120 applied to moveables, we may hold that the residuary Article 144 applies to a suit by the adopted son for the recovery of immoveable property. If Article 144 applies and if the starting point is the date of his adoption, the present claim is not barred by limitation. This conclusion has the sanction of eminent Judges in this country. See *Sreeramulu* v. *Kristamma* (1), *Moro Narayan Joshi* v. *Balaji Raghunath* (2), *Hari* v. *Wamon* (3) and *Harek Chand Babu* v. *Bijoy Chand Mahatab* (4). The defendants have not, therefore, acquired any right by prescription against the plaintiff. The appeal must be dismissed with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 398 OF 1912.
May 27, 1914.
Present:—Mr. Kendall, A. J. C.

ONKAR SINGH—DEFENDANT No. 1—APPELLANT
versus
BHAGWAN DAT SINGH AND ANOTHER—PLAINTIFFS AND BADAL SINGH AND ANOTHER—DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Pre-emption—Pre-emptor and vendee both occupying position of co-sharers – Oudh Laws Act (XVIII of 1876) s.9 —Pre-emptor or vendee, effect of circumstances arising subsequent to decree of first Court in determination of right of—Co-sharer holding subject to danger of being attacked by claim for pre-emption, position of.

A vendee, defendant in a pre-emption suit, occupied, when that suit was instituted against him, the position of a co-sharer with an absolute right of transfer and of enjoyment but subject to the danger of being attacked by a claim for pre-emption by virtue of recent purchases. A decree for pre-emption was passed against him in that suit. Before his appeal came to be decided a suit for pre-emption in respect of one of the other properties had been brought and had been dismissed and the decree had become final in his favour.

Held, that the vendee and the pre-emptors having become persons equally entitled to purchase the property in dispute before the case was finally disposed of in appeal, lots must be cast under section 9, Oudh Laws Act, in order to determine which of them shall exercise the right to buy the property.

In a pre-emption suit, in determining the right of the pre-emptor or of the vendee, the Appellate Court may consider any circumstances which have arisen during the pendency of the suit in appeal, even though these circumstances may have come into being subsequent to the decree of the first Court.

Appeal against the decree of the District Judge of Gonda, dated 31st July 1912, upholding that of the Subordinate Judge, Gonda, dated 1st July 1912.

Babu *Risheshwar Nath*, for the Appellant.

Babu *Ram Chandra*, for the Respondents.

JUDGMENT.—This second appeal has been filed by Onkar Singh, purchaser of a property in respect of which a suit for pre-emption was filed by respondents Nos. 1 and 2 who are admittedly co-sharers in the *mahal*. Onkar Singh purchased the property in dispute by a sale-deed, dated 30th November 1910 and registered on 16th December 1910, for an ostensible consideration of Rs. 3,500. He purchased three sets of properties: (*a*) a definite share (1 anna 2 pies 8 *krants*) of which the vendors were the actual owners, (*b*) two shares in the possession of *Musammat* Jasso and another as widows with a life-interest, to whom the vendors purported to be the reversioners and (*c*) certain arrears of rent due from tenants. This suit for pre-emption was brought in respect of properties (*a*) and (*c*) only, it being claimed that the sale in respect of property (*b*) was illegal.

The first Court found that under the Transfer of Property Act, the section of which it did not quote, properties (*b*) and (*c*) could not be sold and so the vendors had no right to transfer them. As to property (*a*) it found that out of the consideration money Rs. 2,450 had never been paid and it decreed the claim on payment of Rs. 1,050, the amount which the plaintiffs had offered to pay and which it found to be, as a matter of fact, more than the market value of the property. The appellant had further pleaded that he had himself become a co-sharer by virtue

of two purchases made, one from Ratan Singh on the 27th July 1911 and another from Ram Piare on the 9th August 1911.

The lower Appellate Court, relying upon the ruling reported as *Kaleshar Rai* v. *Nabiban Bibi* (1), ruled that he was not a co-sharer. In the lower Appellate Court the appellant contended, *first*, that his right as a co-sharer was established by the two purchases above referred to and, *secondly*, that *Musammat* Jasso having died, her property had passed into the possession of the appellant, and that, therefore, it was incumbent upon the plaintiffs-respondents to sue for pre-emption in respect of that share also, and *finally* that the value of the share of 1 anna 2 pies 8 *krants* exceeded Rs. 1,050. The Court held that there was still a possibility of both those sales being nullified by pre-emptors, also that the transfer of the reversionary interest which the vendor professed to hold was itself void and illegal and that Rs. 1,050 was a fair and proper price; and it accordingly dismissed the appeals.

The points which the appellant has raised in second appeal are:—

(1) that the learned District Judge is wrong in holding that the appellant does not stand on the same footing as an ordinary co-sharer;

(2) that plaintiffs ought to have sued in respect of *Musammat* Jasso's share also;

(3) that they cannot be allowed in law to dispute the validity of the sale in respect of any portion of the property conveyed by it, and

(4) that the lower Appellate Court was wrong in passing a decree for pre-emption on payment of Rs. 1,050 without determining the market value of the property.

The position which the appellant occupied at the time of the institution of the suit was by virtue of his two purchases that of a co-sharer with an absolute right of transfer and of enjoyment, but subject to the danger of being attacked by a claim for pre-emption. His position has materially altered since the date of the decree of the lower Appellate Court. It is stated on his behalf, and admitted for the respondents, that the appellant has given up the share which he purchased from Ratan Singh. It is further proved by an affidavit which he has been allowed to file that a suit for pre-emption had been brought in respect of the share which he purchased from Ram Piare, that that suit has been dismissed by the Munsif of Tarabganj, that the said decision of the Munsif has been upheld by the District Judge of Gonda and that that decision has now become final. This fact is also admitted by the respondents. He, therefore, stands before the Court at this moment a co-sharer in the village. The first question, therefore, to be determined is whether the decrees in the plaintiffs' favour can be maintained, having regard to the fact that, before the case was finally disposed of in this Court, the vendee and the pre-emptors had become persons equally entitled to purchase the property in dispute. This question as far as this Court is concerned, does not seem to be concluded by any authority. In *Janki Prasad* v. *Ishar Das* (2) it was laid down that the cause of action in a suit for pre-emption must subsist at the time when the suit was brought. In the case of *Ram Gopal* v. *Piari Lal* (3) a Bench of the Allahabad High Court went still further and decided that where a plaintiff who had filed a suit for pre-emption lost during the pendency of the suit the right to pre-emption, the suit for pre-emption should be dismissed. That ruling has been cited with approval, both in this Court and in the Punjab Chief Court, where a Statute Law of pre-emption prevails, on more than one occasion. In coming to the above conclusion Strachey, C. J., professed to adopt that mode of decision of the question which would be most in furtherance of the contract or custom of pre-emption and of the principles upon which such a custom or contract of pre-emption is based. He remarked that the effect of a decree in the plaintiff's favour in that suit would be to enforce the right of pre-emption in favour of a person "who does not now form one of the class to whom alone the right

(1) 28 A. 642; A. W. N. (1906) 164; 3 A. L. J. 246.

(2) 21 A. 374 (F. B.); A. W. N. (1899) 126.

(3) 21 A. 441; A. W. N. (1899) 163.

of pre-emption is given." He further found that it was impossible to maintain that there was any general principle of law or procedure which would compel a Court, in disregard of a custom or in disregard of a contract, if it were a case of contract, to look exclusively to the state of things that existed at the date of the institution of the suit, and to say that because on the date the plaintiff was entitled to pre-emption he must have his decree for pre-emption, although since that date his right has ceased to exist; and he finally reversed the decree of the lower Court remarking that there was nothing to compel him to look exclusively to the date of the institution of the suit and to disregard all that has since happened. Banerji, J., also in the same case remarked that to maintain a decree for pre-emption in such a case would be to defeat the object of pre-emption. In *Amir Hasan* v. *Musammat Sardar Begam* (4) a Bench of this Court, adopting the above ruling, held that the principle recognised by the Allahabad High Court could be applied to the Statute Law in Oudh and that a plaintiff pre-emptor was bound to show a valid title on the date the decree of the Court of first instance was passed. It is important to remember that the principle which guided the learned Judges in Allahabad and in this Court was that the law of pre-emption exists *prima facie* for the exclusion of a stranger; and that the fundamental principle is that the Court should not grant a decree for pre-emption when it would place plaintiff in a position he is not entitled to hold in the existing circumstances of the case. Keeping this principle in mind, it is to be considered whether this Court would be justified in looking to events which occurred subsequent to the passing of the decree of the first Court, but before the case is finally decided. In *Khuda Bakhsh* v. *Ram Lotan Lal* (5) the lower Appellate Court had dismissed a suit for pre-emption, because the plaintiff, at a date *subsequent* to the decree of the first Court, lost the right on which his claim was based; and that view of the lower Appellate Court was upheld by a Bench of the High Court in second appeal. In contradistinction to this another Bench of the High Court in *Sakina Bibi* v. *Amiran* (6) refused to look beyond the position of affairs at the time the decree of the first Court was passed. When once it is recognised that an Appellate Court may take into account subsequent circumstances which affect the title of the plaintiff as it was when the suit was instituted, it is hard to support a theory that such circumstances can only be considered up to the time the decree of the first Court is passed. Keeping in mind, as I said before, the principle on which the law of pre-emption is founded, I find that the more equitable view to take is that taken in the earlier of the two Allahabad decisions to which I have referred. The Code of Civil Procedure takes account of, and provides for, changes of the personnel of the contending parties, such as may be caused, for example, by death, marriage and insolvency, or by the attainment of majority by a minor, or by any case of assignment, creation or devolution of any interest during the pendency of the suit. It also provides that an Appellate Court shall have as nearly as may be the same power as a Court of first instance. It is a common occurrence for a party to apply to an Appellate Court to have his name withdrawn as he has ceased to have any interest in the subject-matter. The case reported as *In the matter of the petition of Sarat Chandra Singh* (7) may be referred to. It was there held that section 372 of the Code of Civil Procedure, which has now been re-enacted as Order XXII, rule 10 (1), applies as well to the case of devolution of interest pending an appeal as to the case of a devolution of interest pending a suit; and this ruling has been referred to and followed in several instances. That case and most of the rulings which followed it deal indeed with the devolution of an interest from one person to another, but the principle is the same as in this case. These provisions of the Code of Civil Procedure have in view the prevention of the obvious anomalies which might arise if an alteration in the position of parties after the institution of suit were not to be regarded or considered. It would be clearly inequitable

(4) 3 Ind. Cas. 546; 12 O. C. 129.
(5) A. W. N. (1884) 169.
(6) 10 A. 472; A. W. N. (1888) 177; 13 Ind. Jur. 114.
(7) 18 A. 285; A. W. N. (1896) 45.

in a case like the present that this Court should have to grant a decree for pre-emption, it having been brought to its knowledge and established that, as matters now stand, the plaintiffs are not entitled to such a decree. It is objected for the respondents that to rule that a Court may look to the position of the parties after the passing of the decree in the first Court would operate to make the position of the vendees precarious and uncertain. But the whole law of pre-emption tends to have that effect; and it is for this reason, inasmuch as the law of pre-emption places a restriction upon the liberty of transfer of property, that the rules of the Muhammadan Law of pre-emption are not applied by the Courts in the Madras Presidency as being opposed to justice, equity and good conscience.

I, therefore, hold that in a pre-emption suit, in determining the right of the pre-emptor or of the vendee, the Appellate Court may consider any circumstances which have arisen during the pendency of the suit in appeal, even though those circumstances may have come into being subsequent to the decree of the first Court.

I find, therefore, that Onkar Singh appellant is a co-sharer and has equal rights with the pre-emptors. Lots must be cast under section 9, Act XVIII of 1876.

On the second ground I agree with the finding of the lower Appellate Court. The transfer of reversionary interest was void *ab initio*, and nothing can make it anything else. It further appears from the judgment of the lower Appellate Court that the appellant's possession over this share is not in virtue of the sale-deed in dispute, but is really based on an *ikrarnama* executed in his favour by the reversioner of the lady.

The third ground of the appellant in this Court must equally fail. The ruling reported as *Mahabir Prasad* v. *Ram Jiwan Lal* (8) on which the appellant relies is not on all fours with the present case. It is evident that a pre-emptor cannot be forced to claim pre-emption in respect of a void sale; for the sale being void no right of pre-emption arises. The fourth point as to the price being determined by an in correct method by the lower Appellat Court the appellant does not press; and as I have noted above, the first Court accepted the price which was offered by the plaintiff, which was the price actually paid before the Sub-Registrar and which by proper calculation amounted to a good deal more than the market value of the property calculated at twenty times the extreme net profits.

As far, therefore, as the property which is to be pre-empted and the money payable therefor is concerned the appeal is dismissed; but it is allowed on the first ground, and it is ordered under the concluding paragraph of section 9 that the appellant and the plaintiffs-respondents are to draw lots to determine which of them shall exercise the right to buy the property. As the parties are not personally present before this Court I order the lower Appellate Court to proceed to summon the parties before it and to cause them to draw lots in its presence. The appellant may have his costs to the extent to which he has been successful in this Court. The lower Court's order as to costs is maintained.

Appeal partly allowed.

(8) 8 Ind. Cas. 272; 13 O. C. 260.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 925 OF 1911.

March 17, 1914.

Present:—Justice Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Rattigan.

Musammat KISHEN DEVI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SHIB SARAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Inheritance—Widow gifting property of husband to daughter—Nature of estate—Daughter when succeeding does not form stock of fresh descent—Sons of brother's son preferred to daughter's daughters—Resumption of muafi*—Settlement with particular person does not alter position of settlee with regard to property—Arguments opposed to plaint and pleadings, whether allowed in second appeal.*

A Hindu widow in possession of her husband's property cannot, by any act of donation on her part, confer on the next heir, her daughter, any greater or more extensive rights than she herself possesses.

In the ordinary way a daughter who is under Hindu Law the heir of her father cannot, when succeeding as such heir to her father, form the stock of a fresh descent, and as a result the sons of her father's brother's son (who were the *sapindas* of

KISHEN DEVI *v.* SHIB SARAN.

her father) would be entitled to succeed in preference to her daughters who can claim only as *bandhus* of their deceased grandfather.

In a case where a *muafi* is resumed, and a Settlement is thereafter made with a particular person, the action of the Settlement Authority does not affect or alter the position of the settlee with regard to the property.

The Chief Court will not accept at the late stage of a case an argument which is opposed to the plaint and pleadings and was not so much as hinted at in the Courts below.

Second appeal from decree of the Divisional Judge, Ambala Division, dated the 11th May 1911, reversing that of the Subordinate Judge, first Class, Jullundur, dated the 10th May 1910, decreeing plaintiffs' claim.

Rai Bahadur Pandit *Sheo Narain*, for the Appellants.

The Hon'ble Mr. *Shadi Lal*, R. B., and Lala *Nihal Chand*, for the Respondents.

JUDGMENT.—The pedigree-table of the parties and the facts antecedent to, and connected with, the present litigation are set forth in the judgment of the Divisional Judge.

Admittedly the parties, who are Brahmans of *Mauza* Jadla in the Nawashahr Tahsil, Jullundur District, are governed by Hindu Law, and the property in dispute (some 209 *kanals* of land) was originally acquired by one Jhalmal Singh who (as we are informed) died about the year 1881. After his death, the land passed in the ordinary way to his widow, *Musammat* Har Devi, and at the Settlement of 1885, when a *muafi* which had been held by Jhalmal Singh was resumed, the land revenue was assessed presumably at favourable rates, and the Settlement appears to have been made with *Musammat* Har Devi who was then in possession.

On the 30th August 1903 *Musammat* Har Devi made a gift of the land in favour of her daughter *Musammat* Kahno, and Ruldu (the nephew of Jhalmal Singh) brought a suit to contest the gift, but failed on the ground that he had no *locus standi*, as the donee was, under Hindu Law, the next heir.

Musammat Kahno had a son, Amin Chand, who died in his mother's life-time, leaving a widow *Musammat* Ralli. She had also three daughters (*Musammat* Kishen Devi, *Musammat* Puran Devi and *Musammat* Bishen Devi) all of whom were alive when she died in 1907, and on her death, mutation was effected in favour of *Musammat* Ralli (the widow of Amin Chand). *Musammat* Ralli subsequently made a gift of the land to Rup Lal, the son of her husband's sister, *Musammat* Bishen Devi.

This gift gave rise to a suit by the sons of the said Ruldu, but a compromise was effected between the parties, Rup Lal receiving a sum of Rs. 600 and 5/13th of the land, the remaining portion of the land going to Ruldu's sons. This compromise was effected on the 23rd July 1909. Rup Lal subsequently sued to set aside the compromise on the ground that it was effected by fraud, but (as later events show, fortunately for himself) his suit was dismissed and he did not appeal.

On the 23rd November 1909, the present plaintiffs, *Musammat* Kishen Devi and *Musammat* Puran Devi, sued the sons of Ruldu and Rup Lal for possession of two-thirds of the land, originally acquired by Jhalmal Singh. They admitted that Rup Lal, as the son of their sister, *Musammat* Bishen Devi (since deceased), was entitled to one-third of the land, but they asserted that the sons of Ruldu had no right to the property inasmuch as *Musammat* Kahno had obtained it as a gift from *Musammat* Har Devi and had thereby become absolute owner. As her daughters, plaintiffs contended that their right to succeed was superior to that of Ruldu's sons.

The Subordinate Judge decreed the claim on the ground that as the property had been acquired by Jhalmal Singh, it descended, in the first instance, to his daughter, *Musammat* Kahno, and thereafter to *Musammat* Kahno's daughters who were her rightful heirs.

From the decree of the Subordinate Judge, Ruldu's sons and Rup Lal both appealed separately to the Divisional Judge, who held : —

(1) that *Musammat* Ralli, whose husband had predeceased his mother, *Musammat* Kahno, had no right to the land and could, therefore, make no valid gift of it in favour of Rup Lal ;

(2) that *Musammat* Har Devi, who was in possession of the land merely as the widow of Jhalmal Singh, had no power to alter the devolution of the property by

making a gift of it in favour of her daughter, *Musammat* Kahno ;

(3) that *Musammat* Kahno succeeded to the property merely as the heir of her father, and none-the-less so because her succession was accelerated by *Musammat* Har Devi's surrender of the property to her ;

(4) that as *Musammat* Kahno succeeded to the property as the heir of her father she took a restricted estate and could not herself be "the stock of a fresh line of descent ;"

(5) that, consequently, descent must be traced from Jhalmal Singh, the last male owner of the property ; and

(6) that plaintiffs as daughter's daughters of Jhalmal Singh were merely *bandhus* and as such not entitled to succeed in the presence of Ruldu's sons, who were the paternal great-nephews of Jhalmal Singh and, therefore, *sapindas*.

The learned Judge upon these findings accepted the appeals of Ruldu's sons and of Rup Lal and dismissed plaintiffs' suit.

The latter have appealed to this Court and in addressing us on their behalf Mr. Sheo Narain frankly admitted that unless he could establish that *Musamnat* Har Devi's gift to *Musammat* Kahno had the effect of making the latter an absolute owner, his clients' case must fail.

Realizing this, the learned Advocate contended that *Musammat* Har Devi should not be regarded merely as the widow of Jhalmal Singh As such she admittedly would have had no power by any act of donation on her part to constitute *Musammat* Kahno, her daughter, an absolute proprietor. The argument, therefore, was that Jhalmal Singh was not an ordinary proprietor of the property in dispute, but was in possession as a *muafidar* with a *status* which was something less than that of a proprietor, but higher than that of an occupancy tenant. After his death the *muafi* was resumed, and the Revenue Authorities by settling with his widow, *Musammat* Har Devi, practically made a fresh grant of the land to the latter which constituted her a sort of sub-proprietor, or *adna malik*, the result being that thereafter *Musammat* Har Devi held the land, not as the widow of Jhalmal Singh, but in her own right as a grantee thereof from Government.

Whether upon these allegations it could be held that *Musammat* Har Devi (who at the time when the Settlement was made with her was unquestionably in possession of the property merely as the widow of her deceased husband) by virtue of the act of the Revenue Authorities acquired the property in absolute ownership in her own right and was, therefore, competent to make a grant of it to her daughter, is a question which does not really arise in the case.

The argument is ingenious but desperate The facts may, or may not, be as suggested, but we cannot at this stage of the case accept an argument which is opposed to the plaint and pleadings and was not so much as hinted at in the Courts below. The case has hitherto proceeded upon the assumption that Jhalmal Singh was the proprietor of the property in the ordinary sense of the term, and plaintiffs' contention has been that as the property was acquired by Jhalmal Singh and in view of Ruldu's failure to have the gift made by *Musammat* Har Devi in favour of her daughter, *Musammat* Kahno, set aside, the conclusion must be that *Musammat* Kahno must be taken to be an absolute owner and as such "a fresh stock of descent."

This position is obviously untenable. Whether the property was acquired or ancestral, *Musammat* Har Devi's possession would be merely that of a widow and she could not by any act of donation on her part confer on the next heir, her daughter, *Musammat* Kahno, any greater or more extensive rights than she herself possessed. Ruldu's suit failed, not because the gift in question constituted *Musammat* Kahno an absolute owner, but because it was a gift in favour of the next heir and as such merely amounted to a surrender by the widow of her own life-interest.

Mr. Sheo Narain fully realized this and admitted that in the ordinary way *Musammat* Kahno was, under Hindu Law, the heir of her father Jhalmal Singh, but that she could not when succeeding as such heir to her father form the stock of a fresh descent and as a result, Ruldu's sons (who were the *sapindas* of Jhalmal Singh) would be entitled to succeed in pre-

ference to *Musammat* Kahno's daughters who could claim only as *bandhus* of their deceased grandfather.

In order to overcome this difficulty, the learned Advocate was forced to adopt an entirely new line of argument and to contend that *Musammat* Har Devi by the action of the Revenue Authorities had been constituted an absolute owner of the property in her own right and as such could dispose of it as she thought fit. As we have already remarked, this is an aspect of the case which was not even suggested in the lower Courts, but apart from that objection, no authority has been cited before us in support of the proposition.

On the other hand, we have the authority of the "Punjab Settlement Manual" for holding that in a case where a *muafi* is resumed and a Settlement is thereafter made with a particular person, the action of the Settlement Authority does not affect or alter the position of the settlee with regard to the property. [Settlement Manual (Douie), paragraph 183, pages 89-90].

We must take it, therefore, that this is a case of ordinary succession from the last male owner, Jhalmal Singh, and that *Musammat* Kahno obtained possession (during the life-time of Jhalmal Singh's widow and by gift from the latter) merely as the heir (*sapinda*) of her deceased father. As such, she had no power to alter the devolution of the estate, after her death, by gift or Will, and under the rules of Hindu Law, Ruldu's sons are entitled to succeed to it. They have by the compromise of July 1909 given part of the property to Rup Lal and fortunately for the latter, his suit to set aside that compromise failed.

But apart from this compromise, they would have been entitled to the whole property and consequently plaintiffs' suit has been rightly dismissed.

We accordingly dismiss this appeal with costs against Ruldu's sons. Rup Lal, who has no better claim than plaintiffs to any part of the property and has been successful in litigation despite his own efforts, should, we think, bear his own costs and we direct accordingly.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 2 OF 1913.

August 20, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

SABELLA APPANNA—DEFENDANT No. 2 —APPELLANT

versus

MALLIDI APPANNA AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 AND 3 —RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63 —Execution—Attachment—Claim petition—Judgment-debtor party to claim - Claim allowed Judgment-debtor, whether competent to sue for declaration of his title to property attached and for cancellation of attachment.

A judgment-debtor, who was a party to claim proceedings, can file a suit under Order XXI, rule 63, Civil Procedure Code, for a declaration of his right to the properties and for vacating an adverse order in the said proceedings.

Gurava v. *Subbarayudu*, 13 M. 366; *Muthusami Mudaly* v. *Ayyalu Bathadu*, 13 M. L. J. 367 and *Sardhari Lal* v. *Ambika Pershad*, 15 C. 521 (P. C.); 15 I. A. 123, followed.

Kedar Nath Chatterji v. *Rikhal Das Chatterji*, 15 C. 674, referred to.

Though the discussion of evidence in the judgment of the lower Appellate Court may not be satisfactory, yet that by itself is not sufficient ground for interference in second appeal, like absence of evidence or disregard of it.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Rajahmundry, in Appeal Suit No. 111 of 1912 (Referred Appeal No. 32 of 1910 on the file of the Court of the Subordinate Judge of Cocanada), preferred against that of the District Munsif of Peddapur, in Original Suit No. 607 of 1907.

FACTS.—A claim petition, which had been preferred against an attachment of immoveable property effected in execution proceedings, having been allowed, the judgment-debtor, who was a party to the proceedings, filed a suit under Order XXI, rule 63, Civil Procedure Code, to vacate the said order. The defence was that the suit was not maintainable. The lower Courts decreed the suit. The 2nd defendant then preferred this second appeal to the High Court.

Mr. *G. Venkatramiah*, for the Appellant:—A suit under Order XXI, rule 63, Civil Procedure Code, to vacate an adverse claim order, lies only at the instance of a decree-holder. A judgment-debtor has no *locus standi* to institute a suit. *Kedar Nath Chatterji* v.

Rakhal Das Chatterji (1). The plaintiff ought to have prayed for possession as consequential relief and the suit is, therefore, bad under section 42 of the Specific Relief Act. There is no indication in the judgment as to its being based on any evidence and no discussion at all of the same. The judgment is, therefore, clearly illegal.

Messrs. *P. Narayanamurti* and *P. Somasundaram*, for the Respondents:—Any person affected by a claim order to which he was a party can sue under Order XXI, rule 63, Civil Procedure Code. A judgment-debtor is not prohibited from doing so. *Gurura* v. *Subbarayudu* (2), *Muthusami Mudaly* v. *Ayyalu Bathadu* (3) and *Sardhari Lal* v. *Ambika Pershad* (4). The suit being one for vacating the claim order under the special section it is not necessary to sue for possession as consequential relief. There is sufficient evidence on record to justify the finding of the lower Appellate Court. Mere absence of discussion is no ground of interference in second appeal.

JUDGMENT.—Plaintiff, a judgment-debtor, sued for a declaration of his right to certain lands attached by the 2nd defendant and for the setting aside of the summary order passed on the latter's claim petition.

It is contended, firstly, that only a decree-holder can sue for relief of this nature. It has not, however, been explained how a judgment-debtor is not as directly interested in making a particular portion of his property available for the payment of his debt as the decree-holder is in securing payment from that portion. And, as regards authority, *Gurura* v. *Subbarayudu* (2) and *Muthusamy Mudaly* v. *Ayyalu Bathadu* (3) are against the appellant's contention. The latter case refers to *Sardhari Lal* v. *Ambika Pershad* (4) as reconcilable with the judgment-debtor's right to sue. Authority in this Presidency being in favour of that right, it is unnecessary to deal at length with *Kedarnath Chatterji* v. *Rakhal Das Chatterji* (1) on which the appellant relies. We find against his contention. As it is open to the judgment-debtor to bring a suit of the nature contemplated in Order XXI, rule 63, of the Code of Civil Procedure, it is not necessary for him to include a prayer for possession in his plaint, and it is unnecessary for us to consider whether he is in possession or not.

The remainder of the argument has been directed towards showing that the judgment is, as regards particular points, not based on or against the evidence. We cannot call the discussion of the evidence in the judgment satisfactory. But we do not think that there was an absence of evidence or disregard of evidence on the points in question which would justify our interference in second appeal.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(1) 15 C. 674; 13 Ind. Jur. 104.
(2) 13 M. 366.
(3) 13 M. L. J. 367.
(4) 15 C. 521; 15 I. A. 123 (P. C.); 5 Sar. P. C. J. 172; 12 Ind. Jur. 210.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 210 OF 1913.
June 11, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C.

JAGMOHAN SINGH—PLAINTIFF—APPELLANT

versus

TULA RAM DAS—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch I, Art. 142—Suit for possession of land free of house and trees—Claim for removal of trees.

A suit for possession of land free of the house and trees wrongfully built and planted by the defendant as distinguished from a claim merely for the removal of trees is governed by Article 142 of the Limitation Act, 1908.

Appeal against the decree of the Subordinate Judge, Gonda, dated 15th March 1913, modifying that of the Munsif, Utraula, dated 20th January 1913.

Mr. *J. P. C. Bhattacharji*, for the Appellant.

Mr. *Makhan Lal*, for the Respondent.

JUDGMENT.—This was a suit brought by the plaintiff-appellant for the recovery of possession of plot No. 4557, old, corresponding with No. 5306 new *khasra*, on the allegation that the said plot was *parti* or waste land and that the defendant wrongfully built a thatched house and planted some trees over the same in June 1906. The defence was that the house and the trees existed from sixteen years. In his written statement the defendant called the house

a temple, but the Commissioner, who was deputed by the Court of first instance to inspect the locality, found that there was only an underground room constructed in a corner of the garden, the roof of which was about 4 feet high from the level of the remaining ground.

Both the Courts below held that the house in question was built, and some of the bigger trees planted, about six or seven years ago and that the *phulwari* and some of the remaining trees were planted later. The Court of first instance decreed the claim, but the lower Appellate Court granted possession of the site by removal of the trees planted within six years and refused to direct the demolition of the house or removal of the trees, which existed from more than that period.

The defendant did not allege in his written statement that he had built the house or planted the trees with the consent of the plantiff and no plea of estoppel or acquiescence was set up. Under the circumstances the finding of the Court below that the claim for the demolition of the house and the removal of the trees was barred by Article 120 of the Indian Limitation Act, cannot be supported. The defendant is a *birtdar* holding some specific plots of land in the village. He had no right to construct a house or to plant trees on waste land belonging to the *zemindar* and, as held by Mr. Burkitt in *Ram Autar* v. *Nabi Bakhsh* (1), the plaintiff is entitled to regain possession of the land free of the house and the trees in question at any time within 12 years under Article 142 of the Indian Limitation Act. The defendant will be permitted to remove the materials of the house and the trees standing on the land at any time before his ejectment. To allow the defendant to retain possession of the trees would be to stultify the decree for possession, for trees cover the greater portion of the area comprised in the plot in dispute and, unless the land is denuded of the house and the trees, the possession of the plaintiff would be ineffective. The Court below relied on a decision in *Musharaf Ali* v. *Iftkhar Husain* (2). But in that case the claim was not for possession of any interest in land but solely for the removal of the trees.

The appeal is, therefore, allowed and the plaintiff's claim decreed for possession of the land in dispute by ejectment of the defendant, who will be allowed to remove the materials of the house and the timber of the trees planted by him if he chooses to do so. The plaintiff will get his costs from the defendant in all the Courts.

Appeal allowed.

(1) Select Cases No. 213 of 1892.
(2) 10 A. 634; A. W. N. (1881) 257.

MADRAS HIGH COURT.

CIVIL APPEAL No. 276 OF 1911.

August 28, 1914.

Present:—Sir John Edward Power Wallis, Offg., Chief Justice, and Mr. Justice Hannay.

VADLAMANNATI SRINIVASADIKSHITULU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DAMERA RANGAYYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 74—Interest—Penal rate, when awarded.

Where the alleged penal rate is a common rate of interest in everyday transactions, the Court would be justified in awarding it instead of giving a lower rate.

Annamalai Chetty v. *Veerabadram Chetty*, 26 M. 111, *Sunder Koer* v. *Ra Sham Kishen*, 34 C. 150; 34 I A. 9; 4 A. L. J. 109; 11 C. W. N. 249; 5 C L. J. 106; 17 M L. J. 43; 9 Bom. L. R 304; 2 M. L. T. 75 (P. C.), distinguished.

Appeal against the decree of the District Court of Kistna, in Original Suit No. 59 of 1910.

Mr. *S. Srinivasa Aiyangar*, for Mr. *P. Nagabhushanam*, for the Appellants.

Mr. *K. K. Pandaley*, for the Respondents.

JUDGMENT.—In this case the mortgage-deed provided in the first instance for interest at 10 annas 6 pies per cent. per mensem, and for annual instalments of Rs. 800 to cover principal and interest, that, on default in one instalment interest on it should run at 14 *annas per cent. per mensem from the date of default*, and that in default of payment of two instalments (the event which happened) interest should be at 1 per cent. per mensem compound interest. The District Judge treated these stipulations as penal and awarded compound

interest at 10½ annas from the date of the second default. For the appellants it is not disputed that he was justified in treating these stipulations as penal, but it is contended that he was bound to allow as reasonable compensation something more than the original rate, citing *Annamalai Chetty* v. *Veerabadram Chetty* (1). It was also contended that he has misunderstood the decision of the Privy Council in *Sunder Koer* v. *Rai Sham Krishen* (2). The report in *Sunder Koer* v. *Rai Sham Krishen* (2) makes it clear that the High Court and the Privy Council awarded not the original rate of interest but a higher rate of 12 per cent. compound interest. Under section 74 of the Indian Contract Act, the Court is to award either reasonable compensation or the penalty. When the alleged penal rate is a common rate of interest in everyday transactions, as 12 per cent. is here, we do not think there is any sufficient reason for departing from it. The decree of the lower Court must be modified by allowing 12 per cent. per annum compound interest from the date of the second default as provided in the agreement. The respondent sought also to support the decision on the ground that the plea in paragraph 2 of his written statement had been wrongly overruled. It was that when he asked for particulars of the amount due and offered to pay it, the creditors omitted to send the particulars. No authority has been cited in support of this novel plea which must be disallowed. The appellant does not press the contention that the amount should be calculated according to the Gregorian calendar. The appeal is allowed with proportionate costs. Time for payment is extended to six months from this date.

Appeal allowed.

(1) 26 M. 111.

(2) 34 C. 150; 34 I. A. 9; 4 A L. J. 109; 11 C. W. N. 249; 5 C. L. J. 106; 17 M. L. J. 43; 9 Bom. L. R. 304; 2 M. L. T. 75 (P. C.).

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL NO. 61 OF 1913.

January 9, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C.

BINDA PARSHAD—DEFENDANT—APPELLANT

versus

RAM BHAJAN—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), application of—Appeals from decisions of Revenue Courts to District Judge—Oudh Rent Act (XXII of 1886), s. 119A, appeal under.

The provisions of the Limitation Act apply to appeals from the decisions of Courts of Revenue to a District Judge.

Where the limitation for an appeal under section 119A of the Oudh Rent Act expired on a holiday and the appeal was filed on the day following:

Held, that the appeal was filed within time.

Appeal against the order of the District Judge of Hardoi, dated 16th July 1913, upholding that of the Assistant Collector, Hardoi, dated 23rd December 1912.

Babu *Lachhman Prasad*, for the Appellant.

Dr. *Nazir-ud-din Hasan*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-respondent for the recovery of arrears of profits for 1316 to 1319 *Fasli*. The suit was decreed by the Assistant Collector on the 23rd December 1912. An application was made for copies of the judgment and decree by the defendant-appellant on the 16th January 1913, and the copies became ready for delivery on the 30th July 1913. The limitation provided by section 119A of the Oudh Rent Act for the appeal expired on the 6th February 1913: but that day was a holiday. An appeal was, therefore, filed on the 7th February 1913. The learned District Judge held that the provisions of the Indian Limitation Act did not apply to appeals from the decision of Courts of Revenue to a District Judge. He relied in support of that opinion on *Raghubar Dayal* v. *Sheo Charan* (1). But in that case the question related to the limitation applicable to a suit and not to an appeal. Section 119A of the Oudh Rent Act clearly provides that the rules for the time being in force in regard to the time within which appeals from the decrees and orders of Civil Courts may be received and to all proceedings

(1) 4 O. C. 182.

which may be had in respect of such appeals, shall be applicable to appeals under the Act to the District Judge. This section was inserted by section 53 of Act XX of 1890. The provisions of the Indian Limitation Act, therefore, apply to such appeals in the same manner as they apply to appeals from the decisions of the Civil Courts. Section 10 of the General Clauses Act (X of 1897) also applies and renders the appeal within time, if the limitation expired on a date on which the Court was closed.

The appeal is, therefore, allowed and the case remanded to the lower Appellate Court with a direction to reinstate it under its original number and to dispose of it in accordance with law. The costs will abide the event.

Appeal allowed; Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1156 OF 1913.

October 6, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

PUMPALIYA VENGALIA CHELLATTAN KELU KURUP—PLAINTIFF—APPELLANT

versus

KUNHAMINA AND OTHERS—DEFENDANTS RESPONDENTS.

Malabar Law—Landlord and tenant—Value of trees wrongfully cut by tenants, suit to set off, against improvements claimed by tenants—Landlord, rights of—Limitation Act (IX of 1908), Sch. I, Art. 108, applicability of.

Under the Malabar Common Law governing the mutual rights between landlords and their *kuzhi kanom* tenants, a right to deduct the value of trees wrongfully cut by tenants during the 10 years' term of a *kuzhi kanom* lease from the valueof the improvements due to the tenant, vests in the landlord.

Article 108 of the Limitation Act applies only when the landlord brings a suit for recovery of the value of trees cut down by the lessee.

Second appeal against the decree of the District Court of North Malabar, in Appeal Suits Nos. 388 and 395 of 1911, preferred against that of the Court of the District Munsif of Tellicherry, in Original Suit No. 118 of 1910.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.

Mr. *K. Govinda Marar*, for the Respondents.

JUDGMENT.—Article 108 of the Limitation Act becomes applicable only if a suit is brought by the landlord for recovery of "the value of trees cut down by his lessee." In this case the plaintiff does not sue for recovery of any such value, but only claims that in the taking of the accounts as between himself and his *kuzhi kanom* tenants the value of the trees wrongfully cut down by the latter should be debited against the tenants who want to get credit for the value of the improvements made by them.

The pleadings in the suit make it reasonably clear that the defendants (the tenants) did not deny the right of the landlord to have the value of trees wrongfully cut by them deducted from the value of the improvements due to them (the tenants) and there was no issue raised on the plea of limitation. We are of opinion that under the Malabar Common Law governing the mutual rights between landlords and their *kuzhi kanom* tenants, a right to deduct the value of trees wrongfully cut by the tenants during the 12 years' term of the *kuzhi kanom* lease from the value of the improvements due to the tenants, vests in the landlord. We, therefore, allow the second appeal to the extent of the plaintiff's claim to set off Rs. 60 (value of a Jack tree wrongfully cut down by the defendants) from theamount due for improvements to the tenants. There is nothing in the other contentions in this second appeal, which is dismissed in other respects.

The parties will receive and pay proportionate costs in this second appeal.

Appeal partly allowed; Decree modified.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 18 OF 1914.

May 22, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C., and Mr. Kendall, A. J. C.

GANGA PRASAD AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

SUBHAG CHAND—DECREE-HOLDER—RESPONDENT.

Execution of decree—Decree, application of, to

GANGA PRASAD *v.* SUBHAG CHAND.

description of property—Conflicting description of same property, grounds for selection out of.

Where a decree describes the mortgaged property in more ways than one and one description applies to one set of existing facts and another to another set of existing facts, the duty of the Court executing the decree is to ascertain by a reference to the record or other evidence to which property the decree was intended to apply.

Where two descriptions of the same subject-matter conflict with each other or where two parts of the same description are in conflict, that which is more certain, stable, and the least likely to have been mistaken or inserted inadvertently must prevail, if it sufficiently identifies the subject-matter.

Appeal against the order of the Subordinate Judge, Lucknow, dated 8th January 1914.

Pandit *Tara Shankar*, for the Appellants.

Messrs. *Mumtaz Husain* and *Lachhman Prasad*, for the Respondent.

JUDGMENT.—This is an appeal from an order passed in an execution proceeding involving a question as to the construction of a decree. On the 30th May 1910, Subhag Chand obtained a decree against Muhammad Azim Khan and others for the sale of certain mortgaged property. The property mortgaged comprised a house and certain shops, described in the decree as bearing Nos. 2 and 158 to 173, and standing on *Ahatas* Nos. 9, 163 to 166, 168, 170 and 172. The decree also gives the boundaries of the property mortgaged. The appellants were parties to the decree as subsequent mortgagees. The Court below deputed an *Amin* to prepare a map of the house to identify the property intended to be sold and estimate its value. The *Amin* reported that the decree included many numbers, which did not belong to the judgment-debtors, and that the boundaries and the numbers did not tally. Eventually the *Amin* prepared a map in accordance with the instructions given by the decree-holder of the property intended to be sold, including therein *Ahatas* Nos. 165, 166 and 167 with the buildings standing thereon. The appellants objected to the inclusion of the said *Ahatas*, but the Court below disallowed their objection on the ground that it could not go behind the decree.

The decree, however, did not include *Ahata* No. 167, and a reference to the description given in the decree shows that the house and shops mortgaged extended on the north upto the back wall of the house of Nawab Ahmad Husain Khan. The *Amin* appears to have made no effort to find out where the house of Nawab Ahmad Husain Khan was. Where a decree describes the mortgaged property in more ways than one, and one description applies to one set of existing facts, another to another set of existing facts, the duty of the Court executing the decree is to ascertain by a reference to the record or other evidence to which property the decree was intended to apply. Order VII, rule 3, and Order XX, rule 9, of the Code of Civil Procedure describe the manner in which immoveable property should be described in the plaint and decree. Where the boundaries and survey numbers given in a mortgage decree do not tally, efforts should be made to ascertain what was the property intended to be mortgaged and sold; for in a mortgage decree framed under Order XXXIV, rule 5, of the Code, a Court is ordering the sale only of the mortgaged property.

In *Pahalwan Singh v. Maharaja Muhessur Bukhsh Singh* (1) where a decree directed that the plaintiff should obtain possession of the land according to the boundaries given in the plaint and also specified the quantites of the land of which he was to obtain possession, and it turned out that those quantities were not strictly accurate, their Lordships of the Privy Council held that the decree should be interpreted as if it was a conveyance of land stating the boundaries and the area, and the plaintiff was entitled to all the land contained within the boundaries stated in the plaint, the mistake in the area being merely a false description. Where there is a sufficient description set forth of the premises by giving the boundaries or the particular name of the field or otherwise, a false description added thereto (*e. g.*, the mention of a wrong area or survey number) may be ignored—*Zeenut Ali v. Ram Doyal* (2); *Abdul Ghani* v. *Tajammal Husain* (3); *Santaya* v. *Savitri* (4) and *Karuppa Goundan* v. *Periathambi Goundan* (5). In *Tribhovandas* v. *Krishnaram* (6) where a mortgage purported to comprise

(1) 16 W. R. (P. C) 5; 9 B. L. R. 150.
(2) 18 W. R. 25.
(3) A. W. N. (1883) 38.
(4) 4 Bom. L. R. 871.
(5) 30 M. 397; 2 M. L. T. 336.
(6) 18 B. 283.

all the property appertaining to the *bhag* and in setting forth the particulars of the property mortgaged specified two *gabhans*, one only of which belonged to the *bhag* and the other did not, and it was found that the *bhag* comprised four *gabhans* or building sites, it was held that the particulars were the leading description and the supplementary description of them as constituting the entire *bhag* should be regarded as *falsa demonstratio*. The question in each case is one of intention, and as observed in *Tyada Poosapati Rudra* v. *Maharaja of Jeypore* (7) when two descriptions of the same subject-matter conflict with each other and when there are two conflicting parts of the same description, that which is more certain, stable and the least likely to have been mistaken or inserted inadvertently must prevail, if it sufficiently identifies the subject-matter.

It might, therefore, have been necessary for this Court to remit the case to the Court below for an inquiry as to the property intended to be mortgaged and directed by the decree to be sold. But in view of certain facts admitted by the parties and the map prepared by the *Amin* such a necessity has not arisen. It is admitted that the boundaries given in the decree tally with those given in the mortgage-deed, and it is urged that the survey numbers were not entered in the mortgage-deed but were added when the plaint was filed. We have no means of ascertaining that fact. But it appears from the map that *Ahata* No. 165 contains the outer *sahan* and the main gate leading to the house in dispute and answers the description of the property with reference to which the decree under execution was passed. The area covered by it must, therefore, be deemed to form part of the mortgaged property of which sale has been decreed. *Ahatas* Nos. 166 and 167 do not appear to form part of the property mortgaged, for both of them stand on the north of the outer *sahan* forming *Ahata* No. 165. *Ahata* No. 167 is, moreover, not specifically included in the decree under execution, and in regard to *Ahata* No. 166, the learned Counsel for the respondent admits that it was not included in the property over which the prior lien was declared in a suit brought by the appellants on their subsequent mortgage.

The appeal is, therefore, allowed in regard to *Ahatas* Nos. 166 and 167 *khasra*, which will be excluded from the sale. The parties will, under the circumstances, bear their own costs throughout.

Appeal allowed.

(7) 14 Ind. Cas. 286; 23 M. L. J. 97; 11 M. L. T. 385.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1575 OF 1912.

August 6, 1914.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Walmsley.

Maharani JANKI KOER—PLAINTIFF—APPELLANT

versus

MAHABIR PRASAD—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 90—Suit against agent for neglect of duty—Limitation, when begins to run.

In a suit by a principal against his agent for neglect in discharge of duties, limitation under Article 90 of the Limitation Act begins to run when the agent's neglect becomes known to the principal, and not when the principal comes to know that there is sufficient cause for a good case being run against the agent.

Appeal against the decree of the District Judge of Saran, dated the 18th of March 1912, reversing that of the Munsif, second Court, at Chapra, dated the 13th of September 1911.

Babu *Ram Charan Mitter* and Dr. *Dwarka Nath Mitter*, for the Appellant.

Babus *Mohendra Nath Roy* and *Abani Bhusan Mookerji*, for the Respondent.

JUDGMENT.—The defendant was an *Am-mukhtear* of the Bettiah Raj appointed under a letter of appointment by the Assistant Manager on the 16th May 1904. On the 29th June 1904 he was given a registered *am-mukhtearnama* by which he was authorised to do various things, one of which was signing petitions of executions and filing them. In February 1907 he made reports in respect of a number of decrees that they could not be realized by execution and the Assistant Manager in charge at Chapra sent these remission

reports to the Manager. The Manager sanctioned certain of these recommendations, but with regard to certain decrees the Manager ordered further inquiries. What the result of the further inquiries was, does not appear. But it seems that it was found out that these decrees had been barred by limitation. Upon that, some reports seem to have been called for from the Head Clerk, and the Head Clerk made his report on the 6th September 1907. The defendant was dismissed in 1909 and the suit was brought on the 6th of September 1910 on an insufficient stamp. The deficit stamp was supplied on the 10th September 1910. The suit was for the recovery of about Rs. 800 being the amount of the decrees which had been barred during the incumbency of the defendant as *Am-mukhtear* of the plaintiff in charge of law affairs at Chapra. The first Court gave a decree. The second Court dismissed the suit on the ground that it was barred by limitation, because he considers that the plaint was properly filed on the day on which the deficit Court fee was put in, and *secondly*, on the ground that it was barred by limitation under Article 90 of the Schedule I to the Limitation Act.

It is contended before us that the learned Judge is wrong on both points. As regards the first point, it is conceded by the learned Vakil for the respondent that the plaint must be considered to have been filed when it was presented, *i.e.*, on the 6th September 1910. If the cause of action arose, as stated by the plaintiffs, on the 6th September 1907, then the suit would be within time if Article 90 would apply. On the second ground it is contended here that it will not be necessary to consider whether the cause of action arose on the 6th of September 1907, if the suit is governed by Article 116 instead of Article 90. That would really be so. But it must be seen whether Article 116 would apply. It is contended that it would be so governed by reason of the *am-mukhtearnamah*, by which the defendant was given the power of executing decrees, being a registered document. The suit must be considered as one for compensation for breach of a contract covered by a registered document. Reliance is placed in support of this contention on the case of *Harendra Kishore Singh* v. *Administrator-General of Bengal* (1). That was also a case of the Bettiah Raj. There the appointment of the Manager was under a registered deed by which he agreed to account for all monies that came into his hands and the suit was for misappropriation of Raj moneys. Here the appointment was by a writing on plain paper dated the 16th May 1904 and the registered document only conferred powers upon the defendant for doing certain things, and the suit is brought not for breach of any covenant in the registered *am-mukhtearnama* but for the negligence of the defendant in the discharge of his duties as *Am-mukhtear* which he undertook when he accepted his appointment on the 16th May 1904. The present case, therefore, is distinguishable and we think that Article 90 is the proper Article to apply in this case. That being so, we must see whether the cause of action arose on the 6th September 1907. As regards that, the learned Judge says in the first part of his judgment: "It is admitted that there was previous notice that the decrees were refused execution, as being barred by limitation. But the Head Clerk's report of the 6th September 1907 is said to have been the first notice of the appellant's misfeasance. This distinction is, of course, based on sound principle and must be accepted." In a later part of his judgment, however, the learned Judge says that "Mr. Laurie states that he first had knowledge of the appellant's misconduct or negligence when the Head Clerk, Gopi Nath Sanyal, submitted his report on the 6th September 1907. I am inclined to think that Mr. Laurie must mean that he then first knew that there was sufficient ground for suing the defendant for damages." And then "I am not prepared to hold that Mr. Laurie remained ignorant for all these years, 1905, 1906 and eight months of 1907, of what was so easily discoverable." And then again, "It is one thing to know of a man's negligence, and another to know that you have a good case against him for damages." Reading all these portions in the judgment together, we think that the learned Judge was of opinion that Mr. Laurie, the Assistant Manager of the plaintiff, knew of the defendant's negligence before

(1) 12 C. 357.

the 6th September 1907 and that on the 6th September 1907, he came to know that there was sufficient cause for a good case being run against the defendant. This being so, the knowledge of the plaintiff which was required to be within three years by Article 90 of the Limitation Act was beyond three years and the suit fails. In this view of the case, we think that the appeal must fail.

It is accordingly dismissed with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 123 OF 1913.
MISCELLANEOUS APPEAL No. 44 OF 1913.
February 13, 1914.

Present:—Mr. Lindsay, J. C.

FIDA HUSAIN—DEFENDANT—APPELLANT
versus
THE COLLECTOR OF SHAHJAHANPUR, MANAGER OF PARWAR ESTATE—PLAINTIFF—RESPONDENT.

Provincial Insolvency Act (III of 1907), s. 16, sub-s. (2)—Prohibition contained in section 16, sub-s. (2), Provincial Insolvency Act, applicability of—Order of discharge, operation of.

The prohibition which is contained in section 16, sub-section (2), of the Provincial Insolvency Act is aimed at creditors to whom notice of the insolvency proceedings has been given, and does not affect persons having claims against the insolvent to whom no notice whatever of the insolvent's application has been delivered.

An order of discharge operates only to free debtors from the debts entered in the Schedule.

Appeals against the decree of the Subordinate Judge, Lucknow, dated 31st July 1913.

Babus *Basudev Lal* and *Gopal Sahai*, for the Appellant.

Mr. *N. N. Ghoshal*, for the Respondent.

JUDGMENT.—These two appeals which are appeals by one Fida Husain are closely connected and may be disposed of by one judgment. The facts are somewhat peculiar and must be set out in detail. On the 6th of December 1906 Fida Husain along with one Kuar Mahendro Singh executed a promissory note for Rs. 2,000 in favour of the Bank of Upper India. Kuar Mahendro Singh executed the note as a surety for Fida Husain. On the 25th of February 1909 the Bank obtained a joint and several decree against Fida Husain and Mahendro Singh. On the 25th of October 1909 Fida Husain filed a petition in insolvency in the Court of the District Judge of Lucknow. Attached to his petition was a list A which was supposed to contain the names of the various creditors to whom Fida Husain at that time owed money. One of these creditors was shown as the Bank of Upper India. The amount of the debt was shown as Rs. 2,000 and it was stated that it was due in respect of a *hundi* upon which a decree had been obtained in the Court of the Subordinate Judge of Lucknow on the 26th of February 1909. As a matter of fact the decree was for a considerably larger amount, namely, Rs. 2,432 odd. After the petition was filed notice was given to the various creditors whose names were entered in the list. The Agent of the Bank of Upper India was served personally with notice of these proceedings on the 1st of November 1909. Meantime while the insolvency proceedings were going on, the Bank got its decree transferred to the Court of the Subordinate Judge of Shahjahanpur and took out execution against Mahendro Singh who was the surety. The Bank, it may be noticed, was perfectly entitled to take this step for as the decree obtained by it against Fida Husain and Mahendro Singh was a joint and several decree, it was open to the Bank to take out execution against either of the judgment-debtors. There was nothing arising out of the insolvency proceedings which could have been a bar to the Bank's realising this debt from Kuar Mahendro Singh who was no party in the insolvency case. The adjudication order was made on Fida Husain's application on the 13th of January 1910. On the 18th of the same month the Bank realised Rs. 4,160-13-1 from Kuar Mahendro Singh in full satisfaction of its decree. The result of these proceedings was to constitute Kuar Mahendro Singh a creditor of Fida Husain in respect of the sum he had been obliged to pay under the decree. Kuar Mahendro Singh's name does not appear in the list of creditors, nor has any entry of his claim yet been made in the schedule prepared in the Court of the District

Judge. Late in November 1912, the estate of Kuar Mahendro Singh was taken under the Court of Wards and on the 16th of January 1913, the Court of Wards on behalf of Mahendro Singh's estate filed a suit against Fida Husain to recover the money which Kuar Mahendro Singh had paid under the decree. A written defence was put in on behalf of Fida Husain and one of the pleas taken was to the effect that the suit was barred by the provisions of section 16 of the Provincial Insolvency Act, the reason being that the Court of Wards did not obtain the previous permission of the District Judge to file the suit. This appears to have been the first intimation which came to the Court of Wards of the fact of Fida Husain's having been declared an insolvent. Having become aware of this fact an application was made on behalf of the Court of Wards to the District Judge on the 28th of July 1913 the date fixed for the hearing of the suit against Fida Husain. The facts were set out in the petition and the prayer was that the District Judge should be pleased to grant permission to the Court of Wards plaintiff to "continue" the suit in the Court of the Subordinate Judge of Lucknow. In form this application, of course, was not correct, for the permission which is referred to in section 16 of the Provincial Insolvency Act is a permission, not to continue, but to commence a suit. The learned Judge passed an order giving the Court of Wards leave to prosecute to its termination the suit against Fida Husain. Armed with this permission the case proceeded to trial in the Court of the Subordinate Judge and the result was a decree in favour of the Court of Wards against Fida Husain for the full amount claimed. The Subordinate Judge was of opinion that any defect relating to the institution of the suit was cured by the subsequent order of the District Judge of Lucknow, dated the 28th of July 1913, granting permission to the Court of Wards to "continue" the suit. So far as the provisions of section 16 of the Provincial Insolvency Act are concerned, if they apply to the case at all, it must be taken that the order passed by the District Judge was inoperative and not in accordance with law. The section says clearly that no suit or other legal proceeding shall be commenced except with the leave of Court and this being so, a sanction given after the suit or proceeding has commenced cannot, in my opinion, be invested with any retrospective effect. However, this does not dispose of the matter, for it appears to me extremely doubtful whether the terms of section 16 had any application to this case at all. So far as I am able to understand the scheme of the Insolvency Act, the protection which it affords to debtors who come and ask for the benefit of its provisions, extends only to those debts of which mention is made in the schedule. Proceedings in insolvency begin with a petition presented in most cases by the debtor and the Court has to depend for information as to the extent of his debts upon the statements contained in the list attached to the petition. The Act requires notice to be given to such of the creditors as are mentioned in the list and the proceedings are to be taken in the presence of such persons after due notice has been given. If the name of a particular creditor is suppressed in the list, either by inadvertance or through intention, it would, I think, be extremely unjust that he should be deprived of his ordinary remedy under the Civil Law of bringing a suit against his debtor for the recovery of the debt due by him. The insolvency proceedings having been taken behind his back, he is not in a position to come forward and give proof of his claim before the Insolvency Court and in such circumstances there appears to be no good reason why he should be denied the right of an ordinary creditor. I am disposed to think, therefore, that the prohibition which is contained in section 16, sub-section (2), of the Provincial Insolvency Act is aimed at creditors to whom notice of the insolvency proceedings has been given, and does not affect persons having claims against the insolvent to whom no notice whatever of the insolvent's application has been delivered. Section 24 of the Act no doubt allows creditors of the insolvent to come in and prove their debts and have them entered in the schedule even if their names have not been entered in the list of creditors filed with the petition. But it stands to reason that no creditor would be

able to comply with the provisions of this section unless he had reason to know that the insolvency proceedings were pending.

Again, the scope of the Act may be inferred from the terms of section 45 which lays down the effect of an order of discharge. According to section 45, sub-section 2, an order of discharge releases the insolvent from all debts entered in the schedule. The language of this sub-section is important for it is quite clear that the intention is only to afford protection to the debtor in respect of debts which have found a place in the schedule. It is not laid down that the order of discharge releases the insolvent from all debts which are proveable under the Act, as is the case in Bankruptcy Law in England. I gather, therefore, that when it was laid down that an order of discharge operates only to free debtors from the debts entered in the schedule, the intention was to protect them only against creditors who having had distinct notice of the insolvency proceedings had an opportunity of coming forward and proving their debts in the Bankruptcy Court. The conclusion at which I arrive is that the terms of section 16 of the Insolvency Act do not apply to the present case. The name of Kuar Mahendro Singh or of the Court of Wards which now represents him, has at no time appeared in the schedule and it must be taken as a fact that until the suit was brought in the Subordinate Judge's Court, neither Mahendro Singh nor the Court of Wards which represents him had any notice of the insolvency proceedings. It may be that having received notice by the plea taken in the written statement the Court of Wards might have abandoned the suit and come forward and proved the debt in the ordinary way before the District Judge. But by that time the suit had already been instituted (it was filed on the last day of limitation) and the expenses for Court-fees incident to the filing of the suit had already been incurred, and in the circumstances there would, I think, be no justice in holding that the Court of Wards was bound to give up its claim and prove merely the amount of the debt owing to it, irrespective of the cost of filing the suit in the Subordinate Judge's Court. This plea that the suit was barred is the only plea taken in the First Civil Appeal No. 123 of 1913, the appeal against the decree of the Subordinate Judge. In my opinion the plea ought not to succeed on the ground that section 16 of the Provincial Insolvency Act had no application to the facts of this particular case. This appeal, therefore, fails and is dismissed with costs.

As regards the miscellaneous appeal which is directed against the order of the District Judge, dated the 28th July 1913, I hold for the reasons above given that the order of the Judge was not in accordance with law and should be set aside. The miscellaneous appeal is allowed accordingly, but in the circumstances I decline to grant the appellant any costs.

First Appeal dismissed;
Miscellaneous Appeal allowed.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 1321 OF 1913.
July 1, 1913.
Present:—Mr. Justice Shah Din.
RAM LAL—PLAINTIFF—APPELLANT
versus
GOPI—DEFENDANT—RESPONDENT.

Alienation—Sale—Custom or Hindu Law—Brahmans *of Dangoh Khurd of Una Tahsil of Hoshiarpur District governed by custom Oral evidence on question of custom, when sufficient—Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Compromise before local Commissioner, when not binding.*

In matters of alienation of ancestral land a childless *Brahman* propietor of *Mauza* Dangoh Khurd in the Una Tahsil of the Hoshiarpur District is governed by agricultural custom and not by Hindu Law.

A rule of custom may be established and held to be of binding force even when no instance is forthcoming, if there is an overwhelming preponderance of oral testimony of those governed by it and likely to know of its existence in its favour.

Jowala v. *Hira Singh*, 55 P. R. 1903 (F. B.); 117 P. L. R. 1903, followed.

The proof of custom should not be confined to judicial precedents and definite instances, but might consist in deliberate and well-considered opinion of the people living and governed by the custom and in other recognized modes of establishing its existence.

Diya Ram v. *Sohel Singh*, 110 P. R. 1906 (F. B.); 59 P. W. R. 1907; 31 P. L. R. 1907, followed.

A settlement arrived at between the parties

RAM LAL *v.* GOPI.

before a local Commissioner appointed to investigate their case is not a lawful compromise and on it no decision can be based if either party has the option to repudiate it afterwards on certain conditions.

Daswandhi v. *Mahant Krishen Dev*, 9 Ind. Cas 841; 34 P. R. 1911; 119 P. W. R. 1911; 109 P. L. R. 1911, referred to.

Second appeal from the decree of the Divisional Judge of the Hoshiarpur Division, dated the 9th May 1910, reversing that of the Munsif, 3rd Class, Una, dated the 31st July 1909, decreeing the claim on payment of Rs. 70.

Bakhshi *Tek Chand*, for the Appellant.

Sheikh *Umar Bakhsh*, for the Respondent.

JUDGMENT.—The facts of this case are very fully stated in the judgment of the learned Divisional Judge. The questions for decision in this appeal are :—

(1) Whether the parties entered into a compromise before the local Commissioner who was appointed by the Munsif to make an inquiry into the question of custom that arises in this case, and whether they are not bound by that compromise ? and

(2) if the parties have not settled the case by compromise, whether, in matters of alienation of ancestral land, a childless *Brahman* proprietor of *Mauza* Dangoh Khurd in the Una Tahsil of the Hoshiarpur District is governed by agricultural custom or by Hindu Law ?

On the first question, I agree with the Divisional Judge that the statements made by the parties in the first Court on the 17th July 1909 clearly show that the alleged compromise arrived at between them before the local Commissioner three days previously was not considered by them as of binding effect, as we find the plaintiff stating on the said date that if the defendant chose to repudiate the compromise the Court was at liberty to give its decision on the merits of the case, and that he (the plaintiff) would sue the defendant to recover from him the sum of Rs. 70 which he had paid him in accordance with the compromise. The defendant repudiated this compromise altogether and said that he had been forced by the local Commissioner to accept the terms thereof. In these circumstances, I hold that the case was not settled by the parties by a lawful compromise, and the Divisional Judge was, therefore, right in deciding the appeal on the merits.

The second question set out above is a most important question in the case. Upon that question, the Munsif held that the parties were governed by custom and not by Hindu Law, and that, therefore, the plaintiff had a right to contest the sale made by Jai Karan in favour of the defendant in 1889. He accordingly decreed the plaintiff's claim conditionally on his paying Rs. 70 to the defendant. The Divisional Judge, on the other hand, held that the parties were governed by Hindu Law and not by custom, and he, therefore, accepted the appeal and dismissed the plaintiff's suit.

After hearing arguments on both sides and referring to the record, I think that the view taken by the Munsif is correct. A reference to the history of the village shows that its original owners were *Brahmans* of the *Raru gôt*, and that, some four generations ago, *Brahmans* of the *Dogra gôt* to which the parties belong, came from Pirthipur, a village close by, and acquired land in *Mauza* Dangoh Khurd from the original *Raru* owners. The whole of the village is owned by *Brahmans* of these two *gôts*, 135 *Ghumaons* belonging to *Raru Brahmans* and 52 *ghumaons* to *Brahmans* of the *Dogra gôt*. The parties still reside at village Pirthipur, which is a Rajput village, in which there are only twelve families of *Brahmans* belonging to seven different *gôts*, of which two families are of the *Dogra Brahmans*, one of them being the parties' family. In Pirthipur the *Brahmans* have no share in the *shamilat*; while in village Dangoh Khurd, in which the land in suit is situated, the *Brahmans* own the *shamilat* as well as the whole of the *khewat* land. The *Brahmans* of *Raru gôt* in Dangoh Khurd constitute a compact village community and the *Brahmans* of the *Dogra gôt*, who own and cultivate agricultural land in this village, although they live at Pirthipur, are, to all intents and purposes, members of the same community. It is not denied that, except some well-to-do persons, all the *Brahmans* of the *Dogra gôt* till the soil with their own hand; that they do not, so far as the evidence on the record goes, carry on any priestly functions; and that among them daughters do not succeed to their father's

property in the absence of sons, as they would succeed if this class of *Brahmans* were governed by Hindu Law. The local Commissioner, Sant Ram, who made the inquiry into custom on the spot, is a *Rajput Zaildar*, who belongs to the principal village of the Punjab *Illaqa* in which Dangoh Khurd is situated; and he has examined no less than 60 witnesses, all *Brahmans*, who reside in 17 different villages in that tract. With the exception of five or six witnesses produced by the defendant, all of them have unanimously stated that the parties as well as *Brahmans* of other *gots* inhabiting the Punjab *Illaqa* in the Una Tahsil follow agricultural custom and not Hindu Law; and the local Commissioner has accepted their evidence on this point as correct and has reported accordingly. As observed by Chatterji, J., in *Jowala* v. *Hira Singh* (1). "A rule of custom may be established and held to be of binding force, even where no instance is forthcoming, if there is an overwhelming preponderance of oral testimony of those governed by it and likely to know of its existence in its favour." Similar observations are to be found in *Daya Ram* v. *Sohel Singh* (2): "The proof of custom should not be confined merely to judicial precedents and definite instances, but might consist in the deliberate and well-considered opinion of the people living under, and governed by the custom and other recognized modes of establishing its existence." I entirely agree in these observations; and it seems to me that the unanimous testimony of no less than 54 witnesses, who are all *Brahmans* and who have stated on oath that the *Brahmans* of the tract in which they live are governed by custom and not by Hindu Law, is entitled to very great weight, and the matter is practically clinched when we find that among the *Brahmans* with whom we are concerned in this case daughters are admittedly excluded from inheritance by their father's collaterals. It is not proved that in the village of Dangoh Khurd any alienations of ancestral land have been made by childless *Brahmans* of the *Dogra gôt* to the prejudice of their agnates; and under all the circumstances of this case it must be held that the parties are governed by custom and not by Hindu Law. The onus, therefore, lay on the defendant of proving that the sale in dispute was valid by custom and I am clear that he has failed to discharge that onus. The Dharmsal case, to which the Divisional Judge has referred in his judgment and on which he has placed much reliance, is the one reported as *Daswandhi* v. *Mahant Krishen Dev* (3), and, as will be seen from that report, the decision of this Court, which reversed the judgment and decree of the learned Divisional Judge in that case, is entirely in favour of the plaintiff.

For the reasons given I accept this appeal and setting aside the decree of the Divisional Judge, I restore that of the Munsif with costs throughout.

Appeal accepted.

(1) 55 P. R. 1903 (F. B.), 117 P. L. R. 1903.
(2) 110 P. R. 1906, (F. B.) 59 P. W. R. 1907; 31 P. L. R. 1907.
(3) 9 Ind. Cas. 841; 34 P. R. 1911; 119 P. W. R. 1911; 109 P. L. R. 1911.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 270 OF 1914.
CIVIL MISCELLANEOUS PETITION No. 1204 OF 1914.
September 22, 1914.

Present:—Mr. Justice Kumaraswami Sastri.

ATCHUTARAMIAH—PETITIONER
versus
SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF KISTNA—DEFENDANT—RESPONDENT.

Civil Rules of Practice (Madras), r. 277—Pleader retained by one party, when entitled to appear for opposite side—Engagement of other Pleader—Presumption.

Under amended rule 277 of the Madras Civil Rules of Practice a Pleader, who has been retained for a party and who has drafted a written statement for that party, is entitled to appear for the opposite side when the party originally retaining him does not seek to employ his services and engages other Pleaders in the case.

When another Pleader is engaged, the presumption arises that the services of the Pleader originally retained are not required and that he is free to appear for the opposite side.

Petitions, under section 15 of the Charter Act and Rule 277, Civil Rules of Practice, praying the High Court to revise

the order of the Temporary Subordinate Judge of Rajahmundry at Cocanada, dated 14th March 1914, in Interlocutory Application No. 47 of 1914 (in Original Suit No. 1 of 1913).

Petition, under section 151 of Act V of 1908, praying that the High Court will be pleased to permit the petitioner to appear and act on behalf of the plaintiff in Original Suit No. 1 of 1913, on the file of the Court of the Temporary Subordinate Judge of Rajahmundry at Cocanada.

Messrs. *L. A. Govindaraghava Iyer*, *V. Ramesam*, *P. Narayanamurthy* and *L. S. Veerarghava Iyer*, for the Petitioner.

The *Acting Government Pleader*, for the Government.

JUDGMENT.—These petitions are filed against the order of the Temporary Subordinate Judge of Rajahmundry sitting at Cocanada, refusing the petitioner, who is a first grade Pleader practising in Cocanada, leave to appear on behalf of the Rajah of Vizianagaram in a suit filed by the Rajah against the Government. The facts are shortly these: —"The petitioner, Mr. Atchutaramiah, who according to the Subordinate Judge is a first grade Pleader of long standing with a lucrative practice", was attending to Government work in the Subordinate Judge's Court at Cocanada and was engaged by the Government to defend Original Suit No. 63 of 1912, which was filed by the Rajah of Vizianagaram in respect of certain *lankas* in Godavari. He drafted a written statement and before anything further was done the suit was transferred from the file of the Subordinate Judge of Cocanada to that of the Subordinate Judge of Rajahmundry. When the suit was so transferred, the Collector did not engage Mr. Atchutaramiah to appear before the Subordinate Judge of Rajahmundry, but engaged the Government Pleader in Rajahmundry to appear for the Government, and so far as appears from the record, Mr. Atchutaramiah had nothing further to do with the case. Some time after the transfer of the suit to Rajahmundry Mr. Atchutaramiah resigned his Government pleadership and another gentleman (Mr. Perraya Sastri) was appointed. The Subordinate Judge's Court of Rajahmundry was ordered to hold the Court at Cocanada and the suit came back to Cocanada for trial before the Subordinate Judge. The Collector engaged Mr. Perraya Sastri to defend the suit and no engagement was offered to Mr. Atchutaramiah. The Vakil for the plaintiff died and the Vizianagaram Estate offered the brief to Mr. Atchutaramiah, the petitioner. As he had appeared for the Government, he applied for permission under Rule 277 of the Civil Rules of Practice to appear for the plaintiff. In his affidavit he states that all that he did was to draft the written statement, that when the suit was transferred to Rajahmundry the Collector did not ask him to appear there but engaged the Government Pleader at Rajahmundry, that he did not claim and was not paid any fees for the work he did for the Government in connection with the suit, that he was not in possession of any facts which would be useful to the plaintiff or detrimental to the Government and that when the suit came back to Cocanada the Collector did not offer to engage him. A counter-affidavit was filed by Mr. Venkatarow, the special Officer in connection with the suits, to the effect that Mr. Atchutaramiah when he drafted the written statement, did so with the aid of a memorandum which was so exhaustive and detailed that it placed him in possession of all the information available in the matter and that it would be prejudicial to the interests of Government should Mr. Atchutaramiah appear for the plaintiff. A reply affidavit was filed by Mr. Atchutaramiah wherein he states that although he resigned the office of Government Pleader, he was asked to continue in cases in which he had appeared before his resignation and that the Collector had at first given him oral permission to appear for the Vizianagaram Estate in the present suit but cancelled the same two days afterwards. The question, therefore, for determination is whether a Pleader who has been retained for a party and who has drafted a written statement, is entitled to appear for the opposite side when the party originally retaining him does not seek to employ his services but has engaged other Pleaders in the case. A great deal of unnecessary matter and discussion have been introduced in the lower Court, presumably owing to the fact that the amendment to Rule 277 of the Civil Rules of Practice made on the 16th December 1909 was not brought to the notice of the Court

and probably was not even known to the parties. Rule 277 as it originally stood ran as follows :—

"Except when specially authorised by the Court or with the consent of his former client, a Pleader shall not, after the determination of his appointment, appear or act in the same suit, or appeal, or matter or in any proceedings connected therewith, for any person whose interest is opposed to that of his former client."

The rule, as amended, runs as follows:— "Except when specially authorised by the Court or by consent of the party, a Pleader who has advised in connection with the institution of a suit, appeal or other proceeding, or has drawn pleadings in connection with any such matter or has during the progress of any such suit, appeal or other proceeding acted for a party, shall not, unless he first gives the party for whom he has advised, drawn pleadings or acted, an opportunity of engaging his services, appear in such suit, appeal or other proceeding, or in any appeal or application for revision arising therefrom, or in any matter connected therewith for any person whose interest is opposed to that of his former client:

"Provided that the consent of the party shall be presumed if he engages another Pleader to appear for him in such suit, appeal or other proceeding without offering an engagement to the Pleader whose services he originally engaged."

There can be little doubt from the facts, as appearing from the affidavits, that the engagement of Mr. Atchutaramiah in the Subordinate Judge's Court at Cocanada was treated as at an end when the suit was transferred to Rajahmundry and though he could have been engaged to appear at Rajahmundry and asked to proceed with the suit on behalf of the Government, this was not done. When the suit was transferred from the file of the Subordinate Judge at Cocanada to that of the Subordinate Judge of Rajahmundry the suit ended so far as the Court at Cocanada was concerned and as the engagement of Mr. Atchutaramiah was to appear in the Court of the Subordinate Judge of Cocanada, the proceedings in that suit must be taken to have ended so far as the Pleader was concerned. The transfer terminated all proceedings so far as the Cocanada Sub-Court was concerned just as effectively as if the suit had been decided. It was only an accident that the suit came to be tried again at Cocanada before the Sub-Judge of Rajahmundry. It was open to the Collector to have engaged his services and to have asked him to appear in the Court at Rajahmundry, but admittedly he did not do so and it is not suggested that subsequent to the transfer Mr. Atchutaramiah was either consulted in connection with the suit or had anything to do with its further conduct. As his *vakalat* had terminated before he resigned his appointment of Government Pleader in the Subordinate Judge's Court at Cocanada and as nobody could have anticipated at the time of the resignation that the suit would come back to be tried at Cocanada, it is unnecessary to consider whether his resignation disentitled him to be re-appointed. It is not suggested that his resignation was due to any cause that would render it inexpedient that he should be given any brief by the Government. This is certainly not a case where the Pleader without any justifiable cause throws up the brief of his former client and seeks to appear for the opposite party. On the contrary Mr. Atchutaramiah was all along willing to appear for the Government if he was engaged. I adjourned the case to enable Mr. Grant to communicate with the Collector and ascertain if the Collector is willing to engage him even at this stage of the proceedings, and Mr. Grant stated that the Collector was not going to engage him in the suit. It is difficult to see how, under these circumstances and having regard to the express terms of Rule 277 as it now stands, permission could be refused to Mr. Atchutaramiah to appear for the Estate. It is clear that Mr. Atchutaramiah gave full opportunity to the Collector to engage his services and that the Collector not only did not engage him but at one stage of the proceedings permitted him to appear for the opposite side. Apart from any question of permission, the proviso to Rule 277 throws the onus on the other side, because the engagement of another Pleader when the case came back to be tried at Cocanada, raises the presumption that Mr. Atchutaramiah's services were not required and that he

was free to appear for the opposite side.

I am unable to see any hardship or unfairness in allowing Mr. Atchutaramiah to appear for the Estate. It is not suggested that the Government are bound to engage Mr. Perraya Sastri even though he was Government Pleader at Cocanada. It was perfectly open to the Government to send the brief back to Mr. Atchutaramiah as it is not the case for the Government that Mr. Atchutaramiah did anything in connection with the suit which would have made it impossible for the Government to have engaged his services. I am of opinion that Rule 277 clearly entitles Mr. Atchutaramiah to appear for the Estate. I set aside the order of the Subordinate Judge and allow the petitions. I make no order as to costs.

Petitions accepted.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 692 OF 1913.

February 28, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge.

SHER MUHAMMAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

ALI MUHAMMAD AND OTHERS—PLAINTIFFS AND *Musammat* BAKHAT BIBI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Alienation—Custom—Sale of ancestral holding to stranger by sonless Awan and widow—Objection by reversioners four degrees removed—Necessity Question of fact—Second appeal—Punjab Courts Act (XVIII of 1884) as amended by Punjab Courts Acts (I and IV of 1912), s. 40.

The *Awans* of Tahsil Talagang in the Attock District have extensive powers of alienating their ancestral immoveable property to their relatives, as daughters, sisters and their sons, but they have limited powers like other agriculturists of alienation in favour of a stranger, whether an *Awan* or not.

Nura v. *Tora*, 43 P.R. 1900, P.L.R. 1900 p. 404, *Khuda Yar* v. *Fatteh*, 8 P. R. 1906, 27 P.W.R. (Vol. 1a) 1906; 64 P. L. R. 1906, and *Amir Ali* v. *Biggo*, 15 P. R. 1907; 35 P. W. R. 1907; 4 P. L. R. 1908, distinguished

The question of necessity is almost always a question of fact and should rarely be treated as a question of law for purposes of second appeal.

Second appeal from the decree of the Divisional Judge, Attock Division, dated the 11th March 1913, reversing that of the Munsif, 2nd Class, Attock, dated 28th August 1912, dismissing the claim.

Mr. *Jalal-ud-Din*, for the Appellants.

Mr. *Nand Lal*, for the Respondents.

JUDGMENT.—This is a case of sale of an entire holding of 135-16/20 *kanals* by *Awan* proprietors, a man and a woman, owning in equal shares to other *Awans* of the same village not related to them. It has been contested after four years by collaterals of the vendors four degrees removed.

The revenue assessment on the land is Rs. 3-11-6 and the total sale price was about Rs. 333, including Rs. 135 due on a previous mortgage since redeemed. The remainder of the consideration was said to be paid in cash and the explanation of the sale was that the holding had been long mortgaged to persons other than the present vendees, so that the vendors were obliged to sell for the best price they could in order to have some money to live on.

The first Court found necessity proved and dismissed the suit. The lower Appellate Court found necessity not proved giving reasons, and also held that *Awans* of Tahsil Talagang have not unlimited powers of alienations to strangers. It then declared the sale binding on plaintiff to the extent of Rs. 140 only.

The finding on the latter point involved reference to many rulings and the learned Divisional Judge seems to have been not very sure of his ground as he immediately gave the vendees a certificate on the question of custom involved.

In this second appeal by the vendees, the question of necessity has been raised again as well as the question of custom.

I have taken time to consider the case as there is a good deal to be said on both sides as regards custom. The conclusion, at which I have rather reluctantly arrived, is that I should not interfere on second appeal. Taking first the question of necessity I can see no sufficient reason here for departing from the general rule in cases of the kind that necessity is almost always a question of fact and should rarely be treated as a question of law for purposes of second appeal. The facts are simple enough in this case and the Divisional Judge's reasons for holding necessity not proved are fairly convincing. There is no

good ground for going into the matter further, as in this particular case at any rate no principle of law is involved.

And in regard to *Awan* custom in the Talagang Tahsil it appears to me dangerous to attempt to lay down any invariable rule. Besides the rulings quoted by the Divisional Judge, reference has been made to *Nura* v. *Tora* (1) and *Khuda Yar* v. *Fatteh* (2) and *Amir Ali* v. *Baggo* (3) and the number of authorities cited in various rulings concerned is considerable. The general tendency has, no doubt, been to recognize very extensive powers of alienation among *Awans*, but when it comes to a question of alienation to strangers the discussion has generally turned on the much clearer point of the rights of daughters and their sons. I cannot also overlook the fact that in this case one of the vendors has only her widow's interest in half the land sold and it would be going beyond the published rulings to hold that she has an unrestricted right of alienation.

The present dispute is not of sufficient importance to justify reference to a Division Bench and as a single Judge I am not prepared to say that the decision of the lower Appellate Court is wrong. The appeal is accordingly dismissed, but in this Court also, there will be no order as to costs.

Appeal dismissed.

(1) 46 P. R. 1900; P. L. R 1900 p 494.
(2) 8 P. R. 1906; 27 P. W. R. (Vol Le) 1906, 64 P. L. R. 1906.
(3) 15 P. R. 1907, 35 P. W R. 1907; 4 P. L. R. 1908

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

CIVIL REVISION PETITION NO. 22 OF 1913-14 OF SITAPUR DISTRICT.

May 9, 1914.

Present:—Sir Duncan Colvin Baillie, S. M., and Mr. Tweedy, J. M.

Thakur MUHAMMAD NAWAB ALI KHAN—DEFENDANT—APPELLANT

versus

Musammat JAGDEI—PLAINTIFF—RESPONDENT.

Decree, interpretation of -Special agreement, holding under—Ejectment by notice confirmed by decree -Rights created under decree, whether personal -Successors-in-interest, position of.

A person obtained a decree of the Revenue Court that he held under a special agreement and could not be ejected by notice. After his death, his widow succeeded him. A notice of ejectment was served upon her and she contested it

Held, that although the person obtaining the decree might have held under a special agreement and could not have been ejected by notice, it did not necessarily follow that the same was true of his successors-in-interest.

Appeal from the decree of the Commissioner, Lucknow, dated 16th October 1913, upholding that of the Assistant Commissioner, Sitapur, dated 16th May 1913.

Babu *Bimla Prasad Bhattacharyya*, for the Appellant.

Pandit *Gaya Prasad Tewari*, for the Respondent.

JUDGMENT.

TWEEDY, J. M.—(*May 8th*, 1914).—The difficulty in the case lies in the fact that in 1885 the respondent's husband obtained a decree that he held under a special agreement and could not be ejected by notice. Some years afterwards the appellant sued for a declaration that the respondent's husband had no proprietary or under-proprietary rights in the land and obtained a decision to that effect, the Sub-Judge holding that the "special agreement" was a forgery but at the same time holding that Sita Ram was an occupancy tenant through length of possession. Now this finding is obviously *ultra vires*, as all the Civil Court could do was to declare that proprietary or under-proprietary rights existed or did not exist and the only Court which could decide whether ejectment should take place or not was the Revenue Court.

The finding of the Revenue Court in 1885 that Sita Ram held under a special agreement and could not be ejected by notice, therefore, makes the point *res judicata as far as Sita Ram is concerned*. But the point has hitherto escaped attention that although Sita Ram may have held under a special agreement and could not be ejected by notice, it does not necessarily follow that the same is true of his successors-in-interest. The special agreement may have been personal or it may apply to his successors. I would, therefore, return the case under rule 25 and direct the Assistant Collector to make further inquiry and submit a finding as to whether the decision of 1885 is *res judicata* with reference to the present respondent.

BAILLIE, S. M.—I concur.

Cause remanded.

PUNJAB CHIEF COURT.

MISCELLANEOUS SECOND CIVIL APPEAL NO. 414 OF 1913.

February 21, 1914.

Present:—Mr. Justice Chevis.

MUHAMMAD HAYAT AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NARSING DASS AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption Pre-emption money paid into Court—Money paid by Court to wrong person, effect of.

A pre-emptor does not lose his decree if the pre-emption money paid by him into Court is allowed to be withdrawn by a wrong person The Court will recover back the money wrongly withdrawn.

Miscellaneous second appeal from the order of the Divisional Judge, Shahpur Division, at Sargodha, dated the 9th November 1912, reversing that of the District Judge, Shahpur, dated the 30th July 1912, rejecting the application for cancellation of decree passed by the Chief Court on 29th July, 1911.

Mr. *Nand Lal*, for the Appellants.

Mr. *Gokal Chand Narang*, for the Respondents.

JUDGMENT.—This is a dispute arising out of execution proceedings in a pre-emption suit. The land was sold for Rs. 3,000.

Four separate suits for pre-emption were brought by (1) Narsing Dass, (2) Sohna, (3) Sardara, (4) Ghulam Hussain, but we are now concerned only with two, one of which was brought by Sardara and one by Narsing Dass. Sardara died while his suit was pending in the first Court and is now represented by his son, Muhammad Hayat. Sardara paid Rs. 600 into Court as a deposit under section 19 of the Punjab Pre-emption Act. This deposit was made on 14th October 1908.

The first Court gave all four pre-emptors decrees. The Divisional Judge on appeal threw out the claims of Ghulam Hussain and Muhammad Hayat and gave Narsing Dass a decree for the whole of the land, giving Sohna, a subsidiary decree.

Muhammad Hayat, son of Sardara, appealed to this Court, and the decision was that he and Narsing Dass should share in the proportion of 7 to 52, so Muhammad Hayat was given a decree for 7/59th of the land "on condition of payment of Rs. 356 into the first Court by 26th August 1911 for payment to Narsing Dass."

Gurditta is the original vendee. Out of the Rs. 600 which had been deposited by Sardara, Gurditta withdrew Rs. 359-7 on 26th October 1909, and Muhammad Hayat withdrew Rs. 240-9 on 28th August 1911. So out of the original Rs. 600 deposited, nothing remained for Narsing Dass.

The question is whether Muhammad Hayat has lost his decree. The first Court held that he had not; the Divisional Court holds that he has; so Muhammad Hayat appeals.

It is urged on behalf of the respondent Narsing Dass that Gurditta withdrew the money before the decree of the Chief Court was passed (and this is correct) and so it is argued that Muhammad Hayat was bound to make a further deposit in order to pay Narsing Dass as ordered by the decree of this Court. I do not agree. All that a pre-emptor in such a case has to do is to pay the money into Court; it is, I consider, the duty of the Court to pay the money over to the proper person. Muhammad Hayat had paid in Rs. 600. He withdrew Rs. 240-9-0 which left Rs. 359-7-0 to his credit. I consider that he did all that was required to comply with the decree of this Court. If any one else took money to which he was not entitled and so left too little cash in the treasury for payment to Narsing Dass, it was for the Executing Court to recover money wrongly taken. The words in the decree of this Court "for payment to Narsing Dass" I regard merely as instructions to the Executing Court. I consider that all that Muhammad Hayat had to do was to pay into Court Rs. 356 by a given date. This he had already done long before the given date, depositing Rs. 600 and afterwards withdrawing Rs. 240-9-0.

I accept this appeal and setting aside the order of the Divisional Judge, I restore that of the first Court. I pass no order as to costs, as, no doubt, Narsing Dass thought he had a legitimate grievance when he applied for the Rs. 356 and found no funds available, so parties will bear their own costs in this Court and in the Divisional Court.

Appeal accepted.

JANKI *v.* BEHARI LAL.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 167 OF 1913.

June 24, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C.

JANKI—PLAINTIFF—APPELLANT

versus

BEHARI LAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption, suit for—Ex-proprietary tenant, right of, to pre-empt—Village community, member of, meaning of.

An ex-proprietary tenant in Oudh cannot be regarded as a member of the village community and is not, therefore, entitled to pre-empt as such.

Appeal against the order of the Additional Judge of Lucknow, dated 5th February 1913, upholding that of the Munsif, South Lucknow, dated 4th July 1912.

Babu *Rudra Datt Singh*, for the Appellant.

Pandit *Gokaran Nath Misra*, for the Respondents.

JUDGMENT.—The question for consideration in this case is whether an ex-proprietary tenant is a member of the village community within the meaning of section 9 of the Oudh Laws Act and entitled to pre-empt the sale of a proprietary share of the village or of any plot or house therein. The Courts below found against him.

It is admitted that the plaintiff has no proprietary or under-proprietary share in the village. The case is, therefore, governed by the decision in *Drighijai Singh* v. *Court of Wards, Ramnagar Estate* (1), which was followed in *Narendra Bahadur Singh* v. *Balkaran Singh* (2). The learned Counsel for the plaintiff-appellant relies on the decision of *Ram Dayal* v. *Chaudhri Muhammad Abdul Basit* (3), but in that case the plaintiff was a co-sharer of the village holding land in a *mahal* different from that in which the plot was situated. The question for consideration in that case was whether by reason of his non-residence he was disqualified from bringing a suit for pre-emption in his capacity as a member of the village community. In *Gangole* v. *Syed Kamar Ali Khan* (4) it was held that a grove-holder owning trees but having no interest in the land on which they stood, was not as such a member of the village community and had no right to sue for pre-emption. In *Mangal* v. *Raja Partab Bahadur Singh* (5) a sale of a house by a person who was the owner of the materials of the house but had no right in the land on which it stood beyond that of occupation, was held not to give rise to a right of pre-emption. The position of an ex-proprietary tenant under section 7A (2) of the Oudh Rent Act is analogous to that of an occupancy tenant. He is liable to ejectment under certain conditions and has no such interest in the land, beyond that of occupation so long as he continues to pay the rent assessed, as to make him a member of the village community within the meaning of section 9 of the Act. A member of the village community is ordinarily a person who has some control over the village or its concerns and a mere resident of the village or a tenant cultivating land there, who has no interest in the land beyond that of an occupant, is not entitled to the right of competing with the proprietors or under-proprietors of other *mahals* on an equal footing for the purpose of pre-emption and thereby regulating the composition of the co-parcenary body. The plaintiff-appellant transferred his proprietary rights in favour of his son prior to the sale and his son was impleaded as a plaintiff too late. An objection has been filed by the defendants-respondents to the taxation of the Pleader's fee in the Court below on five times the revenue. This was done in accordance with the rules then in vogue and no cause has been shown for directing an amendment.

The appeal and the cross-objections are dismissed with costs.

Appeal dismissed.

(1) 5 O. C. 266.
(2) 7 O. C. 275.
(3) 1 Ind. Cas. 7; 12 O. C, 1.
(4) 7 Ind. Cas. 613; 13 O. C. 202,
(5) 4 O. C. 26.

NASIR DIN *v.* BALLA MUL.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1043 OF 1911.

January 13, 1914.

Present:—Sir Arthur Ried, KT., Chief Judge, and Mr. Justice Kensington.

NASIR DIN—DEFENDANT—APPELLANT

versus

BALLA MUL AND OTHERS—PLAINTIFFS —RESPONDENTS.

Contract Act (*IX of* 1872), *s.* 16—*Undue influence—Unconscionable bargain not enforced—Compound interest at Rs.* 30 *per cent. reduced to simple interest at Rs.* 18 *per cent.*

Where a debtor, who was an expectant heir and a very inefficient clerk in a Court, went on executing securities at the very high rate of interest of Rs. 30 per cent. with the result that the sum originally advanced accumulated in the course of about 20 years to more than twenty-fold:

Held, that the irresistible presumption was that this was due to the creditor's undue influence within the terms of section 16 of Act IX of 1872 and that the bargain being unconscionable, was not enforceable by a Court of Justice which is not simply a blind and humble instrument of the creditor to plunder the debtor.

Ram Das v. *Netto*, 115 P. R. 1908; 185 P. W. R. 1908, followed.

Accordingly the Chief Court allowed Rs. 18 per cent. simple interest on the principal sum from the date of the loan to the date of institution of the suit, with further interest at 6 per cent. on the amount thus decreed from the date of institution to the date of realisation.

First appeal from the decree of the District Judge, Amritsar, dated 31st December 1911, decreeing plaintiff's claim.

Lala *Lajpat Rai*, for the Appellant.

Messrs. *C. Beven Petman* and *Duni Chand*, for the Respondents.

JUDGMENT.

REID, C. J.—(*June 16th*, 1913).—This is an appeal from a decree for Rs. 1,08,859-6-3 and the respondent has filed a cross-objection that the Court below erred in not allowing interest at the rate of Rs. 2-8 0 per cent. per mensem from the date of institution of the suit until the date of the decree and thereafter at the rate of Rs. 60-0-0 per cent. per mensem (apparently a mistake in the paper-book for Rs. 6-0-0 per cent. per annum) on the amount of decree till date of realisation.

This suit and three by other parties against the appellant were tried by the District Judge of Amritsar who disposed of them in one judgment, dealing first with the facts and law common to all the suits and then with the facts peculiar to each suit. The District Judge has considered very carefully the question whether the contracts sued on were entered into by the defendant-appellant under undue influence exercised on him by the plaintiffs-respondents and has found that the appellant was an expectant heir, that the plaintiffs dealt with him on the strength of his expectations and that they were in a position to dominate his will. We concur with the District Judge in these findings, and it is unnecessary to repeat the facts and the arguments recorded in his judgment in support of them.

On the question whether the respondents abused their dominant position and thereby induced appellant to enter into unconscionable transactions, the District Judge has found that the transactions were not unconscionable, either upon the face of them or upon the evidence; that the plaintiffs did not abuse their dominant position with the object of extorting unconscionable bargains; that the burden of proving undue influence and that he did not receive consideration was on the defendant, and that he failed to discharge it.

The facts of this case differ materially from the facts of the three other cases disposed of in the judgment. The sums of money and the value of the goods which passed from the plaintiffs to the appellant admittedly did not exceed Rs. 4,471-5-9.

Transactions between the parties began on the 18th November 1892. On the 30th January 1893 the appellant executed two bonds one for Rs. 1,753-14-3 and the other for Rs. 450 in respect of transactions from the 18th November 1892 until that date; on the 17th March 1893 he executed a *hundi* for Rs. 660-13-0 and on the 24th January 1897 he executed a *hundi* for Rs. 1,000 and a bond for Rs. 1,999, the total of Rs. 2,999 admittedly including Rs. 1,392-5-6 for interest and the principal consequently being Rs. 1,606-10-6. Counsel have not cited any evidence of the date on which this debt of Rs. 1,606-10-6 was incurred and the judgment below does not help us in the matter, but having regard to the period requisite for interest at about Rs. 30 per cent. to accumulate to nearly Rs. 1,400 and to the fact that the *hundi* preceding the *hundi* and

bond of the 24th January 1897 was executed on the 17th March 1893, we take that date as the starting point for the calculation of interest on the Rs. 1,606-10-5.

In arriving at the conclusion that the respondents did not take undue advantage of the appellant, the District Judge has relied on the facts that a suit on the *hundi* of the 3rd May 1900 in respect of the *hundi* for Rs. 1,000 of the 24th January was barred by limitation on the 7th October 1904 when three *hundis* for Rs. 5,300 in respect of it were executed; that a suit on the *hundi* of the 31st July 1896 for Rs. 1,578-2-6 in respect of the *hundi* for Rs. 660-13-0 of the 17th March 1893 was barred by limitation when the *hundis* of the 3rd May 1900 were executed and that a suit on these latter was barred by limitation when the three *hundis* of the 7th October 1904 for Rs. 7,500 in respect of them were executed; that a suit on the bond of the 23rd May 1896 for Rs. 3,621-9-3 in respect of the bond of the 30th January 1893, was barred by limitation before the *hundi* for Rs. 12,100 of the 25th February 1903 in respect of it was executed; that a suit on the bond of the 24th January 1897 was barred by limitation when *hundis* for Rs. 6,800 of the 25th February 1903 in respect of it were executed; that a suit on the bond of the 31st July 1896 for Rs. 922-8-0 in respect of the bond of the 30th January 1893 was barred by limitation when *hundis* for Rs. 3,100 of the 25th February 1903 were executed in respect of it; in other words, that at one time or another suits in respect of all the items on which the present claim is based were barred by limitation. On these facts the District Judge has argued that the appellant was a free agent; that he could have refused to renew; that the renewals were solely for the purpose of barring limitation and preventing interest lapsing; and that no pressure could have been brought to bear upon him by the respondents.

The impression created on us by these transactions is of the opposite direction. The fact that a suit on one security was barred by limitation would not prevent pressure being brought to bear on the appellant by the respondent in respect of securities which could be enforced, and we are satisfied that the appellant was under the influence of the respondents, that he was under the impression that his best course was to postpone the date of reckoning and that neither party ever imagined that the contracts which purported to have been effected could be enforced to their full extent. As pointed out by the District Judge the transactions were of an eminently speculative character. Even if the appellant survived his aunt and uncle and father the extent of his inheritance from them would be uncertain and if he predeceased his aunt or father, the securities would not have been worth more than the paper on which they were written. The transactions were of an extraordinary description and afford an excellent illustration of what an eminent authority once described as "the ingrained habit of oriental hyperbole."

Counsel on both sides cited a mass of authority, but it is unnecessary to consider the whole of it in detail. A recent ruling of this Court, *Ram Das* v. *Netto* (1), is very directly in point. Chatterji, J., who delivered judgment said: "I should be sorry to think that the Court is compelled to enforce an unconscionable bargain to the strictest letter in circumstances like the present. I venture to think the Court is not simply the blind and humble instrument of the plaintiffs for plundering their fellow-men, but has power to act on its independent judgment. In such cases the creditor must primarily rely on the honour or stupidity of his debtor to carry out the bargains, but if he has to come to Court he must abide by the Court's view of the transaction." The learned Judge further remarked that plaintiffs ran considerable risk when they lent money to the defendant and that the rate of interest ought to be high. Rupees 18 per cent. per annum up to the date of suit was decreed.

Our conclusions are that the appellant was an expectant heir who, although a very inefficient clerk in a Court, was under the influence of the respondents, who used their influence to induce him to execute securities for a very high rate of interest, as pointed out by the District Judge, with the result

(4) 115 P. R. 1908; 185 P. W. R. 1908.

that the sum of something less than Rs. 4,500, the extent to which the respondents were out of pocket, had swollen in the course of about twenty years to about Rs. 1,02,000. The facts in *Ram Das* v. *Netto* (1), above cited, do not go so far as the facts in this case, as the debtor there was not an expectant heir, but was merely a clerk in an office in danger of dismissal if found by his superiors to be in debt. The fact that the money advanced was very possibly invested in speculation does not, in our opinion, help the respondent. The question for decision is, whether the execution of the securities which have increased the original debt more than twenty-fold was induced by undue influence within the terms of section 16 of the Contract Act, and we have no hesitation in deciding that it was. Had the respondents induced the appellant to effect a settlement out of Court, they might have profited by the terms of the securities, but having come into Court they are entitled only to the amount advanced by them, with a reasonable rate of interest. We find it impossible to believe that the appellant realised when renewing that he was merely assisting his creditors to maintain their practice of charging high interest, and we are unable to concur in the District Judge's view that compound interest at a very high rate should be allowed because renewals were the only means of keeping the securities alive and of avoiding loss of interest. Renewals at a reasonable rate of simple interest could have been effected.

For these reasons we decree the appeal to the extent of reducing the sum decreed to the amount which actually passed from the respondents to the appellant, namely, Rs. 4,471-5-9, with simple interest at Rs. 18 per cent. per annum from the date of passing to the date of suit, with interest on the sum thus decreed at Rs. 6-9-0 per cent. per annum from the date of institution to the date of realisation. As above stated, we have assumed for purposes of this case that the debt of Rs. 1,606-10-6 in respect of which the *hundi* for Rs. 1,000 and the bond for Rs. 1,999 were executed on the 24th January 1897 was incurred on the 17th March 1893. The dates from which interest on the items composing the Rs. 4,471-5-9 will run are consequently 30th January 1893, for Rs. 2,203-14-3 and 17th March 1893 for Rs 2,267-7-6. Parties will bear their own costs of all Courts, the appellant's foolish conduct having been largely responsible for the magnitude of the claim.

KENSINGTON, J.—I agree. Delivery of this judgment has been delayed in connection with certain connected appeals.

Appeal partly accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 476 OF 1913.

September 16, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

YERRAGUNTLA SESHACHARLU—PLAINTIFF—APPELLANT

versus

MUKKUMALLA CHINNIAH—DEFENDANT—RESPONDENT.

Registration Act (*XVI of* 1908), *s.* 49—*Evidence Act* (*I of* 1872), *s* 116—*Unregistered deed, when admissible in evidence*—*Landlord and tenant*—*Estoppel.*

A document which simply proves that a document executed previously was only *benami* in its nature, is admissible in evidence even if unregistered, as it is not used as evidence of any transaction affecting land.

It is only the parties to a *benami* transaction that can be estopped from showing that a transaction is otherwise than what it really is.

Kondeti Kama Row v. *Nukamma*, 31 M. 485; 4 M. L. T. 331, 18 M. L. J. 576, distinguished.

Section 116 of the Evidence Act applies only to cases where the tenant has been put in possession by the landlord and not to cases where he has been in possession previously.

Lal Mahomed v. *Kallimus*, 11 C 519, distinguished.

Second appeal against the decree of the Court of the District Judge of Kurnool, in Appeal Suit No. 54 of 1912, preferred against that of the District Munsif of Nandyal, in Original Suit No. 665 of 1911.

Messrs. *K. R. Subramania Sastri* and *A. Jagadeswara Aiyar*, for the Appellant.

Mr. *S. Ranganadha Aiyar*, for the Respondent.

JUDGMENT.—The first point urged in this second appeal is that the plaintiff (who is the appellant before us) has been prejudiced by the procedure followed by the District Munsif with reference to the framing of issues. The District Munsif, during the trial of the suit, amended issues

Nos. 1 and 3 as originally framed and added another issue. It is alleged that the District Munsif made these alterations at the time of writing his judgment and that the effect was to allow the defendant to change his case as set out in the written statement to that disclosed in his evidence, to the prejudice of the plaintiff who thus had no opportunity of meeting the new case. If this was so, of course, the procedure of the District Munsif was clearly unjustifiable. It nowhere appears, however, from the record at what stage of the case the District Munsif altered the issues and there is nothing to support the allegation that he did so at the stage of writing his judgment. Even in the memorandum of appeal to the lower Appellate Court no ground of appeal was taken that the alteration in the issues was effected at the late stage now mentioned. Nor was there any ground of appeal alleging that the plaintiff had been prejudiced by the alteration. The only ground of appeal to the lower Court which relates to issues is No. 5 and that merely states in general terms that the District Munsif ought not to have framed issues inconsistent with the pleadings. There is nothing in the judgment of the lower Appellate Court to indicate that any point was pressed in that Court with reference to the alteration in issues or the prejudice said to have been caused to the plaintiff thereby. The plaintiff (so far as can be ascertained from the record) had reasonable notice of the nature of the defence set up and sufficient opportunity to meet it, and we are not satisfied that he was prejudiced in any material respect. In these circumstances we think there is no real substance in the first point urged and we are not prepared to attach weight to it, seeing that it is raised for the first time in second appeal.

It is next contended that the lower Court is wrong in its finding that Exhibit C is a collusive and colourable transaction because the defendant has, in the first place, been allowed to change his case in regard to that document; *secondly*, because the lower Court was under an error of fact in coming to that decision; and *thirdly*, because Exhibit I has been admitted in evidence, although it was inadmissible for want of registration. As regards the first point, it does not appear that the defendant was in fact allowed to alter his case with regard to Exhibit C. From the first he contended that it represented a *benami* transaction intended to defeat the claims of one Pullayya (who claims the land under another sale-deed) and that it was not supported by consideration. No doubt the so-called "amended" third issue framed by the District Munsif suggests that the defendant's case was that Exhibit C was "only nominally executed in order to induce the plaintiff to help his vendors in the threatened litigation of S. Pullayya," whatever that may mean. This was not in fact the case set up by the defendant either in his written statement (as set out in the preamble to the District Munsif's judgment) or in his evidence. We are, therefore, unable to agree with the view that the defendant changed or was allowed to change his case as regards Exhibit C. With reference to the second point noted above the lower Appellate Court was, no doubt, under a misapprehension of fact in stating that Exhibit C was "got up to shield the property against the claim of S. Pullayya who *had brought a suit* (Original Suit No. 522 of 1901) against Pedda Gurappa and Chinna Gurappa to recover the property." As a matter of fact he had not brought any such suit at the time when Exhibit C was executed, but he filed a suit two or three months later. The error was, however, not a material one. The evidence shows that the plaintiff and his vendors were aware that litigation was about to arise (see Exhibit I) and the conclusion of the lower Court is not affected whether Pullayya had actually brought the suit or was only about to bring it at the time when Exhibit C was executed. As regards the admissibility of Exhibit I we are of opinion that the lack of registration does not render it inadmissible as evidence in this case, having regard to the purpose for which it was used. The object with which it was tendered in evidence was to show that Exhibit C was not a real transaction. It was not used as evidence of any transaction affect-

ing the land; but only to show that whereas by Exhibit C the plaintiff purported to buy the whole property on 2nd July 1901, he on the following day agreed to accept about one-quarter of the same land should the litigation anticipated end in favour of the vendors under Exhibit C without any expenditure on his own part, a course of conduct on the part of the plaintiff which was altogether inconsistent with the reality of the transaction evidenced by Exhibit C. In this view we think that section 49 of the Registration Act was no bar to Exhibit I being received in evidence in the case, though unregistered.

The appellant next argues that, as the defendant admittedly executed Exhibit A, a lease of the suit land from the plaintiff in pursuance of Exhibit C, the defendant ought not, therefore, to be allowed to impugn the sale represented by Exhibit C. The contention is that, assumming Exhibit C to have been a fraudulent sale to defeat the claim of S. Pullayya, the purpose for which the fraud was designed having been carried into effect (for Pullayya's suit was dismissed) neither the plaintiff's vendors nor the defendant, who was the tenant of the latter, can now question the *bona fides* of the sale. In support of this contention the case of *Koudeti Kama Row* v. *Nukamma* (1) is cited. The principle therein enunciated is that where a decree has been passed upholding a transaction between the parties to a suit, neither the plaintiff nor the defendant will be allowed afterwards to say that the decree was the result of a collusive arrangement arrived at by them in order to carry out a scheme of fraud and that it should, therefore, be treated as a nullity and the state of things which existed previously to the passing of such decree be restored. The same principle will apply even if no decree be obtained. The decision has really no application at all to the facts of the present case. Pullayya's suit was dismissed, not because of the sale, Exhibit C, being upheld to be a genuine transaction, but because it was found that Pullayya's vendors had no right to the property.

(1) 31 M. 485; 4 M. L. T. 331; 18 M. L. J 576.

Again Exhibit C was a transaction not between the plaintiff and the defendant in this suit but between the plaintiff and some others. The defendant, at the highest, did no more than assist the fraud by executing Exhibit A in order to give Exhibit C a semblance of reality. In these circumstances we do not think the case cited is authority for the view that the defendant would be debarred from questioning Exhibit C as a collusive transaction. He was a tenant under the vendors of Exhibit C and it may well be that he was not in a position to avoid executing Exhibit A when his landlord was anxious to execute Exhibit C.

The last contention for the appellant is that the defendant is estopped from questioning the plaintiff's title. This contention, of course, is based on section 116 of the Evidence Act. That section, however, does not apply to the facts of this case. It only applies to cases where the tenant has been put in possession by the landlord and not to cases where he has been in possession previously [*Lal Mahomed* v. *Kallanus* (2)]. It also only applies in terms to cases where the denial of the landlord's title is made during the continuance of the tenancy. Here the defendant was not let into possession by the plaintiff and the lease upon which the plea is based (Exhibit A) expired long ago. It is found by the lower Appellate Court that the lease sued upon (Exhibit B) is a forgery.

On all points, therefore, the appeal fails and is dismissed with costs.

Appeal dismissed.

(2) 11 C. 519.

PUNJAB CHIEF COURT.

CIVIL MISCELLANEOUS PETITION NO. 202 OF 1909.

November 6, 1909.

Present:—Mr. Justice Johnstone.

Musammat AMIR BEGAM AND OTHERS—DEFENDANTS—PETITIONERS

versus

SARDAR MUHAMMAD ISMAIL KHAN—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 23—First hearing—Transfer of case—Convenient place of trial,

GANDA SINGH v. GULAB SINGH.

When a case is ready to proceed, it is the first hearing contemplated under section 23, Civil Procedure Code, 1908.

Where the materials on the record are insufficient to determine the place of residence, the case is triable at the place where the cause of action has arisen and where at least some of the assets in suit are situate, particularly when at that place an administration suit is going on between the defendants *inter se* and other suits are pending against the estate in dispute.

Miscellaneous petition, under section 23 of Act V of 1908, for transfer of the case of Sardar Muhammad Ismail Khan, plaintiff, *v. Musammat* Amir Begam and others, defendants, from the Court of the District Judge, Delhi, to any competent Court at Calcutta.

The Hon'ble Mr. *Shadi Lal*, R. B., for the Petitioners.

Rai Bahadur Pandit *Sheo Narain*, for the Respondent.

JUDGMENT.—In my opinion Calcutta is the proper place for trial of this case, and I hereby transfer the case to the High Court of that place.

The cause of action undoubtedly arose in Calcutta—see paragraphs 4 and 6 of plaint. As to residence of defendant it is asserted and denied that Abdul Wahab lives in Calcutta; and it is also denied and asserted that the other defendants live in Delhi. As to Abdul Wahab the probabilities are in favour of the assertion and against the denial; but I admit that the point cannot be settled one way or the other on the record. It is asserted and denied that the Calcutta business is a going concern, and that the bulk of the assets of the estate of the late Abdul Razzak is in Calcutta. This also cannot be determined on the record.

At present then what we have to go on is that the cause of action certainly arose in Calcutta; that some at least of the assets are in Calcutta; that an administration suit between defendants *inter se* is now admittedly going on on the original side of the Caclutta High Court, which implies that all the books and assets of the family are in the custody of that Court; and that admittedly many other creditors of the late Abdul Razzak, being bankers and others of Caclutta, have filed suits of large value in that Court against the estate of the deceased.

On the other side we have only the circumstance that *perhaps* some of the defendants reside in Delhi, but in this connection it should also be noticed that the two ladies—Sardar Begam and Khair-ul-Nissa—whom Mr. Shadi Lal represents and who are pressing this transfer application, are two of the very defendants who, Mr. Sheo Narain affirms, reside in Delhi.

Lastly, though the application was not made to the Court below at the very first hearing, I think this is sufficiently explained by the fact that at that time the minor defendants were not before the Court and so the case was not at all ready to proceed.

The application was made at the first hearing after those minors were properly represented. For these reasons the order of transfer recorded above should be carried out.

Case transferred.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 2141 OF 1913.

March 30, 1914.

Present:—Mr. Justice Scott-Smith.

GANDA SINGH—DEFENDANT—APPELLANT

versus

GULAB SINGH—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Limitation—Alienation by childless proprietor—Suit by reversioner—Punjab Limitation (Ancestral Land Alienation) Act (I of 1900) —Knowledge of alienation not necessary—Evidence Act (I of 1872), s. 115—Estopped—Attestation

In case of alienations governed by the Punjab Limitation (Ancestral Land Alienation) Act I of 1900, where time begins to run from the date of alienee's getting possession of the property alienated, a reversioner's knowledge of alienation is immaterial.

A reversioner by attesting as a witness the deed of exchange of the property in dispute, is estopped from contesting the validity of its alienation.

Second appeal from the decree of the District Judge, Ludhiana, dated the 29th August 1913, reversing that of the Munsif, first Class, Ludhiana, dated the 2nd June 1913, dismissing plaintiff's claim.

FACTS.—The site in dispute was the ancestral property of one *M* who died 14 years ago. On 23rd December 1896 *M* sold it to one *N* who took its possession from the date of the sale. In 1901 *N* gave the site in dispute to *J* and took from

him a house in exchange. *J* sold the house to one *G*. The transaction of exchange was afterwards cancelled and the site in dispute went to Ganda Singh. The plaintiff sued *M* and *N* for possession of the site on the ground that plaintiff was an heir of the deceased and the latter had sold the site without consideration and necessity. It was found that the property was ancestral. The first Court dismissed the claim as barred by time and it also found that there was necessity and the plaintiff was estopped by attesting as a witness the deed of exchange, but the District Judge holding there was no estoppel and the claim was within time decreed it. Ganda Singh appealed to the Chief Court.

Mr. *Nand Lal*, for the Appellant.

Lala *Labhu Ram*, for the Respondents.

JUDGMENT.—There are two points in this appeal :

(1) Limitation.

(2) Acquiescence.

The first Court decided both points in favour of the defendant and dismissed the suit.

The lower Appellate Court decided both points in plaintiff's favour and decreed his claim.

Sardar Ganda Singh appeals.

It is admitted before me that the limitation is that prescribed by Punjab Act I of 1900.

The lower Appellate Court held that time ran from the date of the sale of Jaimal's house, namely, 7th December 1901, but time runs from the date on which Nihala got possession under his sale from Maluka. That sale took place on 23rd December 1896, and the first Court held that the vendee had been in possession since the date of sale. Ganda Singh stands in the shoes of Nihala. It does not appear that in the lower Appellate Court there was any contest as to the date on which Nihala got possession ; the point was not specifically raised in the grounds of appeal and from the judgment of the lower Appellate Court, I gather that the argument was that the appellant (the plaintiff) had no knowledge of the sale to Nihala. "Knowledge," however, was not necessary ; time began to run from the date of possession, whether the appellant knew of the sale or not.

I am also clear that plaintiff is estopped by reason of having signed the deed of exchange, for thereby he showed his admission of Nihala's ownership.

I, therefore, accept the appeal, and setting aside the order of the lower Appellate Court, restore the decree of the first Court dismissing plaintiff's suit with costs throughout.

Appeal accepted

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 923 OF 1913.

June 18, 1914.

Present:—Mr. Justice Chamier.

MATHURA KALWAR—DEFENDANT—APPELLANT

versus

AMBIKA DAT AND OTHERS—PLAINTIFFS—RESPONDENTS.

Registration Act (III of 1877), s. 47—Sale-deed executed before but registered after another—Conflict—Transfer of Property Act (IV of 1882), s. 41.

A deed, executed and registered after the execution but before the registration of another deed, must give way to the earlier deed.

Section 41 of the Transfer of Property Act should not be so construed as to conflict with section 47 of the Registration Act.

Second appeal from a decree of the Subordinate Judge of Jaunpur.

Mr. *Harnandan Prasad* (with him Mr. *S. N. Sen*), for the Appellant.

Mr. *P. D. Tandon*, for the Respondents.

JUDGMENT.—In August 1900 Mata Badal, tenant of a fixed-rate holding mortgaged it to the appellant. On June 1st, 1909, Mata Badal sold all his rights in the holding to the plaintiffs-respondents. The sale-deed was presented for registration on June 18th, 1909, but owing to obstruction offered by the vendor the document was not registered till the following February. In the meantime Mata Badal again sold his rights in the holding to the appellant by a deed of sale, dated the 11th of June 1909 and registered on the same date. This was a suit for redemption of the mortgage and possession of the holding by the respondents. It was resisted by the appellant on the strength of the document of June 11th, 1909. It

has been found that the respondents are *bona fide* purchasers of the property and that the deed of sale in their favour was really executed on June 1st, 1909, and that the deed relied upon by the appellant did not come into existence till ten days later. *Prima facie* the later deed must give way to the earlier deed. On behalf of the appellant it was said that there is some evidence that a few days after the execution of the earlier deed the respondents received some kind of information that Mata Badal intended to execute a deed in favour of the appellant. Even if this was so, it would be no ground for postponing the earlier deed. Much stress was laid on the fact that the appellant had no notice of the earlier sale-deed. In the circumstances of the present case this is immaterial. The respondents are not responsible for the fact, if it be a fact, that the appellant had no notice of the deed. The only other point taken was that the case was covered by section 41 of the Transfer of Property Act. In my opinion that section has no application whatever to the facts of the present case. The person in possession of the property was the appellant. There was no undue delay on the part of the respondents in presenting their document for registration. If this section were read in the way suggested by the appellant it would conflict seriously with the Registration Act. The plaintiffs-respondents are entirely without blame in this matter. Their deed was earlier in date and must prevail over that in favour of the appellant. The appeal fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2226 OF 1912.

August 11, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

MUTHUKARUPPA MUDALI AND OTHERS —PLAINTIFFS—APPELLANTS

versus

PI. MU. KATHAPPUDAYAN AND OTHERS —DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), ss. 2 (d), 127—Contract of suretyship—Consideration must be good and valuable—Mere recommendation for loan, whether sufficient—Consideration.

A mere recommendation by one party to another to lend money to a third party does not render the first party liable as surety for the loan if given.

Sindha Shri Ganpatsingji v. *Abraham* alias *Vajir Mahomed Akuji*, 20 B. 755, followed.

Halsbury's Laws of England, Vol. VII, para. 793, *Juggat Indar Narain Chowdhry* v. *Nistarinee Dassee*, 24 W. R. 445, distinguished.

A consideration must be "good" and "valuable."

Manna Lal v. *Bank of Bengal*, 1 A. 309, relied upon.

Second appeal, against the revised decree of the District Court of Trichinopoly, in Appeal Suit No. 159 of 1905, preferred against that of the District Munsif of Arizalur, in Original Suit No. 861 of 1904.

Mr. *T. Rangachariar*, for the Appellant.

JUDGMENT.

NAPIER, J.—Three points are argued in this second appeal. The first is that under the remand order of the High Court, the District Judge should have returned findings on the other issues of fact in the case. We are clear that the order was only on the question whether the contract of guarantee was supported by consideration on which he has returned a finding. The second is that the District Judge should have passed a decree in the terms of the supposed compromise. We accept his decision that no compromise binding on all the parties was effected. The third is that the District Judge has erred in law in holding that there was no consideration. It is argued that the advances made to other persons on the recommendation of the 1st defendant were good past consideration for the contract. Section 127 of the Indian Contract Act says that anything done for the benefit of the principal debtor may be a sufficient consideration to the surety. Consideration is defined in section 2, "when, at the desire of the promisor, the promisee... .has done... ...something, such act.....is called a consideration." (I extract only that part of the definition relied on by the appellants). In our opinion, the facts of this case do not go as far as these words require. We are not referred to any words expressing the desire of the first defendant that the advances should be given. In *Sindha Shri*

Ganpatsingji v. *Abraham* alias *Vajir Mahomed Akuji* (1), the words are intrepreted to mean "express or implied request or desire". The learned Vakil for the appellants was unable to refer us to any case in which a recommendation was held to be within the words of the section. Nor is any support for the proposition to be found in the commentaries of Sir F. Pollock or Sir H. H. Shephard. In a case reported as *Juggat Indar Narain Roy Chowdhry* v. *Nistarinee Dassee* (2), decided subsequent to the passing of the Indian Contract Act but, it may be arising before that date, there is a dictum that a mere recommendation by one party to another to lend money to a third party does not render the first party liable to re-pay the loan. This, of course, goes no further than that there is no promise, but it is an indication of the light in which recommendations are regarded.

We may add that there can be no doubt that according to English Law a recommendation alone cannot be valuable consideration,—*vide* Halsbury's Laws of England, Volume 7, paragraphs 793 and 794, Consideration, where "the promisee does some act (in India it would include 'has done some act') from which a third person benefits and which he would not have done but for the promise." There is nothing in this case which comes within this definition.

The result will be that the second appeal is dismissed. There will be no order as to costs.

SADASIVA AIYAR, J.—I entirely concur in the judgment just now pronounced by my learned brother, and if I add a few words of my own, it is out of respect for the strenuous arguments of Mr. T. Rangachariar on the question of law which he has argued.

The question as to what kind of past request on behalf of the promisor followed by what kind of act on the part of the promisee forms good consideration for the subsequent agreement by the promisor, is often times a very difficult question. Loose expressions in the wilderness of English cases are likely to be of very little use in deciding this question in any particular case arising in an Indian Court. Section 2, clause (*d*), of the Indian Contract Act says: "when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise." The above definition is couched in the widest possible words, but it has been always held that the "something" which the promisee has done cannot be a merely illusory thing. For instance, if *B* asks his friend *A* to take Rs. 5 from *A*'s left hand pocket and put it into *A*'s right hand pocket and *A* accordingly transfers the money from his left hand pocket into his right hand pocket, *A* suffers no detriment at all by complying with that request of *B*. It would be against common sense to hold that *A*'s above act at *B*'s request will be good consideration for *B*'s signing a promissory note in favour of *A* for Rs. 1,000.

Under the English Common Law, the consideration "must always be present at the time of making the promise and there is no such thing as past consideration." A mere past request by the promissor to the promisee to do an act even to the promisee's detriment without a simultaneous understanding that it is to be recompensed in the future, cannot make the promisee's act good consideration for a subsequent promise to recompense. But the Indian Act does not seem to require any such understanding [See *Sindha Shri Ganpatsingji* v. *Abraham* alias *Vajir Mahomed* (1)].

As I said already it is not every kind of act on the part of the promisee, though done at the promisor's request, which could support a subsequent promise and the act done by the promisee must be "good" or "valuable" consideration in the sense in which those terms appear in English Law, though these words "good" and "valuable" do not appear in the Indian Contract Act which speaks only of lawful and unlawful considerations. "The mere doing of a thing which a person is already" legally "bound to do" is, of course, no consideration for a new promise in his

(1) 20 B. 755.
(2) 24 W. R. 445.

favour [See *Manna Lal* v. *Bank of Bengal* (3)].

There is very little in the circumstances of this case to show that when on the recommendation of the first defendant the plaintiff dealt with other persons, the plaintiff intended to do any service to the first defendent or that the first defendant intended the recommendation to have the character of a request on which he wished the plaintiff to act to the detriment of the plaintiff.

The distinction between the "recommendation" by *A* of *B* to *C* for a certain favour to be shown to *B* and a request by *A* to *C* to do a service to *B* may, no doubt, become in many conceivable cases a very thin distinction; but when we know the circumstances under which a particular recommendation or a particular request is made, it is not usually difficult in most cases to recognize the distinction.

A desire or request shows much more earnestness and personal anxiety than a mere recommendation. In the present case the finding that there was only a recommendation of the principal debtors by the first defendant to the plaintiff is a finding of fact which cannot be interfered with in second appeal. I, therefore, agree that the second appeal should be dismissed.

Appeal dismissed.

(3) 1 A. 309.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 1027 OF 1913.
June 26, 1914.
Present:—Mr. Justice Rafique.
BHAWANI PRASAD—PLAINTIFF—APPELLANT
versus
SUBHAGI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Restitution of conjugal rights—Legal cruelty, what amounts to—Desertion by Hindu wife, when justified.

Where a Hindu husband starves his wife, does not give her proper clothing, shuts her up every time he goes out of the house and frequently uses personal violence to her and is proved to have turned her out more than once from his house, there is legal cruelty inasmuch as the facts are of such a character as to endanger the personal health, if not the safety, of the wife.

One of the circumstances which justifies desertion by a wife under the Hindu Law is cruelty in a degree which renders it unsafe for the wife to return to her husband.

Second appeal from a decree of the Subordinate Judge of Jaunpur.

Mr. *Kalindi Prasad*, for the Appellant.

Mr. *Muhammad Ishaq*, for the Respondents.

JUDGMENT.—The suit out of which this appeal has arisen was brought by the plaintiff-appellant in the Court of the Munsif of Jaunpur for restitution of conjugal rights. The claim was brought against four persons, *i.e.*, *Musammat* Subhagi, Ajudhia, Jageshar and Basawan. It was alleged in the plaint that *Musammat* Subhagi was the lawfully married wife of the plaintiff and that she had been taken away from his house by the other defendants, who were her near relatives, a short time before the institution of the suit, under the promise of sending her back to the plaintiff in a few days. She did not return to him either of her own accord or under the advices of the other defendants inspite of his repeated requests.

It was further alleged in the plaint that *Musammat* Subhagi had gone away with ornaments worth Rs. 100.

The plaintiff, therefore, sued for the restitution of conjugal rights and for the recovery of the ornaments or the value thereof.

The chief contesting defendant in the case was *Musammat* Subhagi. She admitted her marriage with the plaintiff, but resisted his suit mainly on two grounds, *viz.*, (1) that he was impotent and (2) that he frequently used personal violence to her and systematically ill-treated her in other ways.

The learned Munsif accepted both the pleas in defence and dismissed the suit. On appeal the learned Subordinate Judge affirmed the decree of the first Court. He, however, disagreed with the first Court as to its finding on the plea of impotency. The learned Judge was of opinion that in the absence of medical evidence he was not prepared to accept the evidence of *Musam-*

mat Subhagi on the point. But he agreed with the first Court as to the proof of personal violence and ill-treatment by the plaintiff. The latter has come up in second appeal to this Court. It is contended on his behalf that the only cruelty which can be recognised under the Hindu Law justifying the wife to resist the husband's claim for restitution of conjugal rights is legal cruelty which would under the English Law support a suit for judicial separation, that is, such actual violence by the husband as to endanger personal safety or health of the wife.

In the present case no such cruelty, it is said, has been proved.

The learned Counsel for the appellant does not dispute the finding of the lower Appellate Court as to the character of the violence and ill-treatment by the appellant of his wife, *Musammat* Subhagi. It is conceded that the finding on that point is a finding of fact and must be accepted, but his contention is that the violence and the ill-treatment found to have been used by the appellant to his wife do not in law amount to cruelty. On the other hand the learned Counsel for the respondents maintains that the said violence and ill-treatment do amount to legal cruelty. Moreover, it is urged for the respondent, *Musammat* Subhagi, that the finding of the lower Appellate Court on the question of impotency is not a correct one. The absence of medical evidence on the point was no reason for rejecting other evidence in the case. If the learned Judge of the lower Appellate Court was of opinion that medical evidence in the case was indispensable he should have given an opportunity to the respondent to produce such evidence. It is suggested for the respondent that the case should be remanded to the lower Appellate Court for the reception of the medical evidence and the decision of the question of impotency in the light of that and other evidence on the record.

I would have acceded to the suggestion of the respondent if I were of opinion that the finding of the lower Appellate Court on the other point raised in the case could not be upheld. It has been found by the learned Subordinate Judge that the appellant starves his wife, does not give her proper clothing, shuts her up every time he goes out of the house and frequently uses personal violence to her and he has turned her out more than once from his house. These facts, in my opinion, constitute legal cruelty inasmuch as they are of such a character as to endanger the personal health, if not the safety, of *Musammat* Subhagi. One of the circumstances which justifies disertion by a wife under the Hindu Law is cruelty in a degree which renders it unsafe for the wife to return to her husband, *vide* Trevelyan's Hindu Law, page 64.

The plea of the respondent based on the allegation of cruelty, therefore, prevails.

The appeal fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL NO. 465 OF 1910.

June 30, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Roy.

BISHNU CHARAN ROY CHOUDHURY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BIPIN CHANDRA ROY CHOUDHURY AND OTHERS—DEFENDANTS—RESPONDENTS.

Joint tort-feasors—Contribution—Decree for mesne profits—Liability of several defendants not discriminated—Meaning of decree—Plea that plaintiff alone was real wrong-doer, when and how to be raised

The reasonable meaning of a decree for mesne profits which treats all defendants as on the same footing and in no way discriminates between them, is that they are liable in proportion to their interests in the property of which they were in wrongful possession.

Therefore if one of the defendants in such a decree satisfies the whole decree, he is entitled to contribution from the remaining defendants to the extent of their several shares, and the plea that the plaintiff is entitled to no contribution because he alone was in possession of the land in respect of which a decree for mesne profits was given, is of such a special nature and requires such special consideration that it should be distinctly pleaded and made the subject of a distinct issue.

The principle that one of the joint tort-feasors is not entitled to contribution from the rest, does not apply where all of them were not wilful tort-feasors.

Dering v. *Winchelsea* (*Earl*), (1787) 1 Cox. 318; 2 Bos. & P. 270; 1 R. R. 41; 29 Eng. Rep. 1184 and *Jotindra Mohan Lahiri* v. *Guru Prosunno Lahiri*, 8 C. W. N. 625; 31 C. 597 (P.C.); 31 I. A. 94, referred to.

Appeal against the decree of the Subordinate Judge of Faridpur, dated the 27th of June 1910.

BISHNU CHARAN ROY v. BIPIN CHANDRA ROY.

Mr. *S. P. Sinha* and Babus *Dwarka Nath Chakraverty, Tara Kishore Chowdhury, Broja Lal Chakraverty* and *Satish Chandra Bhattacharjee*, for the Appellants.

Babus *Bidhu Bhusan Ganguly, Hirendra Nath Ganguly, Kshirode Narain Bhuyan* and *Brojendra Nath Chatterjee*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for contribution. The findings of the Subordinate Judge are all in favour of the plaintiffs, with the one exception that he considered that he was unable to pass a decree in the plaintiffs' favour by reason of the difficulty in determining the share in which the several defendants should contribute. The result has been that the suit has been dismissed. From this decree the present appeal has been preferred.

The case stated broadly is this. The plaintiffs and the defendants in the present suit may be described in general terms as the *zemindars* of Amgram. There was an adjoining estate which belonged to the *zemindars* of Narail. There was a contest between these two sets of *zemindars* as to the ownership of a considerable area of marshy land, each claiming it to be within their *zemindari*. This led to proceedings under section 145 of the Criminal Procedure Code in which it was determined that possession as to a part was with the *zemindars* of Narail, and as to the rest with the *zemindars* of of Amgram. The *zemindars* of Narail were dissatisfied with this result and they brought a Suit No. 29 of 1887 whereby they claimed possession and *wasilat*. There was a decree passed in their favour for possession of 800 *bighas* in round numbers. An appeal was preferred by some of the *zemindars* of Amgram, with the result that the area awarded to the plaintiffs was materially diminished and as a result the amount of mesne profits was largely decreased. Still a considerable sum was due by way of mesne profits and this the *zemindars* of Narail took steps to realize in execution of the decree, with the result that property belonging to the present plaintiffs was attached and sold. This led to an application under section 310A, and the sale was set aside. In the end the decree in favour of the *zemindars* of Narail was satisfied. The present plaintiffs, being some of the *zemindars* of Amgram, claim that they have paid off the whole of the decretal amount and are thus entitled to contribution from those of their co-sharer *zemindars* of Amgram who were defendants to Suit No. 29 of 1887. The decree for mesne profits in no way discriminates between the defendants, it treats them all as on the same footing, and that no doubt accounts for the fact that by the plaint in this suit the plaintiffs sought a contribution from the defendants equally. Had they been able to substantiate this claim, it would have diminished the complexity of this litigation, but it has been stated before us by Counsel for the plaintiffs that in the circumstances he does not think he would be justified in seeking for contribution except in accordance with the shares of the defendants in the *zemindari* of Amgram. This view is accepted by the respondents if there is any liability at all, and it thus becomes unnecessary for us to consider whether the plaintiffs could have claimed an equal contribution, so that for the purposes of this judgment I will assume that if the plaintiffs are entitled to recover anything from the defendants it will be upon the basis of a contribution by the defendants proportionate to their shares in the *zemindari* of Amgram.

The findings of fact by the trial Judge have not been assailed before us, with one exception to which I will later allude. It has, however, been suggested that the defendants to Suit No. 29 of 1887 were wrongdoers and that, therefore, no right to contribution exists. That, I think, is an argument which we need not consider seriously, for even if the strict law of *Merryweather* v. *Nixan* (1) were applicable in India—a point on which I would desire to reserve my opinion—it certainly would not be applicable in the circumstances of this case, because it cannot be said on the facts on the record that the defendants to Suit No. 29 of 1887 were wilful tort-feasors. But the principal defence urged before us is that the plaintiffs ought not to be given relief in this case because they really were the only wrongdoers in the sense that they alone were in possession of the land in respect of which mesne profits were awarded to the *zemindars* of Narail. It is on this point that the respondents quarrel with the finding of the

(1) (1799) 8 T. R. 186; 16 R. R. 810; 101 Eng. Rep. 1337; 2 Sm. L. C. 569.

Court below. The principle of contribution as applicable in a case like the present is well established and the leading case is *Dering* v. *Winchelsea* (*Earl*) (2). There, as here, it was argued that the author of the loss could not have the benefit of a contribution. But the Lord Chief Baron, while repelling the applicability of the argument to the circumstances of that case, went on to say that "cases, indeed, might be put in which the proposition would be true," and in illustration of this he said: "If a contribution were demanded from a ship and cargo for goods thrown overboard to save the ship, if the plaintiff had actually bored a hole in the ship, he would in that case be certainly the author of the loss, and would not be entitled to any contribution." That illustration is useful as an indication of what might furnish an answer to a plaintiff seeking contribution, when it is urged that he was disentitled by reason of his responsibility for the mischief that had occurred. But in this case notwithstanding the argument that has been addressed to us, I am unable to say that this is made out. *Prima facie* a person in the position of the plaintiffs in this suit has a right to contribution and the particular plea now under consideration is of such a special nature and requires such special consideration that it should be distinctly pleaded and made the subject of a distinct issue. That has not been done, and though there are expressions in the judgment of the learned Subordinate Judge which look as though the point had been discussed, it was in connection with a contention distinct from this plea. Moreover, it is to be noticed that the learned Judge's view of the facts was against the contention now advanced on behalf of the defendants.

The position then is this. So far as the evidence goes, the learned Subordinate Judge who had every opportunity of estimating the value of the testimony given before him, considered that it did not prove that the plaintiffs alone were in possession of the land in dispute in the former litigation. The evidence has also been brought to our notice and I too am unable to regard that evidence as sufficient to establish the special plea that has been advanced. And I may further remark that it is a plea that may involve a very complex inquiry. Thus, even if it did appear that the plaintiffs were in possession of the greater part of this disputed land, it still might have to be considered whether this was not by reason of some understanding under which the defendants were in possession of an equivalent portion of land outside the disputed area as forming part of the *zemindari* of Amgram.

I think I have shown enough to make it evident that we ought not to and we cannot properly, on the materials at present before us, give effect to this plea. Moreover, it has to be noticed that this plea is barely consistent with the decree passed in suit No. 29 of 1887 which treated all the defendants against whom it was passed as equally responsible for the *wasilat*. The theory of that decree, as I understand it, was this. The litigation was treated as one in effect between the *zemindars* of Narail on the one side and the *zemindars* of Amgram on the other and it was the *zemindars* of Amgram who were treated as responsible as being *zemindars* of Amgram. The reasonable meaning of such decree would be, as decided by the Privy Council in *Jotindra Mohan Lahiri* v. *Guru Prosunno Lahiri* (3), that the estate was to be made liable and it is this that justifies the view of the proportionate liability taken by both sides in this case. If, therefore, there be a liability it must be a liability in proportion to the interests of the defendants in the *zemindari* of Amgram. We hold, therefore, that the plaintiffs are entitled to succeed in this suit and that the defendants are liable to the extent of their several shares. The measure of that liability in the case of each defendant will be a proportionate part of the decretal amount in Suit No. 29 of 1887 together with interest on that sum from the time of payment up to the institution of this suit. The amount of that decree is a matter in dispute between the parties. It is one on which they certainly should have no difficulty in settling and for that purpose the learned Vakils on both sides have agreed they will meet and will then give us the requisite figure.

There still remains the question of proportionate shares of the several defendants. That, no doubt, is a matter of some little difficulty unless the defendants will cooperate. The defendants must know what

(2) (1787) 1 Cox 318; 2 Bos. & P. 270; 1 R. R. 41; 29 Eng. Rep. 1184.

(3) 8 C. W. N. 625; 31 C. 597 (P. C.); 31 I. A. 94.

their shares are, and the decree of the Court cannot be defeated because they may think fit to create a difficulty in the way of ascertaining those shares.

We do not propose to send the case down as we intend to pass a decree in this Court for the amount payable by each defendant to the extent of his share and we only have to see how that can most conveniently and expeditiously be ascertained.

(After discussion).

The parties are agreed that the plaintiffs will file their list of the defendants' shares in Court and they will also furnish the defendants with copies of that list within seven days and the defendants on their part will also furnish within a month their list or counter-list if they do not agree with the plaintiffs' list.

The case will be mentioned to us again after a month when we will finally dispose of it.

The parties are agreed as to the proportionate shares in which the defendants-respondents are liable to pay the decretal amount, and have submitted a statement showing the said shares. They also agree that the principal amount to be paid by the defendants is Rs. 21,958-15-6 deposited on the 21st of December 1907, *minus* the sum of Rs. 5,744-2-9 which has subsequently been refunded to the plaintiffs under order, dated the 22nd of February 1909.

It is accordingly decreed that the defendants do pay the following sums in proportion to their respective shares shown in the statement of shares:—The principal sum of Rs. 16,214-12-9 together with interest thereon at the rate of twelve per cent. per annum from the date of payment up to the date of suit as well as interest on the sum of Rs. 5,744-2-9 refunded to the plaintiffs at the rate aforesaid from the date of deposit of that amount up to the date of refund. The decretal amount will carry interest at the rate of six per cent. per annum from this date until realization.

The defendants will pay costs throughout in proportion to their respective shares.

There will be no decree against the three *pro forma* respondents (Nos. 104, 105 and 103), the suit having been compromised with two of them and the third being given up by the plaintiffs in the Court below.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 55 OF 1913.

April 14, 1914.

Present:—Mr. Lindsay, J. C., and Mr. Stuart, A. J. C.

Nawab SAJJAD ALI KHAN AND OTHERS—OBJECTORS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—OPPOSITE PARTY.

Land Acquisition Act (I of 1894), s. 18—Circumstance affecting compensation not put forward before Land Acquisition Officer, whether can be urged in Civil Court—Pleader's fees, assessment of—Civil Digest (Oudh), para. 272, r. 9.

It is the business of the applicant in a Land Acquisition case to put forward before the Land Acquisition Officer every circumstance which might affect the amount of compensation which he demands and if he fails to do so, the Civil Court is justified in ignoring it.

For the purpose of taxation of Pleader's fees proceedings taken on reference under section 18 of the Land Acquisition Act should not be treated as a suit within the meaning of the rules contained in paragraph 272 of the Oudh Civil Digest. Pleader's fees in such cases should be assessed under rule 9 of the latter paragraph.

Appeal against the decree of the District Judge, Lucknow, dated 16th April 1913.

Mr. *A. P. Sen*, for the Appellants.

Babu *N. N. Ghoshal*, for the Respondent.

JUDGMENT.—This appeal has arisen out of proceedings taken in the Court of the District Judge of Lucknow under the provisions of the Land Acquisition Act. It appears that a certain property in Lucknow, known as Kothi Amin-ud-daula, was acquired for public purposes. Proceedings were taken under the Land Acquisition Act and a sum of Rs. 14,904 was awarded as compensation. There are some thirty owners of the property in question, which is a large house without any compound situated in the Aminabad quarter of the city of Lucknow. On the 13th of July 1912 a number of the co-sharers in this property, the aggregate of whose interests came to a 9-annas 3-pies 6-*krants* share applied to the Collector for reference to the District Judge. The grounds taken in the reference were that the property in question used to fetch from Rs. 100 to Rs. 200 rent before the Aminabad park was constructed. It was admitted that for some years before the acquisition the property had

been let out to Mr. Wahaj-ud-din at a rent of Rs. 60 a month. This rent, however, was, it was stated, a favourable rent, the allegation being that Mr. Wahaj-ud-din was a personal friend of, and legal adviser to, some of the applicants. A further allegation in the application was to the effect that the building had originally cost not less than a lac of rupees. In the second paragraph of the application it was stated that on the basis of a rent of Rs. 60 per mensem the capitalized value of the property came to Rs. 24,000 at $33\frac{1}{3}$ years' purchase. To this a sum of Rs. 3,600 was added at the rate of Rs. 15 per cent. for compulsory acquisition, bringing the total value up to Rs. 27,600. The applicants claimed that their share of the property was, therefore, worth all but Rs. 16,000. The reference was defended on the ground that the amount awarded by the Land Acquisition Officer was sufficient. The issue raised before the District Judge was, what was the market value of the property? After hearing the evidence produced by the applicants the Judge confirmed the award made by the Collector.

A number of grounds have been raised in the appeal here. The principal plea taken in appeal is with respect to the market value of the property. It has been argued that a higher sum should have been awarded on the ground that the market value of the property was greater than that found by the learned Judge. To come now to a consideration of the evidence which was produced before the Judge on behalf of the applicants, it is admitted that the property in question is a large dwelling house situated in the Aminabad quarter of Lucknow. It has no land appertaining to it by way of a compound and the only question before the Judge was the value of the house as it stood. There were photographs of the house on the record. It seems to be a house of large dimensions but obviously in a very poor state of repair. The learned Judge inspected the locality in the presence of Counsel for the parties and he describes the house as being in a ruinous condition and as having been apparently neglected for a long time past. Documentary evidence was put in to show that from the years 1869 to 1874 the house was rented by the Canning College at the rate of Rs. 200 per mensem. This evidence is not of much assistance in determining the market value of the property in the year 1911 or 1912, for while the house may have been of considerable value 40 years back, it can hardly be assumed that its value is anything like what it used to be in view of the admissions on the record to the effect that no repairs have been executed for years. According to the evidence of Sajjad Ali Khan, one of the parties to the case, the house was at a later stage rented to the Small Cause Court at a rent of Rs. 100 a month. This arrangement continued, however, only for a few months. After the Small Cause Court vacated the premises, they lay vacant for ten or twelve years after which they were let to Mr. Wahaj-ud-din at a rent of Rs. 60 a month. Mr. Wahaj-ud-din appears to have occupied the house continuously for seven or eight years up to the time of acquisition. Some attempt was made to show that a property in the immediate neighbourhood of the property in dispute has been sold at a very large price to Mr. Mumtaz Husain, Barrister-at-Law. The amount said to have been given by Mr. Mumtaz Husain for the property purchased by him (which is described as Mahelsarai Amin-ud-daula) was Rs. 17,000. As the learned Judge, however, pointed out it would be impossible to draw any safe conclusion as to the value of the premises in dispute from this solitary transaction. Mr. Mumtaz Husain was not called as a witness in the case and it is by no means improbable that he may, for personal reasons of his own, have been induced to give a fancy price for the property. Another witness, Azim-ul-Qadar, gave evidence relating to the sale of certain property situated in the vicinity. It would seem that in or about the year 1909 certain land and shops close to the house in dispute were sold to one Ram Karan for a sum of Rs. 37,000. There were sixteen of these shops and at the time the sale took place the rental value was about Rs. 105. By the year 1911 when this property also was acquired under the Act the rental had been raised to Rs. 260. The learned Judge has pointed out that when the sale took place in the year 1909 the purchase-money was based on a very low estimate of the rental value of the premises. He further points out that when compensation for this property was settled in 1911 the amount awarded was equivalent to 18 years' purchase of the rental in that year. Other instances are referred to by the learned Judge in which 18 years'

purchase has been awarded and accepted for property situated close to the property in dispute. So far, therefore, as instances of sale of property situated in the neighbourhood are concerned it would not, we think, be possible to draw the conclusion that the sum awarded by the learned District Judge is in any way inadequate. On the other hand we think there is abundant justification for his holding that 18 years' purchase of the rental was the fair value of the property. With regard to the figure to be taken as the rental value we see no reason for interfering with the learned Judge's finding that the fair rent was Rs. 60 a month. Having regard to the state of disrepair we think it would not have been possible for the owners to have got a higher rent than this. It is quite obvious from the evidence in the case that there has been no great demand for this house as a place of residence. We have already stated that it was taken many years ago by the Canning College and that after being occupied for a few months by the Small Cause Court it lay vacant for 10 or 12 years. The presumption is that the owners were very glad to find any tenant for the house at all and that Rs. 60 a month was the utmost they could hope to secure for it. We are not much impressed with the story that the house was let at a favourable rate of rent to Mr. Wahaj-ud-din. We prefer to assume on the evidence before us that Rs. 60 represented the highest rent obtainable for the premises. Before the Judge it was alleged that in addition to Rs. 60 per mensem received from Mr. Wahaj-ud-din a cellar in the house had been let at the rate of Rs. 5 a month. The Judge refused to take this circumstance into consideration. He pointed out that no mention of this cellar had ever been made before the case found its way into the Civil Court. We find that this was a matter of which the Judge was not entitled to take cognizance and we are not disposed to allow anything in respect of this item in these proceedings. It was surely the business of these applicants to put forward before the Land Acquisition Officer every circumstance which might affect the amount of compensation which they are demanding. This was a material fact which should not, we think, have been concealed. In our opinion the learned Judge was quite right in ignoring this circumstance, even if we assume it to be a fact that the cellar was let for the rent just mentioned. There remains to be noticed one point which was raised before the learned Judge and which has been pressed again here. It was contended that there has been of late years a considerable increase in the value of the land situated in the neighbourhood of the Aminabad Park. This observation may be true as regards land which is available for building purposes, but we are not satisfied that it would affect the value of the present property. We have already stated that there is no land whatever attached to this house by way of a compound. There is nothing but the site on which it stands. As regards any increase in the rental value of the property by way of its proximity to the Aminabad Park that point does not seem to be established for, as the Judge points out, when the notification for acquisition issued the house was separate from the park by the Aminabad road and was completely cut off both from the road and the park; and further, as the Judge points out, there does not appear to have been any attempt to raise the rent of Mr. Wahaj-ud-din by reason of the property having acquired any enhanced value on account of its proximity to the park in question. Having regard to all the circumstances of the case, we are satisfied that the Judge came to a proper decision and that the 18 years' purchase of the rental on a basis of Rs. 60 per mensem was in all respects adequate. We, therefore, refuse to interfere with his decree in this respect.

There remains to be noticed only one other question which has been raised in connection with the matter of costs. In the concluding portion of his judgment the learned Judge remarked: "As the application fails entirely I allow to the opposite party costs on the difference between this sum (Rs. 14,904) and Rs. 46,000 claimed by the majority of the objectors." We think the learned Judge was in error on this point. What he ought to have been guided by was the value which the applicants put on the property in the application which they made for reference under section 18 of the Act. They did not claim that the whole property was worth Rs. 46,000, but worth Rs. 27,600 only and as regards their own share the amount they claimed was Rs. 16,000 only.

RAMJAS DAS v. MOHAN LAL.

The order for costs, therefore, must be modified. We find that the applicants are liable to pay cost in the Court below to the Secretary of State on the difference between Rs. 16,000 and the proportionate share of Rs. 14,904 which is due to them. This difference comes to Rs. 7,359-11-6 and costs will, therefore, be awarded on this amount. Another point taken in connection with costs is this. It is said that fees have been taxed upon the basis of the case before the Judge being a suit, whereas, it is contended, that it was only a miscellaneous case in which fees on one-quarter of the usual scale were only chargeable. The point as to whether proceedings taken on reference under section 18 of the Land Acquisition Act amount to a suit or merely to a miscellaneous case, is one of some difficulty. It was mentioned in a case reported as *Ekambara Gramany* v. *Munisamy Gramany* (1), but it was not decided. A reference to the rules of this Court, paragraph 319 of the Oudh Civil Digest, shows that for purposes of record references under paragraph IV of Act I of 1894 (Land Acquisition Act) are treated as miscellaneous judicial cases and as being quite distinct from suits. On the whole, we think we ought to hold that for the purposes of taxation of Pleader's fees this case was not a suit within the meaning of the rules contained in paragraph 272 of the Oudh Civil Digest. We think the Pleader's fee should have been assessed under rule 9 of this latter paragraph and we direct accordingly.

With this modification in the decree of the Court below wedirect that this appeal be dismissed with costs.

Appeal dismissed.

(1) 31 M. 328.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 794 OF 1913.

July 6, 1914.

Present:—Mr. Justice Sunder Lal.

RAMJAS DAS—DEFENDANT—APPELLANT

versus

MOHAN LAL—PLAINTIFF—RESPONDENT.

Mortgage—Co-mortgagees—Purchase of property by one of co-mortgagees—Civil Procedure Code (*Act V of* 1908), *s.* 66.

R, *M* and *G* were three joint mortgagees of certain property. *G* purchased the equity of redemption. *R* brought a suit for sale of two-thirds of the mortgaged property making *M pro forma* defendant to the suit. Subsequently *M* was made a co-plaintiff. The suit was dismissed by the lower Appellate Court on the ground that the purchase made by *G* of the equity of redemption extinguished the entire mortgage. *R* appealed to the High Court and made *M* a respondent to the appeal. The High Court decreed the suit, but made no order to safeguard the interest of *M*. *R* purchased the property himself in execution of the decree. Subsequently *M* brought a suit to recover one-half of the property so purchased by *R*

Held, that the suit was not barred by section 66 of the Civil Procedure Code, and was, therefore, maintainable.

Second appeal from the decision of the District Judge, Meerut, dated 26th April 1913.

Mr. *Muhammad Ishaq*, for the Appellant.

Mr. *G. L. Agarwala*, for the Respondent.

JUDGMENT.—This is an appeal in a suit for the recovery of a moiety share in certain property which had been purchased by the defendant Ramjas Das on 20th May 1912, in execution of a decree obtained by him from this Court on 23rd March 1911, under the following circumstances. One Deala Mal had four sons, *viz*, Sohan Lal, Mohan Lal, Mathura Das and Gokul Chand. On 16th February 1880 while the sons were still joint in estate, a mortgage of a plot of land 44 *bighas* 15 *biswas* in extent was obtained in the name of Gokul Chand from one Narain for the sum of Rs. 125 re-payable with compound interest at Rs. 24 per cent. per annum with annual rests. Mathura Das separated but died soon after without leaving any issue, and his share passed on to his three surviving brothers who had also become separate in estate. Of these Sohan Lal died leaving a son named Rama Mal, whose interest in this mortgage was purchased by Ramjas Das, respondent. The mortgagee interest in this property was thus represented by Ramjas Das, Mohan Lal and Gokul Chand each being entitled to a third share therein. The interest of the mortgagor was put up to sale in execution of a simple money-decree on 20th November 1890 and purchased by Gokul Chand. The mortgage

of 16th February 1880 was proclaimed as a subsisting charge on the property at the sale and Gokul Chand purchased it, with the burden thereof. As Gokul Chand was himself a mortgagee to the extent of a third in this property and as he had also acquired the equity of redemption in the said property the mortgage to that extent, *viz.*, to the extent of a third was extinguished and discharged by this purchase and the remaining two-thirds of the mortgaged property remained subject to the remaining two-thirds of the mortgage debt which was due to Ramjas Das and Mohan Lal.

In August 1909, the amount due on this small mortgage for the sum of Rs. 125 swelled up to Rs. 71,811-4-0 by the process of calculating compound interest at 24 per cent. per annum with yearly rests: of this Gokul Chand's one-third interest to the extent of Rs. 23,937 was discharged as above stated and a sum of Rs. 47,874 remained due to Ramjas Das and Mohan Lal recoverable from a $\frac{2}{3}$rds share in the mortgaged property. On 14th August 1909, Ramjas Das instituted a suit for the sale of the remaining $\frac{2}{3}$rds share of the mortgaged property to recover a sum of Rs. 4,000 (after relinquishing Rs. 43,874). The suit as framed was not a suit to recover his own one-third share [for a suit to recover a fractional share of the mortgage debt was not maintainable in law, *Parsotam Saran* v. *Mulu* (1)], but a suit to recover the whole of the mortgage money due on the $\frac{2}{3}$rds share of the mortgage after relinquishing so much of it as had been relinquished by the plaintiff. Mohan Lal, the mortgagee of the remaining third share, was impleaded as a defendant on the gound that he had refused to join in bringing the suit, but his third share in the mortgage money was expressly acknowledged in the plaint. The suit is expressly stated to be a suit for the recovery of the $\frac{2}{3}$rds share of the mortgage-debt from $\frac{2}{3}$rds of the mortgaged property.

At a later stage of the suit the name of Mohan Lal was on his own application transferred to the array of plaintiffs and he thus became one of the plaintiffs in the case.

(1) 9 A. 68 (F. B.); A . W. N. (1886) 298.

The learned Additional Judge of Meerut, before whom the suit came up for hearing, dismissed it on 7th October 1909 holding that by the purchase of Gokul Chand of 20th November 1890 the entire mortgage-debt had been discharged. He also held that Mohan Lal had no interest in the mortgage in suit by reason of certain admission made by him in a suit pending in a Munsif's Court on 9th March 1881. It may be noted here that on the application made by Mohan Lal to be made a co-plaintiff he had stated that he himself could not sue for want of and on account of his poverty, but that he was willing to join as co-plaintiff in the suit already filed by Ramjas Das who was to recover the costs incurred by him in the first instance from the sale-proceeds of the mortgaged property.

Ramjas Das appealed against the said decree to this Court. Mohan Lal was made a *pro forma* plaintiff respondent. The appeal was registered as First Appeal No. 50 of 1910. The appellant asked for a decree of his claim as laid in the plaint. He urged that Gokul Chand's purchase discharged only his one-third share of the mortgage-debt. that Mohan Lal's statement of 9th March 1881 did not estop him from urging his claim for his third share, which ought to have been decreed on the evidence. In the appeal in this Court the suit was still a suit for the recovery of the remaining $\frac{2}{3}$rds of the mortgage-debt from the remaining $\frac{2}{3}$rds share in the mortgaged property.

The appeal came on for hearing before the late Chief Justice (the Hon' ble Sir John Stanley, Kt.,) and the Hon'ble Sir Pramada Charan Banerji. Their Lordships held that the purchase by Gokul Chand extinguished only his one-third share of the mortgage-debt, " but the share of the co-mortgagees did not so become extinguished after this purchase. Therefore the plaintiff as the purchaser of the interest of Rama Mal and so entitled to one-third share of the mortgage debt is entitled to maintain the suit." It appears that Mohan Lal was not represented before this Court in appeal and his interest on the mortgage-money decreed and the mortgaged property ordered to be sold, seems to have been lost sight of in the judgment of this Court. Neither the judgment nor the decree of this Court prepared in that case contains

any directions safeguarding the interest of the co-mortgagee and co-plaintiff, Mohan Lal. His interest to the extent of one-third of the mortgage-money (or rather to the extent of half of the amount claimed) would have expressly been declared in the decree and he would have been held entitled to half the sale proceeds of the mortgaged property, had the fact been brought to the notice of the Court when delivering the judgment in the case. This does not appear to have been done. The decree was, however, a decree for the entire amount claimed, for $\frac{2}{3}$rds of the mortgage-money by sale of $\frac{2}{3}$rds of the property.

In execution of the decree so obtained Ramjas Das put up the $\frac{2}{3}$rds share of the mortgaged property to sale and himself purchased it on 20th May 1912 for Rs. 1,500, which was set off against the decretal amount. The case for the plaintiff is that being entitled to half the mortgage-money decreed, he is entitled to half the property purchased in execution of that decree the price being set off against the decree. Reliance has been placed on behalf of the plaintiff on the Full Bench ruling of this Court in the case of *Kesri* v. *Ganga Sahai* (2). If the ruling in this case applies to the circumstances of this case, the plaintiff has fully made out his case.

The Court of first instance dismissed the claim, but the learned Judge in appeal following the ruling of this Court in *Kesri* v. *Ganga Sahai* (2) has decreed the claim. Mr. Muhammad Ishaq, in the course of his able argument on behalf of the appellant, has urged:—

(1) that the suit is barred by section 66 of Act V of 1908;

(2) that the ruling relied upon is inapplicable as (*a*) the decree in that case was a decree in favour of both the creditors, (*b*) execution was taken out in that case under section 231 of the Civil Procedure Code, 1882, for the benefit of both the creditors;

(3) that the plaintiff was entitled to his share of the price fetched at auction sale but not to the property purchased.

As to the first contention I may say at once that a similar contention based under section 317 of the old Code of Civil Procedure of 1882 was set up in the case of *Kesri* v. *Ganga Sahai* (2) and overruled by the Full Bench. That section corresponds substantially to section 66 of the Code now in force. Following the ruling of the Full Bench I have no hesitation in overruling this contention.

Turning to the second contention the two distinguishing features pointed out by Mr. Muhammad Ishaq between the Full Bench case aforesaid and the case now before me do, no doubt, exist so far as the facts of the two cases are concerned. The question is, do they render the principle on which the ruling in the case of *Kesri* v. *Ganga Sahai* (2) is based inapplicable?

I have already shown that the suit of the plaintiff was a suit for the sale of the entire mortgaged property still available for sale and for the recovery of the entire mortgage-debt (save and except the portion of the claim relinquished). Later on the present plaintiff, Mohan Lal, was made a co-plaintiff to that suit. The plaintiff appealed against the decree of the Court and under rule 4 of Order XLI the Court in appeal was competent to reverse the decree appealed against in favour of all the plaintiffs. The plaintiff's appeal to this Court was in the character of a co-mortgagee suing for and on behalf of himself and his co-mortgagee and the decree was given to him in that character. It is true that by an oversight the decree of this Hon'ble Court does not make any provision to safeguard the rights of the present plaintiff. But this cannot be regarded as a final adjudication to the effect that he has no right as co-mortgagor. It must be remembered that Ramjas Das and Mohan Lal were co-mortgagees and the Court, as between them, could not make any final decision as to their respective rights *inter se* in that case and the fact that in appeal one of the plaintiffs was placed on the array of respondents, did not make any difference in this respect. The property in suit was purchased for the mortgage-money in which both had equal title and share and were entitled to equal shares in the property so purchased. I think the principle of the Full Bench ruling applies to this case and the contentions urged on behalf of the appellant, therefore, fail.

I dismiss the appeal with costs which in this Court will include Counsel's fee on the higher scale.

Appeal dismissed.

(2) 11 Ind. Cas. 517; 33 A. 563; 8 A. L. J. 616.

MADRAS HIGH COURT.

CIVIL APPEAL No. 231 OF 1911.

CIVIL REVISION PETITION No. 648 OF 1911.

September 18, 1914.

Present:—Sir John Edward Power Wallis, Offg. Chief Justice, and Mr. Justice Seshagiri Aiyar.

LAKSHMANAM CHETTY, MINOR, BY HIS NEXT FRIEND, A. R. S. A. R. ARUNACHALAM CHETTY—PLAINTIFF—APPELLANT AND PETITIONER

versus

LAKSHMANAM CHETTIAR AND OTHERS—DEFENDANTS—RESPONDENTS IN BOTH.

Civil Procedure Code (Act V of 1908), s. 2, O. VII, r. 11, O. XXXII—Order rejecting plaint—Decree—Appeal—Minor—Suit by next friend—Next friend indebted to minor—Suit not in interests of minor—Rejection.

An order rejecting a plaint is appealable.

Beni Ram Bhutt v. *Ram Lal Dhukri*, 13 C. 189, followed.

Order XXXII, Civil Procedure Code, does not purport to be exhaustive and in a proper case a Court has jurisdiction to dismiss a suit filed by the next friend of a minor, on the ground that it is not in the interests of the minor that the suit should be allowed to go on.

The fact that the next friend of the minor is indebted to the minor, is a good ground for the conclusion that he is suing on behalf of the minor with a view to avoid payment of his debt.

Appeal against and petition to revise the order of the Court of the Subordinate Judge of Ramnad, in Interlocutory Appeal No. 1278 of 1910 in Original Suit No. 259 of 1910.

Messrs. *S. T. Srinivasa Gopalachariar* and *C. V. Anantha Krishna Aiyar*, for the Appellant.

Messrs. *K. Srinivasa Aiyangar* and *R. Rangaswami Aiyangar*, for the Respondents.

JUDGMENT.—This is an appeal from an order of the Subordinate Judge of Ramnad rejecting a plaint filed by the next friend of a minor, on the ground that the suit was not instituted in the interests of the minor. A preliminary objection has been taken that there is no appeal, as the order does not amount to a decree under section 2 read with Order VII, rule 11, Civil Procedure Code. It has been held in *Beni Ram Bhutt* v. *Ram Lal Dhukri* (1) that an appeal lies and we are not prepared to differ from that decision.

For the appellant it is objected that the Court had no jurisdiction to reject the plaint on this ground and that the utmost it could do, was to remove the next friend under the

(1) 13 C. 189.

provisions of Order XXXII, Civil Procedure Code. We are unable to agree with this contention. Order XXXII, Civil Procedure Code, does not purport to be exhaustive, and does not deal with the case of a suit being filed contrary to the interests of the minor. The passage cited from Simpson on Infants, page 383, citing *Fox* v. *Suwerkorp* (2) and other cases, shows that the Court has jurisdiction in a proper case to dismiss a suit filed by a next friend on the ground that it is not in the interest of the minor that the suit should be allowed to go on. In the present case the next friend is heavily indebted to the minor and, in the opinion of the Subordinate Judge, has instituted the present proceedings with a view to avoid payment of his indebtedness. There appear to be good grounds for this conclusion, and we are not prepared to interfere with the discretion which has been exercised by the Subordinate Judge who has gone into the matter very carefully.

The appeal is dismissed with costs payable by the next friend. The civil revision petition is dismissed.

Appeal dismissed.

(2) 1 Beav. 583; 49 R. R. 460; 48 Eng. Rep. 1068.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 328 OF 1913.

June 16, 1914.

Present:—Mr. Justice Piggott.

MAHARAJA OF JAIPUR—DECREE-HOLDER—APPELLANT.

versus

LALJI SAHAI—JUDGMENT-DEBTOR—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5), (6)—Attachment of decree in execution—Application for execution of attached decree—Decree passed in 1907—Application made in 1909—Limitation Act (IX of 1908), applicability of.

A decree was passed on the 19th March 1907. The decree-holder applied on the 8th April 1909 for execution of his decree by attachment of a decree in favour of the judgment-debtor. The Court issued notice on the 27th April 1909. On its return as being unserved another notice was issued on the 18th May 1909. The decree-holder filed an application on the 14th September 1909 moving the Court to execute the decree attached in favour of his judgment-debtor. On the 15th April 1912 the decree-holder made an application asking for a transfer of his own decree for execution to another Court;

MAHABAJA OF JAIPUR v. LALJI SAHAI.

Held, that the period of limitation should be calculated according to the new Limitation Act of 1908; that the application of the 15th April 1912 was within time under Article 182, clause (6), of Schedule I of the new Act and that even if the Act of 1877 be applied, the Court's order of the 18th May 1909 directing a fresh notice to issue and fixing a fresh date was quite sufficient to afford a fresh starting point of limitation.

Execution first appeal from a decree of the Subordinate Judge of Benares.

Mr. *Jagjiwan Nath Takru*, for the Appellant.

Messrs. *Gokul Prasad* and *Benode Behari*, for the Respondent.

JUDGMENT.—This is an appeal by a decree-holder whose application for execution has been dismissed by the Court below as barred by time. The decree under execution is one for costs passed by this Court in appeal on March the 19th, 1907. An application was made to the proper Court on April 8th, 1909, to execute this decree by attachment of a decree held by this judgment-debtor against some other person which was under execution in the same Court. Incidentally a question has arisen in argument, whether in computing the subsequent period of limitation this Court should have regard to the provisions of the present Limitation Act IX of 1908 or to the Act previously in force, namely, Act XV of 1877. The present Limitation Act came into force on the 1st of January 1909 and the application of 8th April 1909 was a good application for execution within time under the previously existing law. I feel no hesitation, therefore, in holding that future period of limitation, reckoned from the 8th of April 1909 or from subsequent date, must be calculated subject to the provisions of the present Limitation Act IX of 1908.

The application now before the Court is one of the 15th of April 1912. By this application the decree-holder no longer desired to proceed with the attempt to realize his money by executing the decree in favour of his judgment-debtor which he had attached. He asked for a transfer of his own decree for execution to another Court, in order that he might there execute it against the property of his judgment-debtor within the jurisdiction of this other Court. An order of transfer was granted; but the Court to which the decree was transferred has dismissed the application for execution on the ground that the application for transfer, dated April the 15th, 1912, was itself barred by limitation, being an application to a Court to take a step-in-aid of execution of a decree made more than three years after the date of the decree and not saved by any of the other provisions of Article 182 of the first Schedule to the present Limitation Act. In appeal the decree-holder contends that limitation is saved by clause (6) of Article 182 aforesaid. Let us go back to the application of April 8th, 1909, and take note of the fact that this was made more than one year after the date of the decree sought to be executed. A notice had, therefore, to issue to the judgment-debtor under the provisions of Order XXI, rule 22, Civil Procedure Code, and on that same day, namely, the 8th of April 1909, the Court passed an order that notice should issue. A notice was eventually drawn up on the 27th of April 1909 and it bears the signature of the presiding officer of the Court over that date. The notice fixed the 10th of May 1909 for the appearance of the judgment-debtor, and an endorsement on the back shows that it was actually made over to a ministerial officer of the Court for service on May the 4th, 1909. It was eventually returned unserved, endorsed with a report to the effect that the period allowed for service was so short, in view of the distance which had to be covered in order to effect service, that the serving officer had made no attempt to achieve that object, but merely returned the notice with a request that the Court should fix a fresh date. After receipt of this report there was a fresh order passed by the Court, which is to be found in the order-sheet under date May the 1st, 1909. This order is to the following effect: "Notice returned unserved. Therefore let fresh notice issue fixing 7th June." In compliance with this order a fresh notice was drawn up which bears the signature of the presiding officer of the Court over the date May the 19th, 1909, and the endorsement shows that it was made over to a ministerial officer of the Court for execution on May the 21st, 1909. Apparently the issue of this fresh notice

was overlooked in the Court below, for it is not referred to in the judgment of the learned Subordinate Judge. The finding of the Court below is that the date of issue of notice referred to in clause (6) of Article 182 of the first Schedule to the Limitation Act means the date of the order of the Court directing notice to issue and in this case means the 8th of April 1909. On this finding has been based a decision that the present application for execution, dated April the 15th, 1912, is barred by limitation. Under the provisions of Act XV of 1877, where Article 179, clause (5), Schedule II, corresponds to Article 182, clause (6), Schedule I, of the present Act, there was much difference of opinion in the various High Courts as to the meaning of the expression "the date of issuing notice under section 248 of the Code of Civil Procedure," used in the former Act. The Allahabad High Court consistently maintained "that the date of issuing the notice must be taken to be the date of the Court's order directing notice to issue." This was held in a series of cases, the last of which appears to be that of *Jumai Kanjar* v. *Abdul Karim Khan* (1). There has been a change in the wording of the law, the expression used in Article 182, clause (6), of Schedule I to Act IX of 1908 being "the date of issue of notice." The argument for the respondent before me is that these words imply no alteration in the law and no determination one way or the other of the question on which various High Courts had differed. One commentator has expressed the opinion that the change in the wording was intentional, its object being to set at rest the controversy on which various High Courts had previously been divided. If this view is correct then I can only suppose that "the date of issue of notice" was intended to mean the date borne by that paper itself, over or under the signature of the presiding officer of the Court, just as the "date of issue" of a currency note, for instance, is the date appearing on the face of the note itself. I incline to the opinion that this view is correct, though I am not aware that there has been any reported decision in favour of it. On this view the application of 15th April 1912 is within time, either from the date of the notice first issued or from the date of the subsequent notice. I do not think, however, that it is really necessary to the decision of this appeal for me to determine this point. It seems to me that, even if it be held that there has been no change in the law and that the older decisions of the Allahabad High Court are still binding inspite of the apparent change in the language of the Statute, in this particular case the Court's order of the 18th May 1909, directing a fresh notice to issue and fixing a fresh date, is quite sufficient to afford a fresh starting point for limitation.

I am prepared to dispose of this appeal on this ground alone ; but it is perhaps expedient that I should notice a further point which has been discussed before me. I have already pointed out that the application of 8th April 1909 was for the execution of the present decree by attachment of a decree in favour of the present judgment-debtor. The learned Subordinate Judge, who decided this case, does not seem to have had produced before him all the records which have been before me produced at the hearing of this appeal. I have found in one of these records an application, as to the existence of which the learned Subordinate Judge expresses himself as doubtful, dated September the 14th, 1909, by which the present decree-holder moved the proper Court to execute the decree in favour of his judgment-debtor, which he had attached. The question is, whether this application would in any case be sufficient to save limitation under clause (5), Article 182, Schedule I, of the present Limitation Act, apart from any question as to the applicability of clause (6) of the same Article. In *Lachman* v. *Thondi Ram* (2) an application very similar to this one of September the 14th, 1909, was held to be sufficient to save limitation. There is, no doubt, a distinction between the two cases. The application dealt with in the reported case was one which, besides asking for the execution of the decree in favour of the judgment-debtor which had been attached, contained a definite prayer that any money

(1) 30 A. 536; 5 A. L. J. 524; A. W. N. (1908) 245; 4 M. L. T. 446.

(2) 7 A. 382; A. W. N. (1885) 64.

thus realized might be credited in favour of the decree-holder on his original decree. The question to my mind is whether a prayer to that effect should not be taken as implied in the very nature of an application like this of September the 14th, 1909, where the applicant is not the decree-holder under the decree sought to be executed, but a judgment-creditor of that decree-holder who had taken the decree in execution of his own decree. To my mind the decision of this appeal does not turn upon this point; but if I were obliged to decide this appeal on this point alone, I should be inclined to hold that limitation was saved by this application of September the 14th, 1909. A contrary decision would involve a curious anomaly which the learned Subordinate Judge in his judgment seems to contemplate with unconcern, that it might be open to the present decree-holder to proceed with the execution of the decree which he had taken in attachment, even though his own decree had in the meantime become barred by limitation. I am content, however, to base my decision upon the finding that this application of April the 15th, 1912, was within time under Article 182, clause (6), Schedule I, of the present Limitation Act.

I accept this appeal, set aside the decision of the Court below and return the record to that Court directing it to re-admit this application on to its file of pending execution cases and to proceed with it according to law. The appellant will get his costs of this appeal.

Appeal decreed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1177 TO 1180 OF 1913.

August 4, 1914.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswamy Sastri.

P. B. VEDACHALLA MUDALIAR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SIVAPERUMAL MUDALI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 63—Rent—Relinquishment of portion of claim—Consideration—Madras Estates Land Act (I of 1908), s. 26.

Where a landlord agreed to collect from his tenants half the amount of the rent due for certain *faslis* and then filed suits to recover the full amount:

Held, that he could not recover the full amount, as under section 63 of the Contract Act no consideration is necessary to forego a portion of the rent payable.

Section 26 of the Estates Land Act does not exclude the operation of the general law as to consideration embodied in the Contract Act.

Davis v. *Candasami Mudali*, 19 M. 398; 6 M. L. J. 220, followed.

Second appeals against the decrees of the District Court of Chingleput, in Appeal Suits Nos. 19, 131, 144 and 143 of 1912, preferred against that of the Sub-Collector of Chingleput, in Summary Suits Nos. 489, 568 of 1911, 71 of 1912 and 75 of 1911 respectively.

Mr. *T. R. Ramachandra Iyer* (with him Mr. *T. R. Krishnaswami Iyer*), for the Appellants.

Mr. *N. Viswanatha Iyer*, for the Respondents.

JUDGMENT.—The appellants agreed under Exhibit A, dated 11th July 1906, to accept half the usual *tirva* for *fasli* 1315 and the subsequent *faslis*. They now want to levy the full amount. It is not pleaded that there was any fraud or undue influence exercised over them to execute this agreement. Under section 63 of the Contract Act no consideration is necessary for agreeing to forego a portion of rent payable [vide *Davis* v. *Candaswami Mudali* (1)]. Section 26 of the Estates Land Act does not exclude the operation of the general law as to consideration embodied in the Contract Act. The second appeals fail and are dismissed with costs.

Appeals dismissed.

(1) 19 M. 398; 6 M. L. J. 220.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 434 OF 1912.

May 28, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

SARADA KIRPA LALA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

CHAITANYA CHARAN DE AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 49, 161A, 167

SARADA KIRPA LALA *v.* CHAITANYA CHARAN DE.

*—Ejectment of sub-tenant or under-*raiyat*—Notice—Purchaser of* taluk, *right of—"Sub-tenancy", meaning of.*

A sub-tenant is not entitled to a notice of ejectment under section 167 of the Bengal Tenancy Act, nor is an under-*raiyat* entitled to a notice under section 85 of the Act if he does not hold under a registered lease.

The purchaser of the right of a superior *Talukdar* does not step into the shoes of the occupancy *raiyat*, nor is there a merger under section 22 of the Bengal Tenancy Act.

His right to eject an under-*raiyat* arises upon the termination of the interest of the occupancy *raiyat* and a notice under section 49 of the Act is unnecessary.

The word "sub-tenancy" in section 161 A means a tenancy directly under the tenancy which has been purchased. It is not an incumbrance within the meaning of the section.

Appeal against the decree of the Subordinate Judge, Chittagong, dated the 25th November 1911, reversing that of the Munsif at Patya, dated the 23rd May 1911.

Babus *Jogesh Chandra Rai and Probodh Kumar Das*, for the Appellants.

Babu *Khitis Chandra Sen*, for the Respondents.

JUDGMENT.—The plaintiff is the proprietor of an estate within which there was a certain *taluk* named Durga Priya. This *taluk* was sold in execution of a decree for arrears of rent and purchased by the plaintiff. In respect of the land which is the subject of the suit the defendant No. 2 had been recorded in the Record of Rights as a *raiyat* and defendant No. 1 as under-*raiyat*. The suit was a suit for *khas* possession, the plaintiff's allegation being that he had served notice upon the defendants under section 167 of the Bengal Tenancy Act annulling their incumbrances. The defendant No. 2 disclaimed all interest in the land, saying that a long time ago he had sold the same to defendant No. 1. He, however, admitted the receipt of notice under section 167 from the plaintiff. The defendant No. 1 alleged in his written statement that he had been in possession of the land for some 20 years as a *raiyat* and had paid rent in that capacity to the *Talukdar*. When the case came to trial, the defendant No. 1 failed to prove that he had been in possession as a *raiyat* or that he had paid any rent. The rent receipts which he tendered in evidence were rejected as being filed out of time. Thereupon the defendant No. 1 made a new case and offered in evidence a conveyance from defendant No. 2, this being offered after the close of the plaintiff's case. The learned Munsif rightly refused to accept it in evidence.

The Munsif decreed the plaintiff's suit, holding that if the entry in the Record of Rights be correct in describing defendant No. 1 as under-*raiyat*, the defendant No. 1 is not entitled to notice and the plaintiff is entitled to a decree. In appeal the learned Subordinate Judge accepted all the findings of the Munsif, but he held that defendant No. 1 as under-*raiyat* was entitled to notice under section 167 of the Bengal Tenancy Act and that there being no evidence that any such notice was served the suit must be dismissed.

We are of opinion that in so dealing with the case the learned Subordinate Judge fell into an error. The interest of defendant No. 1 is that of a sub-tenant and as sub-tenant he was not in any event entitled to any notice under section 167 of the Bengal Tenancy Act. Under section 85 even if he be treated as an under-*raiyat*, he did not hold under a registered lease and his tenancy is not valid as against the landlord. On that ground also we hold that he was not entitled to any notice. This is clear from the decision of this Court in *Peary Mohun Mookerjee* v. *Badul Chandra Bagdi* (1).

It is now argued for the first time that defendant No. 1 was entitled to notice under section 49 of the Bengal Tenancy Act and in support of this argument the case of *Amirullah Mahomed* v. *Nazir Mahamed* (2) is relied upon. That case is distinguishable, for in that case the plaintiff had purchased the holding of an occupancy *raiyat* and the learned Judges who decided the case held that there was merger under section 22 of the Bengal Tenancy Act, and that having regard to the terms of that section the under-*raiyat* had not lost his right to notice under section 49. In the present case, however, there has been no merger of any kind. The plaintiff purchased the right of the superior *Talukdar*. He has not stepped into the shoes of the occupancy *raiyat*. His right to eject the under-*raiyat* arises not by reason of merger but upon the termination of the interest of the occupancy *raiyat*.

(1) 28 C. 205; 5 C. W. N. 310.
(2) 31 C. 932.

LAL SRIPAT SINGH *v.* LAL BASANT SINGH.

The learned Subordinate Judge has relied on the terms of section 161A in support of his view that an under-*raiyat* is entitled to notice. It is true that the word "sub-tenancy" occurs in section 161A, but it is clear that that means a tenancy directly under the tenancy which has been purchased. It does not mean that the purchaser of a tenancy at a sale has to give notice in the case of a tenancy held under a sub-tenancy. Such an inferior sub-tenancy is not an incumbrance within the meaning of the section. Thus the purchaser of a *taluk* need not give notice to an under-*raiyat*. The under-*raiyati* is not an incumbrance within the meaning of the Tenancy Act with reference to the *taluk*.

The result is that the appeal is allowed, the decree of the lower Appellate Court is set aside and that of the Munsif restored with costs in this Court and in the lower Courts.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 31 OF 1913.

April 29, 1914.

Present:—Mr. Stuart, A. J. C., and Mr. Kanhaiya Lal, A. J. C.

LAL SRIPAT SINGH—DEFENDANT—APPELLANT

versus

LAL BASANT SINGH—PLAINTIFF—RESPONDENT.

Under-proprietary rights, claim for—"Kabiz darmiani," *meaning of—Civil Court, power of, to interpret settlement decree—Alienation of absolute estate, condition in restraint of, null and void—Transfer, absolute right of—Compromise, deed of, interpretation of—Settlement decree, interpretation of.*

The words *"kabiz darmiani"* mean an under-proprietor in the sense in which it is used in the Oudh Rent Acts (XIX of 1868 and XXII of 1886).

A Civil Court has power to interpret a Settlement decree so as to make it comprehensible.

Faiyaz Husain Khan v. *Nil Kanth*, 4 O. C. 163 and *Gaya Din Singh* v. *Syed Mumtaz Husain*, 10 O. C. 136, referred to.

A condition in restraint of alienation of an absolute estate even although it is contained in a Settlement decree is null and void, and in spite of the insertion of such addition, such a Settlement decree conveys an absolute right of transfer.

Faiyaz Husain Khan v. *Nilkanth*, 4 O. C. 163, and *Gaya Din Singh* v. *Syed Mumtaz Husain*, 10 O. C. 136, followed.

Jaydeo Bakhsh Singh v. *Jwala Prasad*, 15 Ind. Cas. 244; 15 O. C. 345, distinguished.

A deed of compromise filed in a case before the Settlement Court stated that the plaintiff and his heirs should take in perpetuity into their enjoyment the profits of a certain village and that the defendant *Talukdar* should have no right to resume possession or enhance the rent, and it further requested that a decree for *"kabiz darmiani"* rights should be given. Thereupon the Settlement Officer passed a decree saying that the plaintiff had under-proprietary rights in the village without rights of transfer and subject to the conditions mentioned in the deed of compromise:

Held, that the deed of compromise conferred upon the plaintiff absolute under-proprietary rights in the village:

Held, further, that the plaintiff had a complete right to transfer the whole or any portion of his under-proprietary rights in the village in spite of the Settlement decree containing the clause forbidding him to do so

Pandit *Gokaran Nath Misra*, for the Appellant.

Mr. *E. Manuel* and Babu *Bisheshwar Nath*, for the Respondent.

JUDGMENT.—The plaintiff-respondent instituted a previous suit in the Settlement Court against the *Talukdar* of Rajapur in the Partabgarh District for a share in the *taluka* and certain other villages. On the 29th October 1867 that suit was amicably settled by the parties, a deed of compromise being filed in the Court of the Assistant Settlement Officer. According to the terms of this deed of compromise, the *talukdar* agreed to give rights over the entire village of Daulatpur and certain specified plots in the villages of Rajapur and Jagapur to the plaintiff-respondent. The Assistant Settlement Officer had no authority to pass a decree upon the basis of the deed of compromise, except with regard to the plots of land in Rajapur and Jagapur. He proceeded to pass a decree on the 1st November 1867 in favour of the plaintiff-respondent with regard to those plots. With regard to the stipulation in respect of the village of Daulatpur, the Assistant Settlement Officer referred the case to the Settlement Officer, who passed on the 14th June 1869 a decree with regard to the village of Daulatpur in which it was declared that the respondent had not the right to transfer the village in question. The plaintiff-respondent executed a deed of usufructuary mortgage in favour of a third party under the terms of which the third party was placed in possession

of the village of Daulatpur. The appellant did not recognize the rights of the mortgagee and instituted a suit against the respondent in a Rent Court for arrears of rent. He obtained a decree on the 9th February 1909 for arrears of rent and on the basis of this decree obtained an order from the Rent Court permitting the plaintiff-respondent's ejectment on the 6th December 1909. In execution of this decree the appellant obtained possession of the village of Daulatpur on the 24th December 1910. The plaintiff-respondent took no steps to contest the validity of the order of ejectment by way of appeal to a superior Revenue Court. He sued in the Rent Court under the provisions of section 108 (10), Act XXII of 1886, to recover possession of the village of Daulatpur on the ground that he had been wrongfully ejected from the same, and the Court of the original hearing granted him a decree. The Commissioner on appeal set this decree aside, and on further appeal the Board of Revenue upheld the order of the Commissioner. The order of the Board of Revenue is dated the 30th November 1911. It is to the effect that the plaintiff-respondent undoubtedly appears to hold a decree for under-proprietary rights over the village, the rights being qualified by a condition that he has no power to transfer. The learned Senior Member of the Board of Revenue found that this decree apparently gave the plaintiff-respondent under-proprietary rights, but inasmuch as the Rent Court had found that he had no under-proprietary rights and had ejected him as a tenant, the learned Senior Member considered that, as a superior Revenue Court of Appeal, he had no jurisdiction to find that the plaintiff-respondent had under-proprietary rights. He, therefore, upheld the order of the Commissioner and referred the plaintiff-respondent to a Civil Court for his remedy. The plaintiff-respondent then instituted the present suit for possession of the village and mesne profits and obtained a decree in the Court of the learned Subordinate Judge of Partabgarh. The *talukdar* prefers the present appeal.

The point for decision is briefly, whether the plaintiff-respondent is or is not an under-proprietor of the village of Daulatpur. When the Assistant Settlement Officer referred, in the year 1867, the compromise between the plaintiff-respondent and the *talukdar* with regard to the village of Daulatpur for the orders of the Settlement Officer, the Settlement Officer by an order dated 8th June 1869 called on the *talukdar* to appear before him and state whether or not he desired the plaintiff-respondent to have a right of transfer with regard to the village. The compromise was silent on the question of transferability. It neither asserted that the plaintiff-respondent had a right of transfer, nor did it assert that he had not a right of transfer. It stated that the plaintiff-respondent and his heirs should take in perpetuity into their enjoyment the profits of the aforesaid village and that the *talukdar* should have no right to resume possession or enhance the rent, and it further requested that a decree for "*kabiz darmiani*" rights should be given. The learned Counsel for the appellant has argued that the words "*kabiz darmiani*" merely mean "intermediate holder." The Settlement Officer interpreted these words to mean "under-proprietor", and we consider that the words can only be interpreted to mean "under-proprietor" in the sense in which that word is used in Act XIX of 1868 and Act XXII of 1886. In the order of 8th June 1869 the Settlement Officer stated that the *talukdar* had agreed to grant the plaintiff-respondent under-proprietary rights in village Daulatpur, subject to the annual payment of Rs. 461-4 and cesses. He considered that, as there was neither an award of the right of transfer nor a refusal of such right, it was necessary that the point should be cleared up, and for this reason he summoned the *talukdar*. It is argued on behalf of the plaintiff-respondent that under the provisions of the law then in force, which do not differ from the provisions of the law at present in force upon the point, the Settlement Officer had no authority to endeavour to procure an addition to the terms of the deed of compromise and that it was his duty to pass a decree in accordance with its terms. It is unnecessary to decide this point as we find it, and we are not in a position to question the legality of the previous proceedings of the Court which passed it. In a subsequent order of the 14th June 1869 the Settlement Officer stated that the *talukdar* had not attended, but the plaintiff-respondent had agreed to forego the right of transfer. There is nothing on the record to show how the plaintiff-respondent agreed to forego this right, or whether

he did or did not clearly understand what the Settlement Officer suggested he should forego. In view of the Settlement Officer's interpretation of the desire of the plaintiff-respondent, he passed the following decree:—" An under-proprietary right in *Mauza* Daulatpur in favour of plaintiff without rights of transfer, subject to annual payment of Rs. 461-4 and subject also to the other conditions contained in the deed of compromise. Plaintiff to bear *Chaukidari* and *Patwari* dues."

We have examined the deed of compromise, and we find that it can only be interpreted as conferring upon the plaintiff-respondent absolute under-proprietary rights in the village in question. The order of the Settlement Officer added to the terms of the deed of compromise a condition that the plaintiff-respondent should have no right to transfer the village. At the time that he passed this order, the provisions of Act XIX of 1868 had come into operation and under that Act an "under-proprietor" was defined as "a person possessing a heritable and transferable right of property in land." The effect of the addition made by the Settlement Officer was thus to make the decree contradictory in terms. If the plaintiff-respondent were an under-proprietor, he had under the law a right to transfer the property. If he had no right to transfer the property, he could not be an under-proprietor. We have already observed that we are not entitled to question the correctness of the views of the Settlement Officer, but it is our duty to interpret his decree so as to make it comprehensible. As it stands it is incomprehensible. We have to decide either that the decree did, or that it did not, confer upon the plaintiff-respondent under-proprietary rights in the village of Daulatpur. The power of this Court so to interpert a Settlement decree has been declared in *Faiyaz Husain Khan* v. *Nilkanth* (1) and further in *Gaya Din Singh* v. *Syed Mumtaz Husain* (2).

These decisions, in addition, lay down the principle that a condition in restraint of alienation of an absolute estate, even although it is contained in a Settlement decree, is null and void and that in spite of the insertion of such addition such a Settlement decree conveys an absolute right of transfer. We accept these principles with reference to this case, and hold that the decree in question conferred upon the plaintiff-respondent full under-proprietary rights with regard to the village of Daulatpur and that he has a complete right to transfer the whole or any portion of his under-proprietary rights in the village in spite of the insertion of the clause forbidding him to do so. The learned Counsel for the appellant has referred us to a recent decision of this Court in *Jagdeo Bakhsh Singh* v. *Jwala Prasad* (3), but we do not consider that there is anything in the said decision which directs us to an opposite view. That decision simply stated that where a grant of the profits of certain property was given for the maintenance of certain persons with a condition that they should not be permitted to transfer the profits, the condition in question was legal and enforceable. But in that case proprietary rights had not been transferred. In this case under-proprietary rights were certainly transferred by the deed of compromise. It is unnecessary in view of our finding on the above point to consider the other grounds raised in the memorandum of appeal. It is sufficient to say that, as the plaintiff-respondent is an under-proprietor, he could not be ejected by a Rent Court, and having been so ejected, he has a perfect right to recover possession through a Civil Court with mesne profits for the period during which he has been out of possession. It has not been raised in appeal that the mesne profits awarded are excessive. The decree of the learned Subordinate Judge is, therefore, a correct decree and this appeal must fail.

We dismiss this appeal. The appellant will pay his own costs and those of the respondents.

Appeal dismissed.

(1) 4 O. C. 163.
(2) 10 O. C. 136.
(3) 15 Ind. Cas. 244; 15 O. C. 345.

MALLI REDDI v. PEDDAKKA.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1489 OF 1912.

July 17, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

MALLI REDDI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

PEDDAKKA AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 5—Time-barred appeal—Ex parte admission, if questionable at final hearing after notice.

An *ex parte* order by a Judge admitting an appeal presented out of time can be questioned and set aside by his successor in office at the final hearing of the appeal after notice.

Venkatarayudu v. *Nagadu*, 9 M. 450; *Krishna Bhatta* v. *Subraya*, 21 M. 228; 7 M. L. J. 188; *Sarat Chunder Bose* v. *Saraswati Debi*, 34 C. 216; 5 C. L. J. 380 and *Acharath Parakkat Kunhammad* v. *Acharath Bappan Karnavan*, 23 Ind. Cas. 946, 1 L W. 440, followed.

Second appeal against the decree of the District Court of Cuddapah, in Appeal Suit No. 121 of 1911, preferred against that of the District Munsif of Gooty, in Original Suit No. 167 of 1910.

FACTS.—An *ex parte* order was passed by a District Judge admitting an appeal which was presented out of time. The appeal came on for hearing after notice, before a different Judge who, considering that the appeal had become barred on the date it was presented and that the delay in filing the appeal had not been adequately explained, dismissed the appeal. The appellants thereupon appealed to the High Court.

Mr. *J. C. Adam*, for the Appellants:—The order admitting the appeal was final. The District Judge who heard the case had no jurisdiction to re-open the question which had been once for all decided by his predecessor-in-office.

Mr. *T. V. Muthukrishna Iyer*, for the Respondents:—The order admitting the appeal was an *ex parte* order. The Judge who actually heard the appeal was perfectly justified in going behind the order and inquiring into the adequacy of the explanation offered for the delay. *Venkatrayudu* v. *Nagadu* (1), *Krishna Bhatta* v. *Subraya* (2), *Sarat Chunder Bose* v. *Saraswati Debi* (3), Appeal against Order No. 71 of 1911 (unreported) and *Acharath Parakkat Kunhammad* v. *Acharath Bappan Karnavan* (4).

(1) 9 M. 450.
(2) 21 M. 228; 7 M. L. J. 188.
(3) 34 C. 216; 5 C. L. J. 380.

JUDGMENT.

SADASIVA AYYAR, J.—Following *Venkatrayudu* v. *Nagadu* (1), *Krishna Bhatta* v. *Subraya* (2), *Sarat Chunder Bose* v. *Saraswati Debi* (3) and the very recent case, Appeal against Order No. 71 of 1911 on the file of the High Court, Madras, decided by Ayling and Napier, JJ., two days ago and also the uniform practice of this Court on this particular question of the effect of an order of a Court admitting an appeal excusing the delay in its filing without giving notice to the other side, I hold that the District Judge had jurisdiction to consider at the final hearing of the appeal after notice the question whether the delay in the filing of the appeal had been adequately explained, notwithstanding the *ex parte* order of his predecessor excusing the delay and admitting the appeal.

This being the only point argued in this second appeal and it being decided against the appellants as above, the second appeal is dismissed with costs.

TYABJI, J.—The decisions referred to by my learned brother [*Venkatrayudu* v. *Nagadu* (1), *Krishna Bhatta* v. *Subraya* (2), *Sarat Chunder Bose* v. *Saraswati Debi*(3) and Appeal against Order No. 71 of 1911 on the file of the High Court, recently decided by Ayling and Napier, JJ.] and also in so far as the circumstances of the present case are concerned, the case reported as *Jhotee Sahoo* v. *Omesh Chunder Sircar* (5) lay down in express terms that "an order made *ex parte* under section 5 of the Limitation Act (IX of 1871) may on proper cause shown be set aside by the Court which made it." These decisions leave no room for the expression of any opinion on my part on the question involved. The decision in *Acharath Parakkat Kunhammad* v. *Acharth Bappan Karnavan* (4) on the file of this Court in which Mr. Justice Miller and I took part, supports the same view. Second Appeal No. 1045 of 1907 (decided by Ayling, J., and me) was not cited to us

(4) 23 Ind. Cas. 946; 1 L. W. 440.
(5) 5 C. 1; 3 Shome L. R. 81.

in this appeal, nor were the decisions above referred to cited to us in Second Appeal No. 1045 of 1907. It is, therefore, unnecessary for me to express any opinion on the point whether Second Appeal No. 1045 of 1907 should also have been governed by the same decisions or whether it was open to us to deal with the particular question then involved as *res integra*.

For these reasons I agree that this appeal should be dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 255 OF 1913.

July 29, 1913.

Present:—Mr. Justice Fletcher.

BALDEODASS BASANTLALL —PLAINTIFF

versus

LOLIT MOHUN NANDY—DEFENDANT.

Contract Act (IX of 1872), s. 30—Contract to pay differences—Actual delivery either excluded or optional—Wagering contract.

Contracts in which only differences are payable and delivery is either excluded or optional, are wagering contracts within the meaning of section 30 of the Contract Act.

Mr. *B. C. Mitter*, instructed by Messrs. *O. C. Ganguly and Co.*, Solicitors, for the Plaintiff.

Mr. *P. R. Das*, instructed by Mr. *T. B. Roy*, Solicitor, for the Defendant.

JUDGMENT.—This is a suit brought by a firm of Buldeodass Basantlall against Lolit Mohun Nandy to recover the sum of Rs. 1,721-2-1 said to be due to the plaintiff in respect of certain jute contracts. The contracts that we are concerned with are certain contracts in the months of November and December 1912, and in these contracts differences were payable to the plaintiff amounting in whole to Rs. 4,265-10-0. The defendant had deposited certain shares in Joint Stock Companies with the plaintiff which they have sold since, and there remains due to the plaintiff this sum of Rs. 1,721-2-1, which includes interest; and the first and only point in this suit to decide is whether the contracts in the suit were wagering contracts.

Section 30 of the Indian Contract Act is substantially in the same terms as the Statute Law in England which is contained in section 18 of the Gaming Act of 1845. That section has been the subject of judicial decisions of the highest tribunal. The contracts in the suit are known as the *Fatka* contracts. They are on the forms known as the pink and white contracts, the sold note being on the white and the bought note on the pink. The question is whether these are gaming transactions.

First of all there is a conflict of testimony in this case. I have heard on behalf of the plaintiff the evidence of Baldeodass and on behalf of the defence the defendant himself. The defendant is, in my view, a much more satisfactory witness than Baldeodass. It may be that Buldeo is a man of much greater wealth, but I have formed an impression that Lolit is a truthful witness. The plaintiff, I think, was not quite frank as to the nature of his transactions. But what is clear on the evidence is that during the year 1912 the plaintiff firm had dealings on those pink and white contracts amounting according to the estimate of the plaintiff Buldeodass, which was probably a modest estimate, between four and five crores of rupees. Out of that the evidence of a servant or clerk is that they only delivered 250 bales, and when one looks at those forms of contract one can have little doubt that they never intended that the buyer or seller should be compelled to take delivery. As a matter of fact there is a clause in the contract that the market rate shall be in accordance with the opinion of six firms, whose certificates stating the market rate will be taken to be conclusive. It is provided in the contract that the rate of these six firms, if they all agree, should be taken to be conclusive and if they did not agree, the average market rate of the six firms should be taken as the settled price.

Mr. B. C. Mitter on behalf of the plaintiff says that it is quite true that the contract provides that you cannot get delivery if you want to. That is so in all these cases. I have looked to the leading cases—one is *The Universal Stock Exchange Ld.* v. *David Strachan* (1), and the terms of business there provided that every purchase or sale contracted by the Company was a *bona fide* transaction for delivery on a specified stipulated day.

(1) (1896) A. C. 166; 65 L. J. Q. B. 429; 74 L. T. 468; 44 W. R. 497; 60 J. P. 468.

Notwithstanding that and the fact that the buyer could have had delivery, the Jury found at the original trial that the transactions were gambling transactions, and that verdict was affirmed not only by the Court of Appeal but also by the House of Lords and Lord Halsbury in the course of his judgment said: "When I look on the terms themselves the whole scheme appears to me to be intended with great ingenuity to pretend that there is to be a real transaction, and yet there is to be payment in respect of the relations between the parties, which is only reconcilable in my mind with its being an unreal transaction." That is what it seems to me to be the fact in this case. Two cases have been shown in which actual deliveries have been made beyond 250 bales in the year 1912 and one with a firm of W. N. Bose and Co. The transactions with W. N. Bose and Co. were completed through the plaintiffs' Attorney. There is not much doubt as to what happened. The plaintiffs probably went to their Attorney and he advised them that their only chance was to declare the marks and having declared the marks, W. N. Bose and Co. sent the shipping instructions to the plaintiff's Attorney. I think it improbable that it is the usual course for the marks to be declared by the Attorney and the shipping instructions sent to the defendant. The contract in suit provides that the marks should be declared five days before the due date. The marks never are declared and the plaintiffs wait and see whether the buyer or the seller will settle the differences. That does not seem to me to except the case from section 30. Moreover, you have got to remember that the plaintiff has no jute press, no godown, no jute. The defendant is a broker to a European firm of Massey and Co. He has nothing to do with bailed jute, except on some occasions dealings have been made in bailed jute in his name, but not on his own account. The same argument which has been put forward by Mr. B. L. Mitter was raised in the House of Lords in the case of *The Universal Stock Exchange Ld.* v. *David Strachan* (1) and Lord Herschell made these remarks: "My Lords, it has been said that wherever a contract is entered into between two parties containing an obligation under any circumstances to cause property to pass from one to another, whatever else there may be in the contract, and although neither of the parties contemplated that that provision should ever become operative yet, if it ever may become operative, the contract cannot be by way of gaming and wagering", and then later on the noble and learned Lord said: "The proposition contended for by the learned Counsel for the appellants would really lead to that result, and I should require much consideration before I give my assent to a proposition involving such consequence". Although Lord Herschell indicated very clearly what his opinion was. he did not think it necessary in the view he took in that case to decide that point. But another case came on before the Court of Appeal, reported as *Gieve, In re*; *Trustee, Ex parte* (2), and that case related to the bankruptcy of a broker Gieve who had carried on business as an outside dealer in stocks and shares in the name of John Shaw, and the contract in that case provided: "it is to be distinctly understood that I am prepared to deliver the stock or share to which the contract refers." In that case the same point was argued that arose in *The Universal Stock Exchange Ld.* v. *David Strachan* (1), and Lord Lindley, who was the Master of the Rolls, said: "If you have got an agreement, for difference and superadded to that the purchaser has the option of purchasing the stock, that is nonetheless an agreement for gaming and wagering." It seems to me in this case that these contracts were in fact gaming and wagering contracts and there was, as the defendant has said, an understanding that he should not be called upon to take delivery of the goods purported to be sold by the contract: what was in fact intended between the parties was merely a gaming or wagering on the difference to be ascertained in the method mentioned in the contract. That being so the present suit fails as against the defendant.

Mr. P. R. Das asked me in settling the issues to frame an issue as to the right of the defendant to get back the shares that he deposited with the plaintiff as security for the difference that became due to him. That point was not raised in the written statement and I do not think such an issue can be framed in the present suit, although there is no doubt that

(2) (1899) 1 Q. B. 794; 68 L. J. Q. B. 509; 80 L T. 438; 47 W. R. 441; 6 Manson 136; 15 T. L. R. 251.

the language of section 18 of the Gaming Act, 1845, is substantially the same as section 30 of the Indian Contract Act. The House of Lords have held that a person depositing the shares with another person to secure differences is entitled to get them back. What I have said will not prejudice the defendant to take any step he may be advised in order to get back his shares from the plaintiffs, which were deposited with them.

The result is that the present suit fails and must be dismissed with costs on scale No. II.

Suit dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 20 OF 1912.

April 13, 1913.

Present:—Mr. Piggott, J. C., and Mr. Kanhaiya Lal, A. J. C.

LALTA PERSHAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat MAJID-UN-NISSA AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 144 (b)—Presumption—Account books summoned but not produced to rebut plea of payment, effect of—Money-lender taking no steps to recover money due on mortgage-bond even after it rose considerably above value of mortgaged property, whether believeable.

Where in a suit upon a mortgage-bond, which referred to the existence of account books kept by the mortgagee, the mortgagor pleaded payment and summoned the mortgagee to produce the account books, but the mortgagee denied the keeping of any such books and did not appear as a witness to support that denial:

Held, that the non-production of the account books justified the presumption under section 114 (*b*) of the Evidence Act of the fact that, if produced, they would have been unfavourable to the mortgagee.

The fact that a careful money-lender took no steps during his lifetime for the recovery of his money after the amount due rose considerably above the market-value of the mortgaged property and left it for his successors-in-interest to realise after his death the money so due, cannot be believed.

Musammat Lal Kunwar v. *Chiranji Lal*, 5 Ind. Cas. 549; 14 C. W. N. 285 at p. 292; 7 M. L. T. 57; 11 C. L. J. 172; 12 Bom. L. R. 244; 37 I. A. 1; (1910) M. W. N. 8; 32 A. 104; 20 M. L. J. 183, referred to.

Appeal from the decree of the Subordinate Judge, Sitapur, dated 30th November 1911.

Mr. *F. G. D. Lincoln* and Pandit *Chand Narain Harkauli*, for the Appellants.

Mr. *St. G. Jackson*, Mirza *Sami Ullah Beg* and Babu *Tinkauri Mohan Ghose*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-appellants for the recovery of money due on a registered mortgage-bond executed by Fida Husain, the husband of the defendant No. 1, in favour of Basantu Shah, the predecessor-in-title of the plaintiffs, on the 29th January 1881. The bond in suit provided for the payment of the mortgage-money on the 12th March 1882 with interest thereon at two per cent. per mensem compoundable yearly and stipulated that if the mortgage-money was not so paid, the mortgagee shall be entitled to recover possession over the mortgaged property. The plaintiffs' allegation was that the mortgagor failed to re-pay the money or deliver possession over the mortgaged property. The defence was that a settlement was arrived at between Fida Husain and Basantu Shah in December 1881 whereby Rs. 800 were found due in respect of the mortgage-bond in suit and that Fida Husain got the said money paid to Basantu Shah by the sale of a portion of the mortgaged property to defendant No. 3.

The learned Subordinate Judge accepted the plea of payment, but not without some hesitation. There was hardly any occasion for that hesitation if, as the learned Subordinate Judge found, the receipt filed by the defendants in favour of the payment was genuine. We have, however, carefully examined that receipt and are by no means satisfied that the receipt can be regarded as free from suspicion. It purports to acknowledge the receipt of Rs. 650 on the 10th February 1882 and of Rs. 150 six days earlier. It professes to have been attested by Idi Halwai and Saiyed Ali Husain, both of whom are proved to have died long ago. Muhammad Askari, defendant No. 3, swears to the execution of the said receipt by Basantu Shah and to the payment of the aforesaid sums by him on the dates therein mentioned. There is no direct evidence, however, to establish that the signature borne by the receipt was actually made by Basantu Shah or tallied with his

handwriting. Defendant No. 3 states in his evidence that Basantu Shah wrote the receipt with his own hand and signed it, but he admits that he does not know the *mahajani* characters in which the receipt professes to have been written, and beyond stating that the receipt, Exhibit W. A5, was the receipt last obtained by him from Basantu Shah, he does not specifically identify the signature borne by the receipt as the one made by Basantu Shah. He summoned Chhedi Lal, who had some dealings with Basantu Shah, to prove his handwriting, but Chhedi Lal admits that he is not in a position to identify the writing and signature on the said receipt. Chhedi Lal produces an account book bearing a signature at page 119, purporting to have been made by Basantu Shah in acknowledgement of an existing debt on the 29th June 1908, but the book is a mere ledger interspersed throughout with blank spaces and the entry in question appears almost at the fag-end of the written portion of the book and cannot be implicitly trusted. An earlier bond, Exhibit A1, executed by Himayat Ali, the father of Fida Husain, in favour of Basantu Shah on the 12th March 1880 bears on the reverse the signature of Basantu Shah below the endorsement made by the Sub-Registrar, evidencing the presentation of that document for registration, and a note in Hindi evidently made by Basantu Shah for his own use stating that the date fixed for payment was the 12th March 1882 (*awada tarikh mah* March 12 *san* 1882). On comparing the signature thereon with the signature borne by the adhesive label affixed on the receipt in question, we find it difficult to trace any such resemblance as to justify us under section 73 of the Indian Evidence Act in inferring its genuineness. In the very first line of the receipt Basantu Shah describes himself by his full name, but in the alleged signature borne by the receipt stamp he is described merely as Basantu Shah and the ink in which the superscription is written is different from the ink of the body of the receipt. We also notice that against the entry of Rs. 150 the year 1881 appears to have been altered or corrected into 1882, the figure 1 being still noticeable in faint ink under the figure 2, and there is some fudging below the figure 2 in the year 1882 against the entry of Rs. 650 too. A careful examination of the stamp shows traces of some kind of a vertical line having originally existed there to cancel the stamp or to make a cross, which may have been washed. We are not disposed, therefore, to attach much value to that receipt as an evidence of payment.

It is not possible, however, to ignore the fact that the bond in suit was executed 30 years ago and had fallen due as far back as the 12th March 1882, and that it provided for the payment of compound interest at a very high rate and also stipulated for the delivery of possession over the mortgaged property in case of non-payment. Basantu Shah was careful enough to note the date fixed for payment in Hindi on the back of the bond, and there is no reason why he should have taken no steps to sue for the recovery of the money or to take possession over the mortgaged property so long if no payment was made. He held two other bonds, one of which was executed by Himayat Ali, the father of Fida Husain, on the 12th March 1880 for Rs. 1,500, and another executed by him on the 21st June 1880 for Rs. 350. Both these bonds were admittedly paid by Fida Husain by the sale of a portion of the mortgaged property to Kalka Bakhsh on the 15th July 1881. On the 24th December 1881 Fida Husain sold another portion of the mortgaged property to defendant No. 3 in lieu of Rs. 900, the consideration of which was evidently left with the vendee for redeeming the property sold from the mortgage now in suit. On the 10th February 1882 defendant No. 3 obtained a receipt from Fida Husain acknowledging the receipt of the said sum of Rs. 900 with the specification that Rs. 800 out of the same were paid to Basantu Shah and the balance of Rs. 100 to Fida Husain. The signature of Fida Husain on that receipt is proved by the evidence of defendant No. 3. Defendant No. 3 states that he paid the money partly with the assistance received from his mother and partly by borrowing from Badri Pershad, in whose favour he executed a bond for Rs. 700 on the 9th February 1882 (Exhibit A6), which he subsequently repaid. That bond does not specify that the money was borrowed for paying to Basantu Shah, but reading

that bond with the statement of defendant No. 3 that he paid Rs. 650 to Basantu Shah on the very next day and the receipt (Exhibit A4) obtained by him from Fida Husain, the long silence or omission of Basantu Shah to take any steps to enforce the bond for nearly thirty years affords an indication that the bond in suit was paid up, though no receipt may have been taken because Basantu Shah promised to return the bond as soon as it was found.

It appears from the evidence of Mohan Lal, Gokul and Shanker Lal that Fida Husain asked Basantu Shah from time to time to return the deed, but Basantu Shah's reply invariably was that he could not find it. The evidence of these witnesses by themselves would not have been of much value; but when we read it with the corroborative evidence afforded by the receipt granted by Fida Husain and the bond executed by defendant No. 3 in favour of Badri Pershad and the circumstances and probabilities of the case, we see no ground for thinking that the story of payment has since been concocted. Basantu Shah was a money-lender who was not likely to allow the mortgage-money to remain unpaid after its amount went beyond the market-value of the property mortgaged, or to remain silent so long in spite of the death of Fida Husain and the sale of different portions of the mortgaged property to other persons.

In 1884 Ghulam Ali and others filed a suit against Fida Husain claiming certain arrears of maintenance due to them under a Will executed by Himayet Ali, the father of Fida Husain. Fida Husain pleaded in that case that he had paid some of the debts due by Himayat Ali and filed a list of documents in proof of that allegation. In that list he did not mention the bond now in suit, but the explanation for its omission from that list is obvious, because that bond was not then in his possession and its money had been paid by him not from his own pocket but by the sale of a portion of the mortgaged property, which he had inherited from the testator. He could not, therefore, very well have mentioned the bond in suit as a bond the payment of which entitled him to claim contribution. The filing of a copy of that bond by Ghulam Ali and others, the then plaintiffs, is also without any significance, because no issue was struck by the Court deciding that suit on that point, and we are not aware what was the nature of the then plaintiffs' replication in regard to that point.

Basantu Shah was alive when section 31 of Act IX of 1908, allowing a period of two years for the institution of suits on mortgages the claim on which had become barred under the ruling of their Lordships of the Privy Council in *Vasudeva Mudaliar* v. *Srinivasa Pillai* (1), came into force, but he took no steps to file a suit on the bond at that time. Mahabir Pershad, the clerk of Babu Chhail Behari Lal, a Pleader of Sitapur, states that Basantu Shah brought to him a mortgage-bond and asked him to draft a plaint for instituting a suit for the recovery of money due on the same. Mahabir Pershad is, however, unable to say when the plaint was drafted, and it is surprising that, though according to Chhedi Lal, Basantu Shah was indebted to him to the sum of Rs. 1,000, he should have taken that draft home and left it in his box for his successor to utilize it as evidence to refute a plea of payment, instead of filing a suit on the said bond forthwith.

The bond in suit (Exhibit 1) executed by Fida Husain in favour of Basantu Shah referred to the existence of account books, which were then being kept by Basantu Shah. If no payment was made towards the bond in suit, it was open to the plaintiffs to prove by the production of account books that the plea of payment was untrue. The defendants summoned the plaintiffs to produce their account books, but the plaintiffs made no efforts to produce them. They falsely denied that any account books were then kept by Basantu Shah. They did not come into the witnesses-box to support that statement on oath or to prove the handwriting of Basantu Shah by the production of his other papers. The account books

(1) 11 C. W. N. 1005; 17 M. L. J. 444; 4 A. L. J. 625; 6 C. L. J. 379; 2 M. L. T. 333; 9 Bom. L. R. 1104; 30 M. 426 (P. C.); 34 I. A. 167.

would have afforded material evidence both in regard to the similarity of handwriting as well as in regard to the alleged non-payment, and their non-production justifies the presumption under section 114, clause (*b*), of the Indian Evidence Act of the fact that, if produced, they would have been unfavourable to the plaintiffs.

The unsatisfactory nature of the receipt filed by the defendants is undoubtedly an element which detracts to some extent from the value of the other circumstantial evidence on which the defence has relied, but the stupidity of litigants is sometimes responsible for the forgery of a receipt when none was taken or of a signature when only a memo., unstamped and unsigned, was obtained. We reject the receipt entirely out of our consideration, but we are unable to reject the other circumstantial evidence in the case which proves that Rs. 800 had been paid in full satisfaction of the claim, because we cannot believe that a money-lender like Basantu Shah would have taken no steps for the recovery of his money after the amount due rose considerably above the market-value of the mortgaged property or that his account books would have been withheld, had no payment been made, *vide* the observation of Lord Atkinson in *Musammat Lal Kunvar* v. *Chiranji Lal* (2).

We dismiss the appeal with costs.

Appeal dismissed.

(2) 5 Ind. Cas. 549 (P. C.); 14 C. W. N. 285 at p. 292; 7 M. L. T. 57; 11 C. L. J. 172; 12 Bom. L. R. 244; 37 I. A. 1; (1910) M. W. N. 8; 32 A. 104; 20 M. L. J. 183.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 17 OF 1914.

August 28, 1914.

Present:—Mr. Stuart, J. C., and Mr. Kendall, A. J. C.

VIDYASAGAR, MINOR, UNDER THE GUARDIANSHIP OF *Musammat* ANANDI DEI—OPPOSITE PARTY—APPELLANT

versus

RATIPAL—APPLICANT—RESPONDENT.

Foreclosure suit—Decrees, preliminary and final—Payment into Court of amount due under preliminary decree, mortgagor's right as to, at any time until final decree is passed—Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 2 and 3 (2)—Application to deposit money into Court, no limitation for—Continuing right—Limitation Act (IX of 1908), Sch. I, Arts. 181, 182 and 183—Redemption, mortgagor's right as to—Possession of mortgaged property obtained through Court without order absolute having been passed, effect of—Adverse possession.

In a foreclosure action the mortgagor is entitled to pay in the amount due under the decree *nisi* (passed under Order XXXIV, rule 2, Civil Procedure Code) at any time until an order absolute is passed (under Order XXXIV, rule 3 (2), Civil Procedure Code), and his application to pay that amount is not time-barred inasmuch as it cannot be treated as one under Articles 181, 182 or 183, Schedule I, of the Limitation Act, and as the right to apply is a continuing right.

A mortgagee in possession of the mortgaged property sued for and obtained a preliminary decree for foreclosure. The mortgagor failed to deposit the amount due under the deed of mortgage and to redeem the mortgage within the time fixed by this decree. The mortgagee then did not apply for a decree absolute, but for formal possession and got it, the mortgagor receiving no notice of this application. Twenty-seven years after this the mortgagor applied for permission to deposit the mortgage-money found due and for a re-transfer of the property, the mortgagee's name having continued to be recorded as such, and not as a proprietor, in the revenue papers:

Held, that the mortgagor was entitled to deposit the money due and his right to redeem subsisted until an order absolute for foreclosure had been passed.

Held, further, that no question of limitation could arise in respect of the mortgagor's application.

Held, also, that no question of adverse possession arose in the case.

Poresh Nath Mojumdar v. *Ramjadu Mojumdar*, 16 C. 246; *Ajudhia Pershad* v. *Baldeo Singh*, 21 C. 818; *Narayana Raddi* v. *Papayya*, 22 M. 133; 8 M. L. J. 205, *Somesh* v. *Ram Krishna Chowdhry*, 27 C. 705; 4 C. W. N. 699, *Raham Ilahi Khan* v. *Ghasita*, 20 A. 375; A. W. N. (1898) 78; *Nihali* v. *Mittar Sen*, 20 A. 446; A. W. N. (1898) 112; *Salig Ram* v. *Muradan*, 25 A. 231; A. W. N. (1903) 20; *Nand Ram* v. *Babaji*, 22 B. 771 and *Musammat Buta* alias *Goti* v. *Usman*, 1 O. C. 91, referred to.

Makhan v. *Bhagirath Pershad*, 8 O. C. 33 and *Jageshar Singh* v. *Raja Bhagwan Bakhsh Singh*, 9 Ind. Cas. 337; 14 O. C. 10, explained.

Appeal against the order of the District Judge, Fyzabad, dated 20th January 1914, reversing that of the Additional Munsif, Fyzabad, dated 31st May 1913.

Babu *Gopal Sahai*, for the Appellant.

Pandit *Gokaran Nath Misra*, for the Respondent.

JUDGMENT.—In this case the respondent's ancestor executed on 7th June 1878 a mortgage by conditional sale in favour of the ancestor of the appellant and possession was

delivered to the mortgagee. On the 2nd June 1884 the mortgagee sued for and obtained a preliminary decree for foreclosure. The period within which the mortgagor was directed under this decree to deposit the amount due under the deed of mortgage and to redeem the mortgage; expired without the mortgagor making any payment. The mortgagee did not, however, apply for a decree absolute. He applied to the Court for formal possession. No notice of his application for formal possession was given to the mortgagor, and the Court proceeded to award him formal possession on the 20th February 1885. He was already in possession of the property under the terms of the deed of mortgage and the evidence shows that his name has continued to be entered in the revenue papers as a mortgagee in possession of the property, and not as a proprietor. In December 1912 the mortgagor applied for permission to deposit the mortgage-money found due and for a re-transfer of the property. The mortgagee resisted this application. The Court of the Munsif disallowed the application on the ground that it was time-barred. The learned District Judge has reversed the order of the learned Munsif on the ground that no question of limitation has arisen, and that according to the view of the law taken by the High Courts of Calcutta, Madras and Allahabad, the right to redeem subsists until an order absolute for foreclosure has been passed. Against this decision of the learned District Judge the present appeal was filed. It came on for hearing before the Judicial Commissioner, who in his order, dated 26th May 1914, stated that there was a conflict of authorities as to the law on the subject, which made the point of sufficient importance to necessitate its determination by a Bench and referred it to a Bench accordingly.

In *Poresh Nath Mojumdar* v. *Ramjadu Mojumdar* (1) a Bench of two Judges of the Calcutta High Court decided that in a foreclosure action the mortgagor could redeem at any time until an order absolute was made under section 87 of Act IV of 1882. They said at page 248: "The terms of section 86 have been taken apparently from the terms of the decree which was formerly made in the Court of Chancery in England, and there is no doubt that under the procedure of that Court, the mortgagor was entitled to redeem, at any rate, up to the final order of foreclosure..... Apart, however, from the English cases, it is quite clear that the Legislature in enacting section 87 intended to give some effect to it, but if the respondent's contention were right, this section would be of no effect, and section 86 *plus* non-payment of the money would give a right of possession. Section 87 of the Transfer of Property Act provides that if the payment be not made within the time fixed in the decree, 'the plaintiff may apply to the Court for an order that the defendant, and all persons claiming through or under him, be debarred absolutely of all right to redeem the mortgaged property.' That means that without such an order the defendant would not be debarred of all right to redeem the mortgaged property. The fact that the Legislature allowed the plaintiff to apply for such an order, shows that, without that order, the right to redeem would not be taken away .....It seems quite clear to us that the fact of the Legislature having made this provision, requiring an order absolute to be made, makes the earlier order simply an order *nisi*, and the mortgagor can at any time, until the order absolute is made, redeem his property."

The decison in this case was referred to with approval in *Ajudhia Pershad* v. *Baldeo Singh* (2). In *Narayana Raddi* v. *Papayya* (3) a Bench of two Judges of the Madras High Court held that in a case in which a decree for foreclosure had been passed, and a period of three months had been fixed for the discharge of the mortgage-debt and the mortgagor had made default, and in which the decree-holder had applied for and been placed in possession of the property, the mortgagor, to whom no notice had been given of the decree-holder's application, had a right to obtain an extension of time for payment, because a second order or order absolute on application by the mortgagee for such an order was imperative under the Transfer of Property Act to enable the plaintiff to obtain possession of the property, and no such order had been passed. The decisions in 16 Calcutta

(1) 10 C. 246.

(2) 21 C. 818.

(3) 22 M. 133; 8 M. L. J. 205.

and 22 Madras were referred to with approval by a Bench of the High Court of Calcutta in *Somesh* v. *Ram Krishna Chowdhry* (4). Maclean, C. J., stated at page 708 of that decision: "These decisions are consistent with the old practice in Chancery in England, and with the present practice in the Chancery Division of the High Court in England, and it is, I think, reasonably clear that sections 86 and 87 of the Transfer of Property Act are modelled on that practice and view of the law, or, perhaps I should say, recognised principles of equity." It was laid down by a Bench of the Allahabad High Court in *Rahim Ilahi Khan* v. *Ghasita* (5) that the right of an ex-mortgagee to proprietary possession dated from the date of the order absolute and not from the date on which the mortgagor had made default in payment of the amount due under the decree, and another Bench of the same High Court decided in *Nihali* v. *Mittar Sen* (6), agreeing with the decision in 16 Calcutta and the previous decision of the Allahabad High Court mentioned above, that the mortgagor had a right to pay in the amount due at any time until the decree had been brought to maturity by an order absolute under section 87, Act IV of 1882. A single Judge of the Allahabad High Court decided in *Salig Ram* v. *Muradan* (7) that in a case in which a mortgagee had obtained a decree which was in effect a decree *nisi* under section 86 of the Transfer of Property Act and the mortgagor had failed to pay the money within the time limited by that decree, the mortgagor had a right to deposit at a later period than that fixed, as a decree absolute had not been passed under the provisions of section 87. He referred with approval to the last quoted case of the Allahabad High Court and to the decision in 27 Calcutta. In *Nand Ram* v. *Babaji* (8) the same principle was followed. In the case of *Musammat Buta* alias *Goti* v. *Usman* (9), Blennerhassett, J. C., following the decision in *Poresh Nath Majumdar* v. *Ramjadu Mojumdar* (1), laid down that a mortgagor could defeat foreclosure by paying money due under the decree so long as an absolute decree had not been passed against him.

Against the above rulings the learned Counsel for the appellant has referred us to two rulings of Benches of this Court. The first is contained in *Makhan* v. *Bhagirath Pershad* (10). In that case a certain Baid Nath obtained a decree under section 86 of the Transfer of Property Act, which provided that if the amount found due on the mortgage on the 20th January 1888 were not paid on that date, the mortgage would be foreclosed and the defendant be absolutely debarred of all right to redeem the property included in the mortgage. On the 19th January 1888 the mortgagor applied for an extension of the time fixed for paymant, and the mortgagee consented to an extension of four months on condition that he obtained possession of the property, which he agreed to surrender if the amount were paid within that period. An extension of four months for payment was granted and the mortgagee obtained and remained in possession of the property to 22nd January 1902, no part of the mortgage-debt having ever been paid. On the 22nd January 1902 the plaintiffs sued the defendants for redemption of the property on payment of what was due on the mortgage under the terms of the decree on the 25th February 1888. The Bench found that the former mortgagee had been in possession of the mortgaged property since the 13th June 1888 as absolute owner and thus had been in adverse possession for more than 12 years before the suit was instituted. They further found that the effect of certain orders which were passed by the Court in 1888 placed the mortgagee in possession as proprietor. The present appeal was at first argued on an interpretation of this ruling to the effect that it laid down that the right to redeem became extinguished upon the expiration of the period allowed in the preliminary decree. But we are of opinion that this is not a correct interpretation of the decision in question. We do not find that this decision is in conflict with the mass of

(4) 27 C. 705; 4 C. W. N. 699.
(5) 20 A. 375 A. W. N. (1898) 78.
(6) 20 A. 446; A. W. N. (1898) 112.
(7) 25 A. 231 A. W. N. (1903) 20.
(8) 22 B. 771.
(9) 1 O. C. 91.

(10) 8 O. C. 33.

rulings already quoted to the effect that the right to redeem subsists until an order absolute has been obtained. The facts in the case quoted in *Makhan v. Bhagirath Pershad* (10) were peculiar, for there it appears that the mortgagor of his own accord placed the mortgagee in possession of the property as proprietor on a distinct understanding as to his right to recover possession by payment of the amount due on the mortgage and that the Court executing the decree did no more than sanction this arrangement between the parties. Here the case is very different. The mortgagor has never consented to proprietary title passing to the mortgagee and the Court never conferred proprietary title upon him and the mortgagee has not had his name entered as proprietor and asserted title to proprietary rights.

Thus in the present case no question of adverse possession arises, as has been rightly laid down by the learned District Judge. We have still to consider the effect of a further decision of a Bench of this Court in *Jageshar Singh* v. *Raja Bhagwan Bakhsh Singh* (11). In that case the appellant obtained a decree for redemption on the 1st November 1904 against the respondents in which the period fixed for payment of the mortgage-money was six months. That decree was finally affirmed by the Judicial Commissioner on the 9th July 1906. On the 8th July 1909 the decree-holder deposited in Court the amount payable under the decree and on the 13th July 1909 he presented an application praying that he might be placed in possession of the mortgaged property. The application of the 13th July 1909 was held to be governed by Article 182 of the first Schedule to the Limitation Act of 1908, and it has been argued that on an analogous process of reasoning the application made by the mortgagor in this case is time-barred. But we are of opinion that the point for decision in that case is distinct from the point raised in the present appeal. Here the mortgagor is not asking for execution of a decree or order of any Civil Court not provided for by Article 183 or by section 48 of the Code of Civil Procedure of 1908. The Article refers to execution of decrees or orders. The mortgagor is not asking for the execution of a decree or order. Only the decree-holder could ask for execution. The mortgagor is asking permission to deposit money due from him. Article 183 also does not affect this case. We have been asked to apply Article 181 and to treat the request of the decree-holder as an application for which no period of limitation is provided elsewhere in this Schedule or by section 48 of the Code of Civil Procedure. In our opinion this Article also does not bind the case. The right to apply was a continuing right. The mortgagor was, according to the view of law taken by all High Courts and by our own Courts, entitled to pay in the amount due under the decree *nisi* at any time until an order absolute was passed and his application is not barred by limitation. This disposes of all the grounds raised in the appeal.

We, therefore, dismiss this appeal. The appellant will pay his own costs and those of the respondent.

Appeal dismissed.

(11) 9 Ind. Cas. 337; 14 O. C. 10.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1394 OF 1912.

August 6, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

K. M. P. PARAMESWARAN NAMBUDRIPAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

K. M. S. SANKARAN NAMBUDRIPAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 7—"Discharge"—Meaning of Malabar tarwad—Karnavan's *act impugned—Right to give discharge.*

The term "discharge" in section 7 of the Limitation Act is not confined merely to pecuniary liability, but includes also "release of rights to immoveable property."

Ahinsa Bibi v. *Abdul Kader Saheb*, 25 M. 26, followed.

A suit to have a *karnavan's* alienation declared invalid, if brought ten years after the cause of action arose, is barred by limitation whether it falls under Article 91 or Article 120 of the Limitation Act.

PARAMESWARAN NAMBUDRIPAD *v.* SANKARAN NAMBUDRIPAD.

Where no fraud is proved as against a *karnavan*, he sufficiently represents the *tarwad* and can give a valid discharge even on behalf of the minor members of that *tarwad*.

Meloth Kannan Nair v. *Kodath Kammaran Nair*, 22 Ind. Cas. 609; 1 L. W. 102; (1914) M. W. N. 231, followed.

Where he can give such a discharge, section 7 (2) of the Limitation Act has no application.

Napier, J.—Where the act impugned is that of the *karnavan*, it is doubtful whether he could be said to be able to give discharge within the meaning of section 7, clause (2), of the Limitation Act.

Second appeal against the decree of the Court of the Subordinate Judge of South Malabar, in Appeal Suit No. 585 of 1911, preferred against that of the District Munsif of Chowghat, in Original Suit No. 105 of 1910.

Mr. *T. R. Ramachandra Aiyar*, for the Appellants.

Mr. *C. V. Anantha Krishna Aiyar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—Plaintiffs Nos. 2 to 5 are the appellants. The suit was brought by the appellants and 15 other members of their *tarwad* for a declaration that the *karar* executed by the plaintiffs' *karnavan*, the 1st defendant, in favour of the 2nd defendant in 1899 acknowledging the right of the 2nd defendant's *tarwad* to a half share in the *uraima* right in the plaint *devaswom*, was obtained by the 2nd defendant by fraud, etc., and that the said agreement is not binding upon the plaintiffs' *tarwad*. The plaint also contained a prayer for an injunction restraining the 2nd defendant and the members of his *tarwad* from interfering with the *devaswom* affairs. The suit was brought in 1910.

The lower Appellate Court dismissed the plaintiffs' suit on three grounds: (*a*) that the suit is opposed to the provisions of section 42 of the Specific Relief Act, I of 1877; (*b*) that the plaintiffs could not be allowed to amend the plaint so as to bring the prayers in the plaint into conformity with section 42 of the Specific Relief Act; and (*c*) that the suit is barred by limitation. It is unnecessary to go into the first two questions for the purpose of the decision of this second appeal. I might, however, remark that under the new Civil Procedure Code, Act V of 1908, Order VI, rule 17, all amendments "*shall be made*" as may be necessary for the purpose of determining the real question in controversy between the parties; and I think that the cases decided before the enactment of the new Civil Procedure Code, ruling that it is not desirable to allow amendments at a very late stage or so as to oust the jurisdiction of the Court in which the suit was instituted, are no longer of much value on the question of the amendment of plaints.

On the question of limitation I think that the lower Appellate Court has taken the right view. This suit was brought more than ten years after the date of the agreement, Exhibit A, and the reliefs claimed in the plaint bring this suit under one or more of the following heads :—(*a*) a suit to cancel or set aside an instrument (Article 91, Limitation Act of 1908), (*b*) a suit for an injunction, (*c*) a suit for a declaration, (*d*) a suit for which no period of limitation is expressly provided for. Under whichever head the suit is placed, the limitation is either three years under Article 91 or six years under Article 120. The suit is, therefore, clearly barred unless the plaintiffs could take advantage of the saving provisions contained in sections 6 or 7 of the Limitation Act, 1908, corresponding to sections 7 and 8 of the old Limitation Act, 1877. It is admitted that section 6 (old section 7) does not apply, because all the plaintiffs are not minors. Hence section 7 (old section 8) is relied upon.

Section 7 is as follows :—"Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of such person, time will run against them all: but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased." It has been settled by a long course of decisions that the term "discharge" in this section is not confined to dischage of a pecuniary liability of the defendant, but includes release of rights in immoveable property and other rights which may belong to the plaintiffs. Now in such a case as the present, who are the several persons "jointly entitled to institute a suit" for the reliefs now claimed? It is clear that this suit is brought, not on behalf of the plaintiffs individually, but on behalf

of the whole *tarwad* including the *karnavan*, the 1st defendant. The suit being based upon fraud, misrepresentation and undue influence, the 1st defendant himself could have brought the suit on behalf of the *tarwad* and he is clearly one of the several persons jointly entitled to institute this suit. I shall assume that the senior adult *anandravan* does not stand in the position of an elder brother in a Hindu family (who is the *de jure* manager of the family affairs after the father's death) and can give valid discharges in certain circumstances so as to be binding on his minor younger brothers. See *Doraisawmi Sirumadan* v. *Nondisami Saluvan* (1). There is, however, the *karnavan* himself who is jointly entitled to institute a suit, could always give a valid discharge under proper conditions and hence I am inclined to hold that the 2nd clause of section 7 of the Limitation Act which comes into force only where no discharge can be given by any of the persons jointly entitled to institute a suit, cannot be relied upon by the appellants in this case. The appellants' learned Vakil (Mr. T. R. Ramachandra Aiyar) quoted the decision of *Ahnisa Bibi* v. *Abdul Kader Saheb* (2) as in his favour. In that case *C*, one of four partners, died in 1891 and the partnership became dissolved. In 1898 the legal representatives of *C* brought the suit against the surviving partners (and others) for an account and for a share of the profits of the dissolved partnership. One of the legal representatives of *C* (the 3rd plaintiff in the case) was a minor. It was held that the suit was not barred as against any of the plaintiffs, as *C* was a Mussalman and his two adult heirs could not give a valid discharge on behalf of the 3rd plaintiff (minor) and hence section 8 of the old Limitation Act, 1877, (present section 7) saved the bar of limitation in favour of all the plaintiffs. The decision in that case seems to me, however, not to be helpful to the plaintiffs in this case, for one of the persons jointly entitled to bring this suit, namely, the 1st defendant, could give a valid discharge; whereas in *Ahinsa Bibi* v. *Abdul Kader Saheb* (2) neither of the two adult plaintiffs who brought that suit could have given a valid discharge.

If the cause of action to set aside the *karnavan's* alienation arose out of the fraud of the *karnavan* directed by him against the *tarwad*, then the *tarwad*, by the very nature of the *karnavan's* act, cannot (it may be argued) be any longer represented by that *karnavan* so far as steps necessary to be taken to get rid of the effect of his said action are concerned and hence he cannot be said by the necessities of the case and under those peculiar circumstances to be entitled to grant a discharge on behalf of the *tarwad* in respect of such rights. But the present is not such a case, the plaint alleging not any fraud perpetrated by the *karnavan* as the cause of action but fraud, etc., directed against him and against the *tarwad* represented by him (see paragraphs 5 and 6 of the plaint).

Even if I am going too far in holding this view that the *karnavan* himself continues to represent the *tarwad* as regards the power to give a discharge in connection with a claim arising out of his unauthorised acts, it seems to me clear that the *karnavan* acting *with all the adult male members of the family* must fully represent the *tarwad* in respect of such power of discharge. That all the adult members fully represent the *tarwad* in the matter of the family *karars* cannot be disputed. There is even a presumption that the *karnavan* and the senior *anandravan* fully represent the *tarwad* in respect of alienations of the *tarwad* properties. In *Meloth Kannan Nair* v. *Kodath Kammaran Nair* (3) it was held that the consent of the *karnavan* and of the senior *anandravan* in age is very strong evidence that the *tarwad* as a whole gave a valid consent. In the present case, as the *karnavan* and all the adult members of the family fully represent the *tarwad* including the minor members for all purposes, they fully represented the *tarwad* for the purpose of giving a discharge also and the latter part of section 7 of the Limitation Act, 1908, clearly applies and this suit was rightly held by the lower Appellate Court to be barred by limitation.

I would, therefore, dismiss the second appeal with costs.

(1) 21 Ind. Cas. 410; 14 M. L. T. 401; 25 M. L. J. 405.

(2) 25 M.

(3) 22 Ind. Cas. 609; 1 L. W. 102; (1914) M. W. N. 231.

SHIAM BIHARI v. BHAGWATI SINGH.

NAPIER, J.—I concur with my learned brother that the suit was rightly held to be barred by limitation, the circumstances being those referred to in the latter part of his judgment, but with great respect to his far wider experience, I should hesitate to hold that a *karnavan* whose contract was sought to be impeached could by himself be held to be able to give a discharge within the meaning of the section.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

CIVIL REVISION PETITION NO. 2 OF 1913-14 OF SITAPUR DISTRICT.

March 27, 1914.

Present:—Mr. Tweedy, J. M.

SHIAM BIHARI—OBJECTOR—APPELLANT

versus

BHAGWATI SINGH—APPLICANT—RESPONDENT.

Hindu Law—Mahant *dying without validly nominating his successor, effect of*—*Appointment, power of, reverting to family of founder of trust*—*U. P. Land Revenue Act (III of* 1901), *s.* 34—*Mutation of names*—*Possession to be by virtue of succession.*

Where a *mahant* makes no vaild nomination of his successor, the power of appointment reverts to the author of the trust or to his successors.

In mutation cases, the question of possession does not arise unless there is evidence of succession.

Appeal against the order of the Commissioner, Lucknow, dated 23rd September 1913.

FACTS.—The facts of the case clearly appear from the order of the Commissioner, which was as follows :—

Shiam Bihari, objector, appellant, made a claim to be a *mahant* in charge of property endowed on a *Thakurji* in succession to his father Govind Prasad who had died. The original entry was in the name of the late *mahant*. Both the lower Courts have found that this was incorrect and that it should have been in the name of the *Thakurji* under the *sarbarahkarship* of the *mahant*.

The Court of first instance has found that the appellant's claim for succession to his father is made out and has ordered entry accordingly in accordance with the amended form. The Court of first appeal has found that the late *mahant* failed to nominate a successor and hence appellant's claim to succeed is based on no title and he is a mere trespasser. The fact that he is the son of the late *mahant* confers on him no claim whatever.

It is against this finding that appeal is made.

I accept the finding of the two lower Courts that the form of entry has been wrong hitherto and that the entry must be in the name of the *thakurji*, and hence it is a question of whether appellant can have his name entered as *sarbarahkar*. I also agree with the Court of first appeal that there is no satisfactory proof that the late *mahant* nominated appellant as his successor. The fact that his son came forward as a claimant is good proof of this. But the question then arises as to who is to be recorded as the *sarbarahkar*. The Court of first appeal has dealt with this question rather summarily. I have heard full argument on the point. It is pointed out that under Hindu Law, page 570 of 6th Edition, when the *mahant* makes no valid nomination of his successor, the power to appoint a manager reverts to the author of the trust or to his successor. This view is held in *Raj Krishna Dey* v. *Bipin Bihari Dey* (1). No ruling opposed to it is produced. Hence this must be held to be the settled law on the subject. Appellant is a trespaser. I agree with the decision of the Court of first appeal. I dismiss this appeal with costs and Pleader's fees at Rs. 8.

Mr. *H. C. Dutt*, for the Appellant.

Mr. *St. G. H. S. Jackson*, for the Respondent.

ORDER.—I am not prepared to say that the decision of the lower Appellate Court is incorrect. They have found as a question of fact that there was no valid nomination and assuming that this finding is correct, the finding which pleads that the power of appointment reverts to the family of the founder of the trust is good law.

The strongest point in appeal is the question of possession, but as the Deputy Commissioner has rightly pointed out, the question of possession does not arise unless there is evidence of succession, and good grounds have been given for holding that there was no succession.

The appeal is dismissed with costs and Rs. 10 Pleader's fees.

Appeal dismissed.

(1) 18 Ind. Cas. 961; 17 C. L. J. 189; 40 C. 251.

KRISHNA PATTER *v.* SINNAPONNU.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1270 OF 1913.

April 17, 1914.

Present:—Mr. Justice Tyabji and Mr. Justice Spencer.

S. KRISHNA PATTER—DEFENDANT No. 1—APPELLANT

versus

RAMASAMI PATTER'S WIFE SINNAPONNU *alias* ALAMELU AMMAL AND ANOTHER—PLAINTIFF AND DEFENDANT No. 2—RESPONDENTS.

Hindu law—Widow—Maintenance, whether charge on whole family property or on husband's share only—Charge, when and how arises—Alienee of property, liability of—Attachment, right created by—Suit by one widow for declaration of charge—Co-widow, whether necessary party.

A Hindu widow has a right to get her husband's estate charged with her maintenance, but she must make a formal assertion to obtain recognition. Waste or improper alienation of her husband's estate with the very object of depriving her of her subsistence is invalid, and the purchaser who joins in the effort to defeat her rights is under certain circumstances himself liable to the charge.

Deendyal Lal v. *Jugdeep Narain Singh*, 4 I. A. 247; 3 C. 198; 1 C. L. R. 49; 3 Sar. P. C. J. 730; 3 Suth. P. C J. 468; 1 Ind. Jur. 504 (P. C.), referred to.

The right of maintenance of a Hindu widow against persons other than her husband or son rests upon their possession of family property in which her husband had a share.

Mangala Debi v. *Dinanath Bose*, 4 B. L. R. (O.C J.) 72, 12 W. R. (O. C.) 35; *Srimati Bhagabati Dasi* v. *Kanailal Mitter*, 8 B. L. R. 225; 17 W. R. 433 *Note*; *Gauri* v. *Chandramani*, 1 A. 262; *Maina* v. *Bachchi*, 28 A. 655; 3 A. L. J. 551; A. W. N. (1906) 165; *Kuloda Prosad Chatterjee* v. *Joyeshar Koer*, 27 C. 194; *Sham Lal* v. *Banna*, 4 A. 296 at p. 298; A. W. N. (1882) 42; 6 Ind. Jur 594, *Gur Dyal* v. *Kaunsila*, 5 A. 367; A. W. N. (1883) 65, *Lakshman Ramchandra Joshi* v. *Satyabhamabai*, 2 B. 494; *Gokaldas Gopaldas* v. *Puranmal Premsukhdas*, 10 C. 1035; 11 I. A. 126 (P C.); 8 Ind. Jur. 396; 4 Sar P. C. J. 543; *Lakshman* v. *Saraswatibai*, 12 B. H. C R. 69 at p. 71; *Heera Lal* v. *Musammat Kousillah*, 2 Agra Rep. 42, *Ramachandra* v. *Savitribai*, 4 B. H. C. R. (A. C. J.) 73 and *Jamiyatram Ramchandra* v. *Parbhudas Hathi*, 9 B. H. C. R. 116, followed.

The mere attachment of a property before it is charged for maintenance creates no right or title in the attaching creditor.

Soobul Chunder Law v. *Russick Lall Mitter*, 15 C. 202 and *Moti Lal* v. *Karrabuddin*, 25 C. 179(P. C.); 24 I. A. 170; 1 C. W. N. 639, followed.

In a suit by a widow for declaration that she has a charge for maintenance on certain property, the co-widow is not a necessary party.

Per *Tyabji, J.*—The Court has power to charge the whole of the joint family property for a widow's maintenance, though her deceased husband's share in the property in fixing the amount of maintenance will naturally be taken into consideration

Per *Spencer, J.*—The whole family property remains liable for the widow's maintenance, provided that the portion charged does not exceed her husband's interest therein.

Subraydu Chetty v. *Kamalavalli Thayaramma*, 10 Ind. Cas. 347; 35 M. 147; 21 M. L. J. 493; 10 M. L. T. 1; (1911) 2 M. W. N. 148, followed.

Where the estate of the husband of a Hindu widow was attached in a simple money-decree prior to her decree for maintenance, but was sold after the decree was passed:

Held, that the decree was binding on the purchaser and created a charge on the estate.

Second appeal against the decree of the District Court of South Malabar, in Appeal Suits Nos. 881 and 903 of 1912, preferred against that of the District Munsif of Alatur, in Original Suit No. 394 of 1911.

Mr. *C. V. Anantha Krishna Iyer*, for the Appellant.

Mr. *J. L. Rosario* (with him Mr. *K. Govinda Marar*), for the Respondents.

JUDGMENT.

TYABJI, J.—The appellant is the sole surviving male member of a joint Hindu family. The respondents are widows of the appellant's paternal uncle, who was the manager of the family during his life-time. I will refer to the parties as appellant and respondents throughout and will include in the term appellant his predecessor-in-title, unless the appellant's predecessor-in-title has to be distinguished from the appellant.

The appellant claims to derive his title to the property mentioned in the plaint from a Court sale of the property which, it is common ground, originally belonged to a joint Hindu family. His contention is that he has purchased it free of any charge or encumbrance and is entitled to hold it so. The sale was held on 28th October 1902 in execution of a simple money-decree obtained in a suit (Original Suit No. 4 of 1900) against the late manager of the family. The property had been attached on or about 19th August 1902, though the sale did not take place till 28th October 1902. This was the earliest of the three suits which it is necessary to mention.

The 1st respondent claims that the property is in the hands of the appellant, subject to a charge for her maintenance. The charge was created by a decree, dated 19th September 1902, in a suit by the respondent for maintenance (Original Suit No. 264 of 1902) which was instituted against her husband as such manager. This was the second of the three suits.

After obtaining the decree charging her maintenance on the family property the 1st respondent applied for attachment of the property. The appellant then objected to the attachment on the following grounds (see Miscellaneous Petition No. 2934 of 1910):—

"(1) that he is not in possession nor enjoyed any of the deceased judgment-debtor's assets;

"(2) that the decree is not binding on him;

"(3) that as the judgment-debtor's rights over theproperty were sold away in 1902 they are no longer liable for his debts and that he (respondent) is in possession by purchase for valuable consideration."

In Miscellaneous Petition No. 2934 of 1910 the appellant's claim was allowed on the ground that the 1st respondent had no charge on the property till the date of the decree in her favour, *i. e.*, 19th September 1902, and that as the attachment of the property by the appellant's predecessor-in-title was made on 19th August 1902, prior to the decree, the attachment must prevail.

On this the 3rd suit was filed. The present appeal arises out of this 3rd suit. The 1st respondent seeks in this suit a declaration that by reason of the charge created in the 2nd suit, she is entitled to have the properties sold, in other words, that the purchase by the appellant's predecessor-in-title was subject to her charge, and that the appellant must hold the property with the same limitations.

The appellant relied on (1) his sale certificate, (2) on a certain mortgage, Exhibit IV, dated 8th May 1899. The mortgage does not affect the other question; there was no issue as to its existence or validity or as to whether it must have precedence over the maintenance charge: *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (1). The mortgage can have no practical effect on the rights of the appellant and 1st respondent, unless it is held that the 1st respondent can succeed in her contention. It has, however, been held that the mortgage does exist and there are no cross-objections on the point. I will, therefore, not refer to it any further.

Under the circumstances the priority has to be determined between (1) the 1st respondent's decretal charge for maintenance as a widow, and (2) the appellant's sale which was later than the decree charging the properties, but which was in pursuance of an attachment prior to the decree.

The appellant claims that the property has been derived by him through such a transferee for consideration as is referred to in section 39 of the Transfer of Property Act, and that, therefore, in his hands the property is not subject to any charge.

The considerations affecting the determination of these questions may be grouped under the following heads: (1) the nature of the 1st respondent's claim before and after she had obtained the decree in the 2nd suit charging the properties with her maintenance; (2) whether for this purpose the 1st respondent's rights must be considered (*a*) to date back to the time when she instituted her suit for maintenance or (*b*) on the footing that her charge was created at the date of the decree and (3) if the latter, then whether or not the attachment protected the appellant against any charge being created by such a decree as the respondent obtained; (4) the nature of the claims of the decree-holder in Original Suit No. 4 of 1900—the first suit—with reference to the 1st respondent's claim; and (5) whether the 1st respondent's right must in any event prevail against the whole of the co-parcenary property or only against such part of it as would have come to her husband's share on partition. It will not be necessary to deal with all these questions *seriatim*.

With reference to the nature of a widow's claim for maintenance we have the benefit of the judgments of Westropp, C. J., and West, J., in *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (2).

In that case the question was whether the widow Satyabhamabai could claim to have a charge for maintenance (1) on property sold by her deceased husband's brother Mahadeo to the 2nd defendant (Lakshman) and (2) on part of the same property re-sold by the 2nd defendant to 3rd defendant (Vishnu). It was admitted that both the original purchaser (the 2nd defendant) and the purchaser from him (3rd defendant) had notice of the widow's claim (page 498).

Westropp, C. J., held that notice of the claim was not conclusive; because the widow's rights could not be put on a

(1) 10 C. 1035; 11 I. A. 126 (P. C.); 8 Ind. Jur. 396; 4 Sar. P. C. J. 543.

(2) 2 B. 494.

KRISHNA PATTER v. SINNAPONNU.

higher footing than the sons; and because when ancestral property devolves upon the widow, she would not only be justified, but it would be her duty, to apply it if necessary in payment of the debts (not contracted for immoral purposes) of her deceased husband or of his father or grandfather: so that for the purpose of paying such debts, the mortgage and sale would be valid as against the widow, whether or not the transferee had notice of her claim for maintenance. Westropp, C. J., refrained from expressing any opinion as to the rights of a widow who obtained a decree against the family estate for prospective maintenance, if subsequently the creditors of her husband or of his father or grandfather instituted an administration suit against her and the surviving parceners praying a sale of the estate, and application of the proceeds in payment of the debts due to creditors by her husband or his father or grandfather.

West, J., pronounced an elaborate judgment dealing with the question on first principles. All the elements of the right of maintenance are considered in that judgment—elements which, I think, must be adverted to. For though section 39 of the Transfer of Property Act was enacted after the decision, yet the section refers to the defeating and enforcing of the right to receive maintenance: the nature of the right must, therefore, be fixed as a preliminary to the construction of the section.

West, J., in the first place referred to the conflict between *Lakshman* v. *Saraswatibai* (3), where the maintenance of a Hindu widow was held not to be a charge on property in the hands of a *bona fide* purchaser from her late husband's successors, and to *Heera Lal* v. *Musammat Kousillah* (4), *Ramchandra* v. *Savitribai* (5), which seem to lay down that the widow has such a charge. In the result he thought it desirable to examine more at large the topic of the Hindu widow's maintenance in relation to the family estate. In the course of such examination he traces the right of maintenance through four stages: (1) the right of a wife against her husband; (2) the right of a widow (*a*) against sons, whether they be her own sons or of her deceased husband by another wife, (*b*) against the co-parceners of her deceased husband, who are not his sons and (*c*) against a sole surviving co-parcener not being a son.

He cites Jimutavahana* that a wife acquires an interest in her husband's property. He points out, however, that on the one hand her interest in her husband's property must be considered to be of a secondary nature for four reasons to which I add a fifth from *Sham Lal* v. *Banna* (6): (*i*) according to Manu (Chapter VIII, Pl. 416) the wife is ranked along with a son and a slave as incapable of having wealth exclusively her own†, (*ii*) Apastamba‡ denies that a partition can take place between husband and wife because of the essential unity of the married pair, (*iii*) Manu (Chapter V, Pl. 148) and Narada alike insist on the dependence of women (*iv*) Jimutavahana says there is neither partition nor co-parcenary, *i.e.*, membership of a joint Hindu family with the mother§, (*v*) "the author of Viramitrodaya‖ does not apparently consider there is any real ownership on her part; he says: "Her right is only fictional, but not a real one: the wife's right to the husband's property, which, to all appearance, seems to be the same (as the husband's right) like a mixture of milk and water is suitable to the performance of acts which are to be jointly performed, but is not mutual like that of the brothers; hence it is that there may be separation of brothers, but not of the husband and wife; on this reason is founded the text, namely, ...Partition cannot take place between the husband and wife'; therefore, it cannot but be admitted that on the extinction

(3) 12 B. H. C. R. 69 at p. 71.
(4) 2 Agra. Rep. 42.
(5) 4 B. H. C. R., A. C. J. 73.
(6) 4 A. 296 at p. 298; A. W. N. (1882) 42; 6 Ind. Jur. 594.

*Dayabhaga, Ch. XI, Sec. I, Pl. 26; Jagannath, Sec Coleb. Dig. Bk. V, Ch. VIII, Sec. I, Pl. 415; See also Smriti Chandrika, Ch. IV, Pl. 9; Ch. IX, Sec. 2, Pl. 14; Ch. II, Sec. I, Pl. 19.

†Vyav. Mayukha, Ch. IV, Sec. 10, Pl. 7; Smriti Chandrika, Ch. 9, Sec. 1, Pl. 12, 13.

‡Coleb. Dig., Bk. V, Ch. II, Pl. 89.

§Dayabagha, Ch. XI, Sec. 1, Pl. 30.

‖Cited in Shamlal v. Banna, 4 A. 296 at p. 298; A. W. N. (1882) 42; 6 Ind. Jur. 594.

of the husband's rights the extinction of the wife's rights is necessary."

Yet on the other hand West, J., points out (p. 504) that (*i*) the wife's interest has been deemed enough to entitle her to an equal share with sons when her husband makes a partition of his property,* and (*ii*) the removal of "the superior and dominant interest of the husband appears to have been recognised by, at least, some of the *Smritis* as bringing out the wife's right into greater definiteness;" so that the widow's interest may be higher than the wife's. As examples of the recognition, he refers to Narada (Part 1, Chapter III, 39, 40) assigning "to the widow a general control of the estate in priority even to sons," and Manu (Ch. IX, 104) making the widowed mother's consent necessary for partition by her sons during her life-time.

In the result he concludes that the nebulous interest of the wife in her husband's estate during his life-time becomes something more definite and more important on his death.

I might pause here a moment to allude to the analogous development of the law relating to the maintenance of a wife and widow in Muhammadan Law. The wife's claim to maintenance being a personal claim against her husband was (according to the earlier Quranic rule) continued on the death of the husband in the same form as a claim for a year's maintenance out of his estate (Quran, II, 241): later this right was developed into a claim more definite and important, a right to inherit a share of the estate (Quran, IV, 15, 16). A similar process took place with the parent's right: the claim to maintenance developed and became transformed to a right to inherit a definite fraction of the estate (Quran, II, 176, IV, 12).

It would seem, however, that while the stages through which Muhammadan Law has developed are perhaps more clearly marked and easier of being historically fixed, they also led the rights of the widow to a point of crystallization denied to her in Hindu Law. Yet in Hindu Law likewise several stages may be noticed. Thus, according to Jimutavahana, the rights have acquired greater solidity as against brethren than as against the superior claims of a son, grandson, or grand-grandson. The latter through the operation of special texts in their favour have succeeded in keeping the rights of the widow in a state of fluctuation. But according to the *Mitakshara* the rights against all co-parceners are undeveloped to any more substantial form than a claim to maintenance. In one respect the *Dayabhaga* and the *Mitakshara* systems have operated in opposite directions. For under the *Mitakshara* the doctrine of survivorship and the allied doctrine that sons like all joint owners acquire an interest in the ancestral property by birth, give to the sons an ownership antecedent to the rights of the widow as such. And yet as against the sons she has the right to an equal share in partition; to this right I am going presently to refer.

For fixing the nature of the rights of the widow as against the sons of the late owners West, J., refers to the following considerations, the first six tending to enhance the widow's rights and the other two showing their limitations:—(1) Narada assigns to her a general control over her deceased husband's estate in priority even to sons; (2) Manu makes her consent necessary for partition by her sons; (3) she has the right of absolute disposal over the property that is allotted to her in such partition; (4) she is not allowed any such veto over partition by the sons in modern Hindu Law as is adjudged to her by Manu, yet when there is a partition her share is equal to that of a son and not a mere equivalent for maintenance;* (5) as a consequence of this where a partition suit is instituted by the sons, the mother is a necessary party and where the suit is by others than the sons, the Court insists on a provision for suitable maintenance for her, as a necessary preliminary or ingredient in the decree for partition, so that the Privy Council, while holding in

* 4 Coleb. Dig., Bk. V, Ch. II, Pl. 87, 88.

*Manu cited, Coleb. Dig, Bk 3, Ch. IV, Pl. 397, Comm. Vyasa, quoted in the Vyavahara Mayuka, Ch. IV, Sec IV, Pl. 19.

Deendyal Lal v. *Jugdeep Narain Singh* (7) that a purchaser at an execution sale of the father's interest had acquired a right only to a severance of his share as distinguished from the son's, recognises that, in the partition to be thus made, the wife also of the judgment-debtor, if he had one, might be entitled to an allotment; (6) "precisely the same word '*bhartavyam*' is used by Yajnavalkya to express the claim of persons who are excluded from a share and of their wives, and the same verb is used to express the right to support of a deceased co-parcener's widow in Narada" (Part II, Chapter XIII, Sloka 28) *; (7) debts of the deceased owner take precedence over the maintenance of the widow; (8) even the existence of such debts does not prevent the sons disposing of the estate so as to convey a good title to a purchaser: *Jamiyatram Ramchandra* v. *Parbhudas Hathi* (8), much less, therefore, can the existence of the right to maintenance prevent such disposition: yet this power of disposition is curtailed by the decision that an adopted son cannot convey to a stranger such a right to the family dwelling as to deprive the adoptive mother of her right of residence: *Mangala Debi* v. *Dinanath Bose*(9)†; *Srimati Bhagabati Dasi* v. *Kanailal Mitter* (10) and *Gauri* v. *Chandramani*(11). The result of this West, J., sums up as giving to the sons under *Mitakshara* Law "a more completely untrammelled power" than under *Dayabhaga* Law "of dealing with the estate without regard to the widow's claims, however subject they may be to moral reprobation should they heedlessly dispose of it, and however impossible it may be for them to escape a personal liability for the widow's maintenance." He concludes on pages 510-511: "It seems opposed, therefore, both to the text of the *Mitakshara* and to the constructions of the local interpreters to regard the widow's maintenance as 'a charge on the inheritance' taken by the sons in the sense of a perfect right *in re*. At the same time as the maintenance, even of a concubine, 'is a burden placed upon (the estate) by Hindu Law,' which may properly be secured by an investment or other secure provision under the direction of the Court, the widowed mother or step-mother may demand, at least, an equal protection. Her right, then, though resting on a somewhat different theory, appears, on the whole, to stand practically on the same level here as in Bengal. 'The widow's claim to maintenance from her husband's estate,' Mr. Ellis says, 'is absolute, unlimited by circumstances; but then it is only a claim to maintenance, and it is not correct to say that she is entitled to any share or division.' The sons taking the property subject to the burden of maintaining the widow are in a position bearing some analogy to that of a husband becoming owner-at-law of his wife's property, but bound to provide for her support. The origin of the obligations, no doubt, is quite different; but, in the relations to which they give rise between the parties and in their bearing on the property, they seem to be very nearly alike. If, then, a mother foregoing her claim to a separate provision out of the paternal property resides with her sons or step-sons, and is maintained by them, she must submit, I think, to their dealing with the estate. A fraudulent alienation for the purpose of defeating her claims, as pointed out by Sir G. Turner, V. C., in the case of a wife in *Tidd* v. *Lister* (12) will not be supported; but the particular assignee for value acquires under such circumstances a complete title not impaired like that of the assignee in insolvency by the then obvious incapacity of the insolvent son to support out of the estate those whose maintenance is a charge on it. The charge must, I think,

(7) 4 I. A. 247; 3 C. 198; 1 C. L. R. 49; 3 Sar. P. C. J. 730; 3 Suth. P. C. J. 468; 1 Ind. Jur. 604 (P. C.).
(8) 9 B. H. C. R. 116.
(9) 4 B. L. R. (O. C. J.) 72, 12 W. R. (O. C.) 35.
(10) 8 B. L. R. 225; 17 W. R. 433 *note*.
(11) 1 A. 262.
(12) 10 Hare 140; 3 De G. & M. G. 857; 23 L. J. Ch. 249; 18 Jur. 543; 2 W. R. 184; 68 Eng. Rep. 872; 90 R. R. 312.

* It has been held that the maintenance of persons excluded from a share ranks as a real charge on the inheritance, though in the same case the daughter-in-law's claim to maintenance is held to create no more than a moral obligation: *Khetramani Dasi* v. *Kashinath Das*, 2 B. L. R., A. C. J. 15; 10 W. R. (F. B.) 89. West, J., is of opinion that the distinction between the two classes of rights is unfounded and that the sustenance of persons entitled to no definite share cannot be considered an indefeasible charge any more that the maintenance of their wives.

†Citing Colob. Dig., Bk. II, Ch. IV, S. 19.

be regarded as an equitable one of a special kind, enforceable in all cases in which the mother or step-mother living apart is not maintained by the sons, but not in other cases except under circumstances which affect the good faith of a transaction by which it is sought to get rid of the burden."

Having thus considered the right of maintenance of the wife as against the husband and of the widow (when she has to assert it against the sons), West, J., proceeds to consider if the incidents of the right might be different where the joint family consists of surviving brothers or cousins. In such circumstances, "her identity with her deceased husband cannot be considered less than where the husband was separated from his brethren and has left sons" [*Lakshman Ramchandra Joshi* v. *Satyabhamabai* (2)]. But the texts are in different terms and refer to "maintenance or a share of the property for her life"* which right is subject to be resumed if the widow "does not keep unsullied the bed of her lord"†, and there is "no express injunction to assign an aliquot portion to any widow except the widow of a father. Yet Sir T. Strange says that in every case 'an allowance.....proportioned to her support.....with a reference to the amount of the property so as, at the utmost (as has been said), not to exceed a son's or other parcener's share,' is to be made to her, and that 'care should be taken to have it secured.' He thus places the widow of the ordinary co-parcener apparently on exactly the same level with a mother seeking maintenance from her sons" (page 513).

The decisions referring to the widow's rights at this stage recognise that she is entitled to a charge, but apparently involve the limitation (not approved by West, J.) that the widow's charge arises only in case there is no other property in the hands of the members of her late husband's family out of which she can claim maintenance‡ or "if she failed in getting her maintenance" from the said members.*

This alleged limitation upon the widow's rights is considered by West, J., on pages 515-517. The inconvenience is pointed out of subjecting property to a sort of springing use uncertain in itself and calculated to injure the value of the property, being dependent on the solvency and honesty of the vendor and perhaps of several other persons. The analogy of English Law is also considered.

The result arrived at may be formulated as follows: (1) the widow has a right to get the estate charged with her maintenance, which she may or may not exercise; that right contains all the elements necessary for its ripening into a specific charge; it only needs formal assertion to obtain recognition: but nevertheless, West, J., observes: "I do no think it can be called an 'already existing proprietary right;'" (2) Waste or improper alienation with the very object of depriving her of her subsistence would be a fraud upon a person specially under the protection of the law and would be pronounced invalid or subject to revision in the interests of the persons prejudiced; (3) the purchaser who joins in the effort to defeat the widow's rights may himself be made subject to the charge: whether or not this should be done would depend upon considerations which include (*a*) the sacredness of the duty to maintain, (*b*) the existence of other property out of which maintenance may be obtained, (*c*) whether or not the widow has deliberately (in the hope of sharing the improvement in the family circumstances) or through neglect (*i. e.*, the failure to assert her right of obtaining a charge) thrown in her lot with the family leaving to the male co-parceners an unlimited estate to deal with at their discretion, (*d*) whether such property sought to be followed in the hands of the purchaser was honestly available *in toto* to the widow for her maintenance, or whether a deduction for unpaid debts would first have had to be made, (*e*) whether "the consideration received by the heir for the sale of the deceased's property

*See 1 West and Bhuler 9, and Coleb. Dig., Bk. V, Chap. VII, Pl. 481, Comm. Smiriti Chandrika, Chap. XI, Sec. 1, Pl. 35.

†Narada, Chap. IV, Sec. 8, Pl. 6; Mitakshara, Chap. II, Sec. 1, Pl. 20, 27, 28, Sec. 10, Pl. 13, 14.

‡*Anund Moyee Goopta* v. *Gopal Chunder Banerjee*, (1864) W. R. 310.

*Musammat Khukroo Misrain v. *Jhoomuck Lal Das*, 15 W. R. 263.

will so far as the widow's right of recourse to it is concerned take the place of the property sold,"* (*f*) knowledge or means of knowledge on the part of the vendee that the widow's claim cannot be satisfied without recourse to what he proposes to buy—in other words, whether the purchaser has "notice of the existence of a claim likely to be unjustly impaired by the proposed transaction."

How this question of notice has to be determined in any particular case is further elucidated by the questions that were referred to the lower Court by Westropp, C. J., at page 500 and by West, J., at pages 523-526. West, J., proceeds to consider the 4th stage of maintenance rights: that of a widow against a single surviving co-parcener. He points out that the only distinction that can arise from the fact of there being a single co-parcener is, that the right which a mother or an unmarried sister of the co-parceners has on partition to have a definite share allotted to her is unavailing, as there can be no partition where there is a single co-parcener to whom the whole joint property belongs.

The result of West, J.'s examination of the nature of the widow's rights where she has not obtained a charge on any property has already been formulated by me.

With reference to the effect of a decree effecting such a charge, West, J., says: "as the maintenance, even of a concubine, 'is a burden placed upon (the estate) by Hindu Law,' which may properly be secured by an investment or other secure provision under the direction of the Court, the widowed mother or step-mother may demand, at least, an equal protection." (Page 510). "She may at her will get her claim recognized as chargeable on the estate in the hands of the co-parceners reduced to certainty and secured as a specific charge on the estate or, as Katyayana says, by 'the allotment of a share for her life.'" Page 515. Finally in distinguishing the right of the two widows mentioned in the case before him—one of whom (Sarasvatibai) had, and the other (the plaintiff) had not, obtained a decree, he said: "For proper reasons, as for the discharge of a debt incumbent on the family and on him as its sole surviving proprietary member, Mahadev might sell the estate which had thus vested in him. He could not thus affect the right of another co-parcener's widow Sarasvatibai, whose claim had by means of a decree become a right *in re* adhering to the estate; but the right of Satyabhamabai, not yet reduced to definiteness and made a precise and actual charge on the property, could not prevent his dealing with it at his discretion." (Page 524).

Westropp, C. J., as I pointed out before, refrained from expressing an opinion on the question of how far the widow's decree would avail against an administration suit by creditors of the family. That question does not arise in the present case either. We are not concerned with a case where the creditors of a joint family claim to have their rights enforced in priority to the widow's, or when they contend that they cannot be prejudicially affected by a decree to which they were not parties and which has the effect of defeating their claims.

I will assume (without expressing an uncalled-for opinion on the question) that just as a transfer with the intention of defeating the right to receive maintenance will not affect the right to receive maintenance, so conversely an assertion of a claim to maintenance and a decree collusively obtained with the intention of defeating creditors or co-parceners would be unavailing against the creditors or co-parceners. Even where there is no such intention, the Allahabad High Court has expressed an opinion that the maintenance charge cannot avail against creditors to whom the property has been transferred in satisfaction of claims which would have precedence over maintenance: *Sham Lal* v. *Banna* (6); *Gur Dayal* v. *Kaunsila* (13). But creditors do not necessarily have such precedence. The 1st respondent might well rely upon the existence of her pending suit for maintenance which would make it more difficult for the transferee to avail himself of the provisions of section 39 of the Transfer of Property Act. Had the decree been passed and had the claim of the transferee arisen after the decree, it is clear that the transferee would have taken subject to the charge: *Kuloda Prosad Chatterjee*

*Phear, J. in *Srimati Bhagabati Dasi* v. *Kanailal Mitter*, 8 B. L. R. 225; 17 W. R. 433 *note*.

(13) 5 A. 367; A. W. N. (1883) 65.

v. *Jogeshar Koer* (14); and even where the transfer is pending the decree, if the property is directly and specifically brought in question in a maintenance suit [*Manika Gramani* v. *Ellappa Chetti* (15)] and a mortgage is made pending the suits, though prior to the actual passing of the maintenance decree, the mortgage may be effectual only subject to the maintenance charge: *Dose Thimmanna Bhutta* v. *Krishna Tantri* (16).

These considerations make it clear, it seems to me, that in so far as the sale of 28th October 1902 is concerned it cannot avail the appellant, for that is subsequent to the maintenance decree. The appellant must succeed, if at all, on the strength of the priority (over maintenance) of these claims in satisfaction of which the sale was held: he can succeed only if he can make out that (1) he is entitled to stand in the shoes of a creditor, (2) that that creditor could have had the property sold free from the maintenance charge and (3) that the property was so sold.

Before considering the appellant's rights on this basis I must deal with another point taken for the appellant. He claims that there is another reason why his rights should have priority—a reason not dependent on the inherent priority of the claims of the creditor in whose shoes he alleges that he stands. This reason is that prior to the date of the 1st respondent's decree, the property had been attached (in the first suit). The respondent at the time of the attachment had no charge on the property. The property by the attachment was, it is true, merely kept in *custodia legis*, *Sankaralinga, Reddi* v. *Kandasami Thevan* (17), so that according to that decision, in one sense and to the extent pointed out in that decision, "the attaching creditor is said to have a charge on the attached property" (page 416 first line). Still it may be that the Court could have ordered the charge to take effect retrospectively and that section 64 of the Civil Procedure Code would not prevent the property being affected by a charge created by the Court. In the present case, however, the decree, which is not very happily worded, does not purport to do so. It is ordered "that the plaint 46 items of properties, described in the schedule below, be a charge for the life-long maintenance of the plaintiff." Presumably the charge would take effect from the date of the decree.

It may be that the attaching creditor (in the first suit) would have been entitled to claim, if he had been before the Court creating the charge (in the 2nd suit), that the property attached by him should not be charged so far as his claims were concerned and it may even be that in the absence of his having an opportunity to make such an application, the charge created on the property should be held subject to his own claims provided that they arise out of some liability which is imposed upon the joint property and which has priority over the maintenance claim. It may also be that the attachment was evidence of the existence of prior claims which should not have been disregarded when the decree for the maintenance charge was passed in the 2nd suit and that this may throw light on the question whether a decree in the second suit was collusive—a point to which I shall allude.

But none of these points seems to me to require consideration now. It seems to me, for reasons which I shall presently state, that all that has to be considered is whether this property could be subjected to the charge at the time of the second decree. If it had then been sold away and gone out of the possession of the family it could not have been so charged. Being merely under attachment it was subject to being charged by the Court. It is common ground that the Court would have made the maintenance charge subject to such prior debts as would have had priority over maintenance claims. Had the question arisen between the widow and a creditor seeking to bring himself under section 39 of the Transfer of Property Act or under the rulings in *Sham Lal* v. *Banna* (6) and *Gur Dayal* v. *Kaunsila* (13), all the considerations to which I have referred might have been relevant. They seem to me to be of no relevancy.

I will assume that the attachment was in respect of such a debt as would have priority over a widow's maintenance decree; and that the auction-purchaser in the first suit from

(14) 27 C. 194.
(15) 19 M. 271.
(16) 29 M. 508; 16 M. L. J. 413.
(17) 30 M. 413; 17 M. L. J. 334; 2 M. L. T. 365.

whom the appellant purchased the property was a *bona fide* transferee who had no such intention to defeat the rights of the widow as would make the property in his hands subject to the charge under section 39 of the Transfer of Property Act. The result would, therefore, be that the purchaser could have said to the widow if he had had the good fortune to possess the combined scholarship and legal acumen of West and Phear, JJ.:—"This property is not in honesty available to you except with a deduction for debts unpaid; and so far as your right of recourse is concerned, the consideration received by the heir for the sale of the property will take the place of the property sold." The widow would then have turned away, leaving the property in the hands of the purchaser, and sought to have recourse against the consideration. And what would have been the result of her search? She would have found that on the 10th July 1909 the consideration had, by virtue of Exhibit II, taken once again the shape of the property. Can these transactions, therefore, affect her charge? In *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (2) it is shown with abundant learning that by no device can the co-parcener evade his liability to maintain the widow so long as he has ancestral funds: by no jugglery of sale and re-purchase can the essential liability be "shuffled off." The widow being entitled to claim her maintenance from the joint property in which her deceased husband was interested subject only to a deduction for just debts, and that right being of so sacred a character that even a third party purchasing for consideration, if it be proved that he attempted to join in an effort to defeat the widow's rights by a colourable purchase, will hold the property subject to her charge, how can the Court in the present case proceed on the basis that that right has been defeated by the course of events which have taken place, though the property is now in the hands of the sole male member of the joint family who admits in his written statement that the property is ancestral?

Must the property then be considered to be subject merely to such an inchoate right in favour of the widow as she would have had prior to and irrespective of the decree in the 2nd suit (as contemplated in section 39 of the Transfer of Property Act) or will the decree operate against this property and subject it to a charge of such a specific character as has been held to come within section 100 of the Transfer of Property Act *Maina* v. *Bachchi* (18)? The 1st respondent claims to bring the property under the latter alternative, notwithstanding that it may have passed through the crucible of section 39 of the Transfer of Property Act.

It seems to me that the 1st respondent must succeed in this contention also. And for this reason: assuming that the decree in the second suit is binding upon the appellant, that decree subjects the property to a specific charge, and if a third party was, by availing himself of section 39 of the Transfer of Property Act, enabled to withdraw the property from the decretal charge in favour of the 1st respondent, then the charge would operate on the consideration by which the third party re-placed the property originally charged and that consideration, as I have already stated, is now again represented by the property itself. This result might, it is true, have been prevented from arising if the consideration for Exhibit II were not the consideration for the sale held on 28th October 1902. For in that case the appellant could have said that, on the reasoning I have adopted, the charge must continue on the consideration for the latter sale, and that that consideration is not here represented by the property now in question. But as the appellant is the sole member of the joint family to which he belongs and as according to his own allegations there has been no partition, and there is no allegation that the consideration for Exhibit II was paid out of his self-acquisitions, which would not be liable to any maintenance charge, it seems to me that the property must be held by him in the same way as if it had never passed out of the family. In speaking of the consideration for the sale of 28th October 1902 I have not lost sight of the fact that it purports to consist, not of a sum of money, but of the satisfaction of liabilities to which the property of the joint family was subject. The sale of 28th October 1902 enhanced the value of the joint family property by reducing its liabilities; the consideration for Exhibit II

(18) 28 A. 655; 3 A. L. J. 551; A. W. N. (1906) 165.

proceeds from the sole surviving member of the family who has not shown that he had property which he could hold as his self-acquired property. It may be admitted that from the nature of the transaction the consideration for the sale of 28th October 1902 cannot be said to have been ear-marked; or that the same consideration was present in the identical form in both cases. The consideration may be shown to be identical in this with such strictness only in cases where there is a barter in each case, or where the property is alienated by the manager of the family in the first instance for a bag of money which is sealed up and kept apart and with the same bag of money the property is re-purchased. But it is not necessary to trace the identity of the consideration with such strictness. The consideration came out of the joint family property and was again merged into it. That, in my opinion, is enough for the purposes of the questions now before us.

I have so far assumed that the decree in the second suit creating the charge was binding upon the appellant. The appellant in the 9th. paragraph of his written statement contended that the decree for maintenance in the second suit was not binding on him because it was fraudulently obtained. The question whether the decree had been so obtained was not made the subject of any specific issue, nor considered by either of the lower Courts except casually. There is no ground of appeal expressly referring to this point. There is certainly no evidence in support of the allegation. It may, on the other hand, be admitted that what appears on the record casts suspicion on the decree. We cannot, however, on mere suspicion disregard the decree. There is also much force in the argument that at most the appellant can attack the decree on the ground that the amount allowed for maintenance is excessive. That contention was not taken in the suit. If the circumstances necessary for a reduction of the amount exist, the appellant ought to have taken the point specifically or instituted a suit for the purpose: *Sidlingapa* v. *Sidava* kom *Sidlingapa* (19); *Bangaru Ammal* v. *Vijayamachi Reddiar* (20).

(19) 2 B. 624 at pp. 629, 630 (F. B.).
(20) 22 M. 175.

Taking then the facts as they stand on the contentions of the parties and the evidence before us, the decree must, in my opinion, be considered to be binding on the appellant both as regards the amount of the maintenance and as regards the creation of the charge.

It was argued before us that the charge on the property in favour of the 1st respondent ought to prevail only as against such part of it as would on partition have been allotted to her deceased husband. Reliance is placed for this proposition on the remarks in *Jayanti Subbiah* v. *Alamelu Mangamma* (21). Those remarks refer to what should ordinarily be considered to be a reasonable portion of the property for being so charged. With great respect I express my entire concurrence with those remarks. The Court has, however, power to charge the whole of the joint family property though her deceased husband's property, in the share will naturally be taken into consideration in fixing the amount of the maintenance: *Subrayulu Chetty* v. *Kamalavalli Thayaramma* (22). It cannot, therefore, be said that the decree is less binding on the appellant because it purports to charge more than such a portion of the joint property as would have come to her husband's share in partition.

I must here draw attention to the necessity for caution before a decree is passed creating a maintenance charge on the whole of the family property, especially in a case where only one out of several members of a joint family is a party to the suit and that member does not appear at the hearing. Decrees hastily passed in such circumstances without consideration being given to the rights of creditors or co-parceners who are not parties, would frequently be ineffectual. The jurisdiction of creating a charge on property is exceptional. There seems no exact equivalent in England. The analogy of the statutory jurisdiction of charging funds in Court and of enforcing a covenant made by the parties to charge property is not very helpful: Daniell's Chancery Practice, Vol. I, page 755. Fisher on

(21) 27 M. 45 at pp. 48; 49; 12 M. L. J. 270.
(22) 10 Ind. Cas. 347; 35 M. 147; 21 M. L. J. 493; 10 M. L. T. 1; (1911) 2 M. W. N. 148.

KRISHNA PATTER v. SINNAPONNU.

Mortgages, paragraphs 217-224, 468-473. The present case well illustrates the necessity for caution.

There still remains the question as to whether the 2nd defendant (the 2nd defendant before us) was a necessary or proper party to the suit. I cannot see how the 2nd defendant is interested in these proceedings. She is, no doubt, interested in having her rights under her own decree for maintenance considered and adjudicated upon. Those rights may be very similar to the rights of the 1st respondent (the original plaintiff). It may be that if there had been another suit by the second defendant against the appellant (1st defendant) that suit and the plaintiff's may well have been tried together. But that does not make the 2nd defendant a necessary or proper party to a suit by another widow for a declaration that the property is subject to a charge created by another decree. There have, however, been no separate costs caused by the 2nd defendant's presence and the only question is whether the lower Courts were right in giving to the 2nd defendant a decree in the same terms in which they have given a decree to the plaintiff. Their procedure seems to me to have been obviously erroneous.

They might have added the 2nd defendant as a plaintiff. To such addition the other parties may have taken such objections as they might have been advised to take. Or the 2nd defendant might have been referred to another suit with such alterations in regard to the prayers and allegations as might have been necessitated by what I understand to be the fact, *viz.*, the 2nd defendant did not put in any such execution petition as is referred to in the 6th paragraph of the plaint.

Under the circumstances the words in the decree declaring the rights of the 2nd defendant must be omitted. This will not, of course, affect her rights. It will merely mean that in the present proceedings the 2nd defendant would not have been a party and can claim no relief.

With the omission of the words above referred to the decree under appeal will be confirmed and the appeal dismissed with costs.

SPENCER, J.—The appellant is the transferee from a purchaser of property sold at a Court sale in execution of a simple money decree obtained against his uncle Ramasami Patter. The sale was held on 28th October 1902. On 19th September 1902 the 1st respondent, who is one of the widows of Ramasami Patter, obtained a decree for maintenance charging 46 items of family property. The money-decree was prior to the decree for maintenance.

The principal question argued before us is, whether the appellant's purchase was subject to the charge for maintenance or takes precedence over it.

There can be no doubt as a general proposition that debts contracted by a Hindu take precedence over maintenance as a charge upon the estate (Mayne's Hindu Law, paragraph 464). The District Judge holds that the case is different where a definite charge is created over specified items of property by a decree for maintenance, and he supports his opinion by a reference to *Maina* v. *Bachchi* (18).

In that case certain transferees for value without notice had to take the property purchased by them from a daughter of the last male owner subject to the charge for maintenance created previously by a decree incorporating a compromise in favour of a son's widow. In *Kuloda Prosad Chatterjee* v. *Jogeshar Koer* (14) the purchasers in execution of a mortgage-decree obtained by them on a mortgage-bond executed after the date of a decree for maintenance, which effected a charge on certain properties, were held to be bound by the maintenance decree even in respect of maintenance that accrued due subsequent to their mortgage. The present case differs on the facts from those two cases in that, as I have already pointed out, the money-decree here was obtained before the mortgage-decree for maintenance, but the sale in execution of the money decree was after the charge for maintenance had been imposed on specific property by the mortgage-decree.

In *Sham Lal* v. *Banna* (6) the following observation occurs at the end of the Full Bench decision:—"When the maintenance has been expressly charged on the purchased property, it will be liable, although it be shown that there is property in the hands of the heirs sufficient to meet the claim, but the property will not be liable if the transfer was made to satisfy a claim for which the

ancestral property is liable by Hindu Law, and which under that law takes precedence of that of maintenance." This was followed in *Gur Dayal* v. *Kaunsila* (13). On the strength of these decisions and of that in *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (2). Sir John Trevelyan at page 87 of his Hindu Law comes to the conclusion that even a decree for maintenance charging specific property would not bind a purchaser who purchased in execution of a decree that enforced a claim which under Hindu Law takes precedence of a claim for maintenance.

There is no evidence on record as to the nature of the debt for which the decree in Original Suit No. 4 of 1900 was obtained.

In her plaint Alamelu Ammal characterised the auction held on October 28th, 1902, as fraudulent and deceitful. The District Munsif found no evidence that the purchaser at the Court auction had any notice of this plaintiff's decree. The District Judge did not record a finding on this point. It might be a question for consideration whether the 1st defendant owing to his close relationship as nephew of the judgment-debtor was not likely to have been unaware of the plaintiff's decree for maintenance when he took a transfer from the auction-purchaser, Nanu Patter, at the sale under the decree in Original Suit No. 4 of 1900.

In this view, it might be necessary to call for findings from the lower Appellate Court on the two following issues:

1. Whether the debt which formed the subject-matter of Original Suit No. 4 of 1900 was one which by its nature would take precedence of a claim for maintenance?

2. Whether the 1st defendant was a *bona fide* transferee for consideration without notice within the meaning of section 39 of the Transfer of Property Act?

The appeal, however, can be disposed of without a remand as, in my opinion, it must fail on other grounds. The 1st defendant and his uncle Ramasami Patter belonged to a joint Hindu family and the properties charged with the widow's maintenance by the decree in Original Suit No. 264 of 1902 were ancestral properties. At the trial of this suit there was no dispute that the family was undivided when that decree was passed. Although the 1st defendant alleged in his written statement that he had been residing separately from his uncle, he made no attempt to prove partition or that there was fraud and collusion between his uncle and his uncle's wife in getting the *ex parte* decree passed. Having succeeded to the family properties, therefore, he cannot now repudiate the act of the then manager of the family in permitting particular items of property to be made liable for the widow's maintenance.

The other questions raised before us may be briefly dealt with. They are (1) that the 1st defendant's half share of the family properties could not be made liable for the maintenance of his uncle's widow;

(2) that the priority in time of the attachment in execution of the decree in Original Suit No. 4 of 1900 to the decree in Original Suit No. 264 of 1902 created a superior title in the decree-holder in Original Suit No. 4 of 1900 (Subramaniam Patter) and in the decree-holder's son (Nanu Pattar) who purchased at the auction sale held in consequence of the attachment;

(3) that 1st defendant being the assignee of the prior mortgage (Exhibit IV) in favour of Seetharama Patter, takes in priority to the subsequent mortgage decree-holder;

(4) that the 2nd defendant being a co-widow of the deceased Ramasami Patter with the plaintiff, should not have been joined in this suit.

Following *Subraydu Chetty* v. *Kamalavalli Thayaramma* (22) I consider that the whole of the joint family property could be made liable for the widow's maintenance provided that the portion charged did not exceed her husband's interest therein.

Following *Soobul Chunder Law* v. *Russick Lall Mitter* (23) and *Moti Lal* v. *Karrabuldin* (24) I think that the attachment of the property under the decree in Original Suit No. 4 of 1900 created no right or title in the attaching creditor. This is not a case of *lis pendens* as the purchase was subsequent to the decree for maintenance.

The lower Appellate Court's decree provides for the plaint properties being sold subject to the prior mortgage under Exhibit IV of which 1st defendant has got an assignment. The 1st defendant is not entitled to defeat the rights of the subsequent

(23) 15 C. 202.
(24) 25 C. 179 (P. C.); 24 I. A. 170; 1 C. W. N. 639.

mortgagee by tacking his rights as transferee from a purchaser at a sale under a simple money decree to his rights as transferee under the prior mortgage bond (Exhibit IV).

The 2nd defendant who got a separate decree for maintenance had no cause of action under Order XXI, rule 63, in respect of the order on the claim petition passed against the plaintiff. She was not a necessary party to this suit and the words "and the 2nd defendant" after the words "the maintenance of the plaintiffs" will have to be struck out of the decrees of both the lower Courts; but in respect of costs no alteration is required, the District Munsif's order having been passed subject to the condition that she paid her own costs.

In other respects this second appeal must be dismissed with costs.

Appeal dismissed.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 92 OF 1913.

June 25, 1914.

Present:—Mr. McColl, A. C. J.

BHAI KHAN—APPLICANT

versus

DES RAJ—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXVIII, r. 5—Attachment before judgment—Property outside Court's jurisdiction—Interpretation of Statute—Reference to proceedings of Legislature.

A Civil Court has no power to issue a warrant of attachment before judgment on property situated without its jurisdiction.

Haji Jiva Nur Mahomed v. *Abubakar Ibrahim Meman*, 8 B. H. C. R. (O. C. J.) 29, approved.

A Court is not justified in referring to the proceedings of the Legislature, which resulted in the passing of an Act, as an aid to the construction of any of its provisions.

Mr. *A. C. Mukerjee*, for the Applicant.

Mr. *J. N. Basu*, for the Respondent.

JUDGMENT.—The question for decision in this application is, whether a Civil Court has power to issue a warrant of attachment before judgment on property situated without its jurisdiction.

In *Kin Kin* v. *Nga Kyaw We* (1) it was held that Courts had not this power under the Code of 1882, but the learned District Judge has held that there has been an alteration of the law.

The words "within the jurisdiction of the Court" which appeared in section 483 of the Code of 1882 have been omitted in Order XXXVIII, rule 5, of the present Code, and it is urged that as the word "property" is now not qualified in any way, it must include both property within and property without the jurisdiction of the Court, and that the deliberate omission of the words mentioned shows that the Legislature intended to alter the law.

But if the matter be gone into a little deeper, this reasoning does not appear to be sound. The word "property" appears in many sections in the Code without any qualification and yet clearly meaning property within the jurisdiction of the Court, *e.g.*, in Order XXI, rules 11, 12, 21. The Legislature have gone back in this respect to the language of the Codes of 1859 and 1877, under which Codes it was held that the property which a Court could attach before judgment was property within its jurisdiction. This was held in *Haji Jiva Nur Mahomed* v. *Abubakar Ibrahim Memon* (2) overruling a previous decision of the same Court to the opposite effect, and the reasons given for the decision appear to me to be very weighty. The learned Chief Judge said: "*Prima facie* when we look to enactments relating to the powers of a Court over the property of litigants, we should expect to find those enactments concerned with property, whether it be moveable or immoveable, which is situated within their local jurisdiction. Even Courts of Equity in England and America, which exercise the widest jurisdiction, do not attempt to operate directly *in rem* when the *res* is beyond their local jurisdiction, but act in *personam* only . . . . . If the original Court has not power immediately to execute its own decrees in the district of another Court, and execution of them can be only obtained by the intervention of the latter, we should require some very distinct language on the part of the Legislature to show that it intended that the Court in which the suit is brought can make or execute any order of attachment before judgment of

(1) U. B. R. (1907-09) II, C. P. C. p. 13.

(2) 8 B. H. C. R. (O. C. J.) 29.

property situate beyond the local limits of its jurisdiction."

The omission of the words "within the jurisdiction" certainly at first sight make it look as if the Legislature did intend to alter the law, but they have reverted to the language of the Civil Procedure Code of 1859, and if it were held that the word "property" included property outside the Court's jurisdiction merely because it was not qualified, the same argument could be applied to other sections in which this word occurs, and the omission of the words "within the jurisdiction" in one section would lead to an interpretation of other sections which, certainly, was not intended. It is to be noted that the Legislature considered it necessary to add to section 16 of the present Code an explanation of the word "property" used in that section as "property situate in British India." One would have thought that if they intended the word "property" in Order XXXVIII, rule 5, to have the same meaning, they would have said so.

It has been urged that the report of the Select Committee on the Civil Procedure Code of 1908 shows clearly that there was an intention to remove the restriction imposed by the words "within the jurisdiction," but the question is rather what the Legislature have done than what they intended to do, and for this reason it has been held by the Privy Council that a Court is not justified in referring to the proceedings of the Legislature, which resulted in the passing of an Act, as an aid to the construction of any of its provisions.

I am of opinion, therefore, that a Court has not power to attach before judgment property situate beyond the local limits of its jurisdiction.

The order of the District Court, Mandalay, is accordingly set aside with all costs.

Advocate's fee, two gold *mohurs*.

Order set aside.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2349 OF 1913.

August 27, 1914.

Present:—Mr. Justice Seshagiri Iyer and Mr. Justice Kumaraswamy Sastri.

MUTHUKARUPPAN SAMBAN AND OTHERS —DEFENDANTS—APPELLANTS

versus

MUTHU SAMBAN—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 4, 54—Registration Act (XVI of 1908), ss. 48, 49—Usufructuary mortgage of immoveable property below Rs. 100 in value—Oral sale to mortgagee—Delivery, if necessary—Subsequent sale under registered sale-deed to third party—Priority—Sale-deeds of immoveable properties, whether compulsorily registrable—Unregistered sale-deed, whether admissible to prove nature of possession held thereunder—Adverse possession, title by—Transaction affecting immoveable property.

In case of sale of immoveable property both section 48 of the Registration Act and section 54 of the Transfer of Property Act require delivery of possession to the vendee.

In cases of oral sale of immoveable property below Rs. 100 in value the mere fact that the vendee is already in possession of the property which is the subject of the sale, does not invalidate the same, provided the vendor has, by appropriate acts or declarations, converted the possession of the vendee (which was that of a mortgagee in the present case) into that of a purchaser.

Sibendrapada Banerjee v. *Secretary of State for India in Council* 34 C. 207; 5 C. L. J. 390, not followed.

Kannan v. *Krishnan*, 13 M. 324, *Palani* v. *Sliambara* 9 M. 207, *Bai Khushal* v. *Lakshma Mana*, 7 B. 452, referred to.

There is no reason to construe section 54 of the Transfer of Property Act as requiring all sales of immoveable property of value less than Rs. 100 to be only by a registered instrument, in cases where the vendee is already in possession as tenant or mortgagee.

The effect of sections 4 and 54 of the Transfer of Property Act is to make all *sale-deeds* of immoveable property compulsorily registrable, irrespective of the value of the property comprised therein.

An unregistered sale-deed, which is required by law to be registered, is not admissible in evidence even for the purpose of showing the nature of possession held thereunder.

Subbayya v. *Madduletiah*, 17 M. L. J. 469, followed.

So far as the Madras Presidency is concerned, the establishment of a title by adverse possession is a transaction affecting immoveable property.

Second appeal against the decree of the District Court of Madura, in Appeal Suit No. 163 of 1912, preferred against that of the Court of the District Munsif of Tirumangalam, in Original Suit No. 92 of 1912.

MUTHUKARUPPAN SAMBAN *v.* MUTHU SAMBAN.

FACTS.—The facts of the case sufficiently appear from the judgment.

Mr. *G. S. Ramachandra Iyer*, for the Appellants:—Delivery of possession is not necessary in such a case as the present. See 11 C. W. N. 190 *note*, criticising *Sibendrapada Banerjee* v. *Secretary of State for India in Council* (1), see also *Khairati* v. *Sanda* (2) and *Ummar Sahib* v. *Vythilinga Mudali* (3). Such delivery as the property is capable of is all that is necessary. Vide *Kannan* v. *Krishnan* (4). Even if delivery should be held essential, the recital in the sale-deed to the following effect, *viz.*, "you shall ever possess and enjoy from this date", shows that delivery was duly made and taken. With regard to the question of adverse possession the case in *Ariyaputhira Padayachi* v. *Muthukumaraswamy Padayachi* (5) is clearly distinguishable.

Mr. *K. Jagannatha Iyer*, for the Respondent:—Section 54 of the Transfer of Property Act is imperative in its terms. To pass a valid title to a vendee in case of sale of immoveable property below Rs. 100 in value either a registered sale-deed or delivery of possession is absolutely essential. Here, admittedly, there is no registered deed and as the vendee was already in possession, no delivery under the sale was possible nor was one ever made. With regard to the question of title by adverse possession the unregistered deed cannot be looked into even for the collateral purpose of showing the nature of possession held thereunder. There being no other evidence to show whether there has been delivery at all and what the nature of the defendants' possession was, the decree of the Court below is correct.

JUDGMENT.—Defendants Nos. 1 to 5 are the appellants. The plaintiff, as the purchaser from one Alagar Samban, sued to redeem an usufructuary mortgage, dated 8th December 1897, executed by Alagar Samban in favour of the 1st defendant. Defendants Nos. 1 to 5 plead a sale by Alagar Samban to the 1st defendant by an unregistered sale-deed dated 6th April 1898 and state that they have been in possession as owners ever since that date and that the plaintiff's suit is barred by limitation. The District Munsif held that the plaintiff was aware of the sale-deed in favour of the defendants and the defendants' possession thereunder and that he was not entitled to redeem on the strength of the sale-deed. He held in effect that, though the plaintiff's deed was registered and that of the defendants unregistered, the plaintiff was entitled to no priority as he purchased with notice of the defendants' title. The District Judge on appeal reversed the decision of the District Munsif on the ground that, as the defendants were already in possession as mortgagees at the date of the sale-deed (Exhibit II) and no fresh possession was given to them, they acquired no title under section 54 of the Transfer of Property Act. He also held that a mere assertion of title under an invalid sale-deed cannot create prescriptive rights. He was of opinion that it was not shown that the plaintiff had notice of the defendants' unregistered sale-deed when he purchased the property. It is contended for the appellants that the view taken by the District Judge is erroneous and that the fact that the defendants were already in possession will not render the sale to them invalid. The District Judge relied on *Sibendrapada Banerjee* v. *Secretary of State for India in Council* (1) and was of opinion that the oral sale, even if true, was invalid as the vendee was already in possession of the properties at the time of the oral sale. We are unable to see why an oral sale with a request by the vendor to the vendee to remain in possession in the capacity of vendee and with absolute rights should not be sufficient to pass title without recourse to the expedient of the vendee quitting the property one moment and entering upon it at another. An arrangement by which the legal nature and character of the previous possession is put an end to and subsequent possession treated as one by the vendee with absolute title is, in our opinion, sufficient to satisfy the requirements of section 54 of the Transfer of Property Act. In *Kannan* v. *Krishnan* (4), it was held that possession under a mortgage, which was followed by an agreement to sell, was equivalent to delivery of possession so as to satisfy the requirements of section 48 of the Registration Act. In *Palani* v. *Selambara* (6) it was held that an attornment by

(1) 34 C. 207; 5 C. L. J. 390.
(2) 2 O. C. 74.
(3) 4 Ind. Cas. 1135; 5 M. L. T. 263.
(4) 13 M. 324.
(5) 15 Ind. Cas. 343; 23 M. L. J. 339; 12 M. L. T 425; (1912) M. W. N. 854; 37 M. 423.
(6) 9 M. 267.

tenants was sufficient delivery of possession to satisfy the requirements of section 48 of the Registration Act, and in *Kannam* v. *Krishnan* (4) above referred to Handley, J., was of opinion that the same principle may be extended to cases where possession is already with the purchaser and he retains it under the agreement to sell. So far as the delivery of possession is concerned, there seems to be no difference between the provisions of section 48 of the Registration Act and those of section 54 of the Transfer of Property Act. Section 48 of the Registration Act requires an agreement or declaration to be accompanied or followed by delivery of possession and section 54 of the Transfer of Property Act requires delivery of the property, such delivery being by putting the purchaser in possession of the property. In *Bai Kushal* v. *Lakshma Mana* (7) it was held that where one of several donees was in physical possession, a declaration by the donor to the donee in occupation that he has parted with the possession is sufficient to validate the gift.

Unless there is something in section 54 of the Transfer of Property Act which compels us to do so, there is no reason for putting on this section a construction that would in effect require sales of properties below Rs. 100 to be only by registered instruments in the numerous classes of cases where the vendee is already in possession as tenant or mortgagee. With due deference to the learned Judges who decided *Sibendra Pada Banerjee* v. *Secretary of State for India in Council* (1), we are unable to accept that case as a correct exposition of the provisions of section 54 of the Transfer of Property Act. The conclusion we have come to is that, if there was an oral sale of the properties, the fact that the vendee was already in possession would not render the sale invalid if the vendor had by appropriate declarations or acts converted the possession of the vendee as mortgagee into one as purchaser. The difficulty in the present case, however, arises from the fact that no oral sale has been pleaded; on the contrary, the case for the defendants has been that there was an unregistered document evidencing the sale which was accompanied by delivery of possession. No issue was raised as to any oral sale having preceded Exhibit II, but issues 1 and 2 are framed on the footing that the defendants' title is based on a deed of sale coupled with delivery of possession. Under these circumstances we do not think that it is open to the appellants to set up an oral sale as to which there was no issue or any evidence.

The position, therefore, is that the sale-deed relied upon by the defendants is invalid for want of registration, as section 54 of the Transfer of Property Act requires all sale-deeds, if in writing, to be registered. Section 3 of the Transfer of Property Act provides that section 54 of the Act shall be read as supplemental to the Registration Act. The effect, therefore, of section 4 read with section 54 of the Transfer of Property Act is to make all sale-deeds compulsorily registrable irrespective of the value of the property. There is therefore, in this case no competition between a document which is optionally registrable and a registered document. The competition is between an invalid and a valid sale-deed. It is argued by the appellants' Vakil that, as the defendants had possession for 12 years before the suit, they acquired title by prescription and that even assuming that the sale-deed in their favour was invalid, it must be taken that their possession was an assertion of absolute title as vendees. The difficulty in accepting this contention of the appellants' Vakil is that as the sale-deed (Exhibit II) is required by law to be registered, it is not admissible in evidence even for the purpose of showing the nature of the appellants' possession. In *Subbayya* v. *Madduletiah* (8) it was held that an unregistered document is inadmissible to prove the nature of the possession of the person claiming under it. So far as this Presidency is concerned, the balance of authority is for holding that the establishment of title by adverse possession is a transaction affecting immoveable property. If the defendants' sale-deed cannot be looked into for the purpose of determining the nature of their possession, there are no materials for holding that their admitted previous possession as mortgagees was altered or that they acquired by prescription absolute title as purchasers.

The second appeal fails and is dismissed with costs.

Appeal dismissed.

(7) 7 B. 452.

(8) 17 M. L. J. 469.

GOVINDAN NAMBIAR *v.* KANNAN NAMBIAR.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL NO. 1121 OF 1912.
August 6, 1914.
Present:—Mr. Justice Ayling and
Mr. Justice Tyabji.
AYILLATH MELAVITTIL GOVINDAN NAMBIAR AND OTHERS—PLAINTIFFS—APPELLANTS
versus
CHEMBRANI VITTIL PARKUM KANNAN NAMBIAR, KARNAVAN AND MANAGER OF AYILLIATH MELEAVITU TARWAD, AND OTHERS—DEFENDANTS—RESPONDENTS.

Malabar Law—Karnavan *erecting building on* tarwad *property—Burden of proof.*

Where a *karnavan* of a Malabar *tarwad* sets up a title in himself to buildings erected by him while in management of the *tarwad* property, the burden is upon him to establish that the structure and the improvements on the land were made out of his own private property and not out of the *tarwad* property.

Vira Rayen v. *Valia Rani Pudia Kovilagom Calicut*, 3 M. 141, *Uramkumarath Kannan* v. *Uramkumarath Tanju*, 5 M. 1, followed.

Second appeal against the decree of the District Court of North Malabar, in Appeal Suit No. 122 of 1910, preferred against that of the District Munsif of Cannanore, in Original Suit No. 85 of 1908.

This second appeal coming on for hearing on the 12th November 1913, and having stood over for consideration till the 2nd of December 1913, the Court delivered the following

JUDGMENT.—The plaintiffs sue "to establish that the registered gift-deed, dated the 16th April 1903, executed by the 1st defendant in favour of defendants Nos. 5 to 15 on the pretext of the 1st defendant possessing *kuzhi kanom* right over the scheduled properties, is invalid, and that the 1st defendant has no special right over the scheduled properties as described in the gift-deed, and for the surrender of the possession of those properties by the defendants to the plaintiffs on behalf of the *tarwad*." The first issue raised by the District Munsif was as follows:—

"Did the *kuzhi kanoms* and *chamayams* gifted by defendant No. 1 to defendants Nos. 5 to 15 belong to the 1st defendant as his private and exclusive property as alleged by him or to his *tarwad*, as alleged by the plaintiffs."

The real question, however, between the parties is, whether the plaintiffs and their *tarwad* are entitled to the value of the structure and improvements existing over the land which is referred to in the plaint, or whether the defendants Nos. 5 to 15 are entitled to receive compensation for such structure and improvements before they can be made to give up possession of the land to the *tarwad*. This point seems to have been rather obscured in the lower Courts, perhaps owing to the mass of evidence that was adduced by both sides. It was suggested before us that all the parties must have proceeded on the basis that, if the 1st defendant proved that he was in possession of the land in 1862 under Exhibit VII, then the defendants must succeed. This may have been so, but there is nothing to show that it was so. As the findings stand, they seem to us to be inconclusive as to the real issues in the case. The District Judge finds that Exhibit VII is not forged, and it would seem, therefore, that in his opinion the 1st defendant has been in possession of the property since 1036-1037 corresponding to 1862. The learned Judge also expresses the opinion that the *tarwad* has not discharged the burden of proving that the *tarwad* built the house and allotted the properties for the maintenance of the 1st defendant's branch. But the learned Judge does not discuss the evidence relating to what appears to be the real point in the case,—whether the structure and improvements were erected and made by the 1st defendant with his own funds, or whether they were made out of the funds of the *tarwad*. In the former case, the defendants must succeed and in the latter case, the plaintiffs. We are informed that there is direct evidence on the point as to the source of these funds, and it seems to us that it is necessary that there should be a definite finding with reference to all the evidence in the case on that point,—which is the real question between the parties.

In this connection, it has been argued on behalf of the plaintiffs that, even if the 1st defendant is shown to have been in possession of the lands prior to 1877-1878 (when the plaintiffs say that the 1st defendant was put in possession by the *karnavan* of the *tarwad*), still the burden is on the 1st defendant to prove that the structure and the improvements

on the land were made out of his own private property, and not out of the *tarwad* property. Reliance is placed for this contention on *Vira Rayen* v. *Valia Rani Pudia Kovilagom, Calicut* (1) where it was stated on page 143: "All property acquired by the holder of a *stanom*, which he has not disposed of in his life-time, or shown an intention to merge in the property attached to the *stanom*, becomes, on his death, the property of the *kovilagom* in which he was born. Property acquired by any member of the *kovilagom* is, in accordance with the principle recognised in the case of the joint Hindu family, presumed to be the common property of the *kovilagom*, unless proof is given that it has been acquired otherwise than with the aid of the common funds: and as in other Malabar families, properties are sometimes entrusted to the possession of a member who is not by the customary law entitled to their management, either for the purposes of management or as an assignment for maintenance." Reliance is also placed on what appears at page 145, *viz.*, "It lay on the first appellant, who being a member of the *kovilagom* is found in possession of property, to prove a separate title to it," and on the following passage from the judgment in *Uramkumarath Kannan* v. *Uramkumarath Tenju* (2): "As to the compensation for improvements claimed, we agree with the Court below that an *anandravan* is not entitled to charge for improvements made in the course of the use of the *tarwad* property."

With reference to the case of *Uramkumarath Kannan* v. *Uramkumarath Tenju* (2) it was, however, pointed out to us that there the District Judge had held that the *tarwad* was entitled to the improvements, "because there was nothing to show that the 1st defendant expended private funds and they merely represented the labour of a junior member."

In the present case, however, it is not a question merely of presumption, but it is stated to us that there is a direct evidence on the point. The 1st defendant is at present the *karnavan* of the *tarwad*, and, though the gift was made shortly before he assumed that office and the improvements in question were made long prior to that date, still the documents, accounts and other records relating to the property of the *tarwad* must presumably be with him, and he must have taken charge of the documents relating to the period when the late *karnavan*, his brother, was in charge of the *tarwad* properties. In any case, if he expended his own private funds in putting up the structure and in making the improvements which are the subject-matter of this suit, it would appear that there would be little difficulty in his being able to establish it.

It must also be observed that there are three items of property forming the subject-matter of the litigation. The evidence relating to the three items is not identical. They must be considered separately.

We, therefore, send the case back for a finding in the light of the observations we have made on the following issue:—

"Whether any building was erected or improvement made by the 1st defendant out of his own private funds on any of the three items of property referred to in the plaint?"

The finding should be submitted within six weeks from the date of the receipt of this order, and one week will be allowed for filing objections.

In compliance with the above the District Judge of North Malabar submitted the following

FINDING.—It is admitted by the learned Vakil for the 5th defendant that the evidence does not show that the 1st defendant had private funds nor that he spent private money on the buildings found on any of the items of property. All that the Vakil says is that the *tarwad* did not prove that they built the buildings nor did they allege that the 1st defendant built them under the direction of the *karnavan* or with the *karnavan's* funds. Therefore the buildings and improvements found by the Commissioner on items Nos. 1, 2 and 3 must have been built or made out of private funds. But I find that the improvements on items Nos. 1, 2 and 3 come in all to Rs. 1,884-14-8 and the only private funds that can be proved are the trifling rents of the *parambas* which 1st defendant says the *karnavan* allowed him to appropriate for his maintenance. As the 5th defendant's Vakil cannot prove the fact of the improvements being made by 1st defendant out of priyate funds, I have not called on the other side and I return a finding in the negative.

(1) 3 M. 141.
(2) 5 M. 1.

HODGKINSON LACK *v.* P. GALLAGHER.

This second appeal coming on this day for final hearing, after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding and allow the appeal. The plaintiffs will be given a decree as sued for with costs throughout.

Appeal allowed.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 6 OF 1914.

June 17, 1914.

Present:—Mr. Shaw, KT., J. C.

CAPTAIN HODGKINSON LACK, I. M. S.
PLAINTIFF—APPLICANT

versus

P. GALLAGHER—DEFENDANT
—RESPONDENT.

Contract Act (IX of 1872), ss. 9, 70—Medical fee—Implied contract—Reasonable amount.

In the absence of an express agreement for payment of fees a medical man is entitled to a reasonable remuneration to be fixed by the Court.

Mr. *R. G. Aiyangar*, for the Applicant.

JUDGMENT.—Plaintiff-applicant, who is the Civil Surgeon of Bhamo, sued to recover Rs. 32, being his fees for two professional visits to the defendant-respondent's wife.

The Small Cause Court gave him a decree for Rs. 4 only and directed that this sum should be paid by monthly instalments of Rs. 2, and further the Court refused the plaintiff-applicant costs.

The Judge relied upon a case, *Rawlins* v. *Daniel* (1), quoted in Woodman's Digest where it was held that (under the circumstances of that particular case) one-fifth of the monthly income of the defendant was the fair amount to which the plaintiff was entitled for his professional attendance on the family of the defendant (who was a public servant) for a year.

The Judge also held that plaintiff-applicant was not entitled to claim fees for his second visit, because he made it without being specially summoned and, as the plaintiff-applicant said, in the ordinary course of his work to see how his patient was progressing; that the plaintiff-applicant was not justified in refusing Rs. 10 which were sent to him by money order, and that his conduct in attempting to charge the defendant-respondent's family individually was most reprehensible. The plaintiff-applicant admitted that he refused to accept a money order for Rs. 10 sent by defendant-respondent's wife, and that when defendant respondent objected to the charge made for the second visit and begged plaintiff-applicant to reduce his claim on the ground of defendant-respondent's small income, he wrote a letter to defendant-respondent pointing out that on the occasion of both visits he was asked to attend to a child, and enclosing 'modified bill' charging Rs. 32 more for attendance on the child or Rs. 64 in all, and he explained that he sent the modified bill merely to show defendant-respondent that the first bill was not excessive.

The defendant-respondent apparently did not file a written statement, but the Judge examined him at the first hearing, and he then admitted that no fees had been mentioned between plaintiff-applicant and him and said that his salary was Rs. 80 a month, that his mother, wife and child were dependent on him, and that he wished to pay by small instalments; in other words, he did not deny his liability, or dispute the correctness of the amount, which the plaintiff-applicant claimed.

The Agra case quoted in Woodman's Digest cannot be followed here. The full report of it is not available. The case was decided by the old High Court of Agra between 1866 and 1868. There is no means of knowing what sum the plaintiff claimed or what the defendant's income was, the claim may have been for thousands of rupees and the defendant's monthly salary may have been in four figures. But we do know that remuneration for a year's attendance was claimed, and that was not at all what plaintiff-applicant sued for in the present case. The only point of resemblance would seem to have been that no agreement had been come to expressly about the fees to be paid, and consequently it fell to the Court to give the plaintiff a decree for a reasonable sum. A contract of this kind is what is called an "implied"

(1) 2 Agra H. C. R. 56.

contract, where the implication is of fact. It is not an "implied" contract which is a legal fiction, a "constructive" contract or "*quasi*" contract, the class of cases referred to in sections 68 to 72, Contract Act; it is a real contract where the promises are not expressed in words but are to be gathered from the conduct of the parties and the surrounding circumstances. This description of contract is also spoken of in the books as an "inferred" or "tacit" contract. An instance given is that of a customer eating something exhibited for sale in a shop, say a pastry cook's shop. There is an implied or inferred promise on the part of the shopkeeper to sell the article to the customer for the notified price or a reasonable price, and there is an implied or inferred promise on the part of the customer to pay the notified price or a reasonable price (see Addison on Contract, 10th Edition, pages 412 *seqq.*, Pollock on Contract, 8th Edition, pages 11 *seqq.*, also section 9, Contract Act, and Cunningham and Shephard's and Pollock's notes to that section.)

Cunningham and Shephard in their commentary on section 9, Contract Act, say: "Where a relation exists between two parties which involves the performance of certain duties by one of them, and the payment of reward to him by the other, the law implies a promise by each party to do what is to be done by him."

Pollock in his notes on the same section says:—"There is a class of cases, of considerable importance in England, where parties are presumed to have contracted with tacit reference to some usage well known in the district or in the trade, and whatever is prescribed by that usage becomes an additional term of the contract, if not contrary to the general law or excluded by express agreement. Such terms are certainly implied as resulting not from words used, but from a general interpretation of the transaction with reference to the usual understanding of persons entering on like transactions in like circumstances."

In reality the present case perhaps fell within this class. But no usage was actually alleged or proved, by which medical officers in the postion of the plaintiff-applicant are in the habit of charging Rs. 16 a visit.

The decision, therefore, had to go on the general principles before explained.

The question was whether the sum which plaintiff-applicant claimed was reasonable. The Judge of the lower Court, assuming the decision in *Rawlins* v. *Daniel* (1) to lay down a general rule, calculated the proper fee for a visit in the present case to be 1 anna 3 pies, but he saw himself that such charge for one or two visits would be inadequate. A medical officer in the position of plaintiff-applicant is a technical expert, who has gone through a long and expensive course of training and obtained diplomas implying a high degree of professional skill and knowledge, and his services, therefore, are deserving of substantial remuneration. A sum of Rs. 4 for a visit was, in my opinion, almost as inadequate here as 1 anna 3 pies would have been. I consider that plaintiff-applicant's claim of Rs. 16 per visit was not only reasonable, but ordinary and moderate.

In England claims by medical practitioners are dealt with under the Medical Acts and the by-laws framed by Professional Colleges. Here there are no Medical Acts. The Government might, no doubt, lay down rules as to the fees which medical officers in its service should charge to paying patients, but except in regard to Chiefs of Native States it has not done so. On the contrary, in paragraph 152 of the Medical Manual it is expressly declared that all questions which may arise regarding the amount of remuneration for professional services will be left to private adjustment.

Paragraphs 150 and 151 of the same Manual enjoin upon medical officers to come to a clear understanding when first called in about fees, but direct them to respond unhesitatingly when called upon, and to leave the question of fees for consideration after the first visit.

Paragraph 150 also says that in the absence of a special agreement on the basis of a yearly payment it shall be fair to assume that a medical officer's professional services will be paid for by the visit.

Here the plaintiff-applicant disregarded the injunction to arrive at an understanding when first called in or after the first visit. But he did what the same rule declares to be proper in charging by the visit.

In paying a second visit and charging for it, although not specially summoned again, I think that plaintiff-applicant was acting in accordance with what everybody knows to be general practice of medical men, and that he was fully justified in doing so.

I do not think that plaintiff-applicant's letter enclosing the modified bill was in very good taste or displayed the kindness and consideration which one is accustomed to meet with in dealing with the family doctor.

I also do not think that the plaintiff-applicant ought to have refused the Rs. 10 that were sent him. The fact that the money order was sent by defendant-respondent's wife was not a good reason for refusing to accept it; it was accompanied too by a promise of Rs. 10 or more next month.

But I do not consider that these circumstances were sufficient to justify the Court in refusing costs to the plaintiff-applicant.

He was under no obligation to accept a part payment, and the fact that he only claimed Rs. 32 showed his explanation of the "modified bill" to be correct.

The Judge's remarks on plaintiff-applicant's conduct were unduly severe.

In overlooking the fact that defendant-respondent did not dispute the correctness of plaintiff-applicant's claim and in reducing the amount claimed to Rs. 4 on the authority of *Rawlins* v. *Daniel* (1), the Judge of the Small Cause Court, in my opinion, failed duly to consider either the fact or the law and was, therefore, guilty of illegality or material irregularity, and his judgment was not in accordance with law.

The decree of the lower Court is set aside. Defendant-respondent will pay Rs. 32 to plaintiff-applicant with costs. He may pay by monthly instalments of Rs. 10.

The money order and the promise accompanying it show that defendant-respondent can afford to pay Rs. 10 a month.

Decree set aside.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 68 OF 1913.

February 13, 1914.

Present:—Mr. Justice Tudball.

REBECCA STEWART—PLAINTIFF—APPLICANT

versus

DEBI PRASAD—DEFENDANT—RESPONDENT.

Master and servant—Order given by servant under master's instructions—Liability of master.

A person is liable to pay for the work done for him, although the order was not given by him personally, if it is proved that it was conveyed by his servant under instructions from him.

Civil revision from an order of the Judge of the Court of Small Causes, Cawnpore.

Mr. *E. A. Howard*, for the Applicant.

Mr. *A. P. Dube*, for the Opposite Party.

JUDGMENT.—This application arises out of a suit brought by the plaintiff-applicant to recover the sum of Rs. 353, costs of printing certain papers on behalf of the defendant. The charges made were admittedly at double rates and they were in respect of four distinct orders for four sets of papers. The defendant denied his liability in respect of two sets of papers. He pleaded that the rates charged were exorbitant and that the work had been badly done. The Court framed three issues, the first being as to whether the defendant gave the two contested orders and whether he was liable therefor. With the other two we are not concerned in this revision. The Court granted the plaintiff a decree for Rs. 59-2-0, holding that the defendant was not liable for the other two orders. The sum of Rs. 59-2-0, according to the judgment of the Court below, was calculated at Government rates. The only point which is, in my opinion, worthy of notice in this matter is the question of the defendant's liability in respect to the two contested orders. The lower Court in its judgment says that these orders were given by one Jai Narain Bajpai, a witness for the plaintiff "who is in the service of the plaintiff and swears that he gave these two orders." On this ground it held that the witness, Jai Narain Bajpai, was liable and not Rai Debi Prasad. The point taken on behalf of the applicant is that this witness distinctly stated that he gave those orders under the instructions of Rai Debi Prasad and that the mere fact that the order was conveyed to the plaintiff by Jai Narain

Bajpai is not a sufficient ground for holding that the defendant was not liable. An affidavit has been filed by Jai Narain Bajpai in which he says:—"It is true that I gave the two orders, but they were given under the instructions of Rai Debi Prasad and I solemnly affirm and say that this is what I stated in my evidence before the Judge, Small Cause Court, Cawnpore." This being so, it seems to me that the lower Court was in error in deciding that the defendant was not liable merely by reason of the fact that the order was conveyed to the plaintiff by the witness, Jai Narain Bajpai, and not by Rai Debi Prasad in person. It is a significant fact that Rai Debi Prasad took no objection on the score of liability for these two orders when the bill was presented to him, though, of course, he did object to the amount of the bill and the rate charged. The lower Court has calculated what would be due on these orders and it comes to Rs. 26-4-6. In my opinion on the evidence the plaintiff ought to have got a decree for this sum in addition to the sum of Rs. 59-2-0 which has already been decreed to her. I allow the application so far that I modify the decree of the Court below and give the plaintiff a decree for the additional sum of Rs. 26-4-6. The parties will pay and receive costs in both Courts in proportion to failure and success.

Application allowed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 224 OF 1909.

July 20, 1914.

Present:—Sir Edward Power Wallis, Offg. Chief Justice, and Mr. Justice Kumaraswamy Sastri.

Sri Meerja Raja POOSAPATI VIJARAMA GAJAPATHI RAJA MAHARAJ MANYA SULTAN BAHADUR OF VIZIANAGARAM—PLAINTIFF—APPELLANT

versus

THE COLLECTOR OF VIZAGAPATAM AND OTHERS—DEFENDANTS—RESPONDENTS.

***Madras Land Revenue Assessment Act** (I of 1876)—Separate registration—Permanent grantee at favourable rent.*

Regulation XXV of 1802 does not affect the validity of transfers by *zemindars*, but only saves the right of Government.

A permanent lease of a *zemindari* is not a transfer of proprietary rights within the meaning of section 8 of Regulation XXV of 1802. A permanent grant at a favourable rent of the nature of *jodi*, *kattubadi* or *poruppu* is not a transfer of ownership and the grantees are not liable to have their lands separately registered under Act I of 1876 and separate assessment imposed on them.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Vizagapatam, in Original Suit No. 34 of 1906.

Mr. *S. Srinivasa Iyengar* (with him Mr. *K.V. Krishnasawmi Aiyar*), for the Appellant.

Messrs. *C. Sidney Smith*, *R. Narasimham*, *V. Ramesam*, *S. Doraiswami Aiyar*, for the Respondents.

JUDGMENT.—We think the Subordinate Judge in this case was right. The first question relates to the nature of the interest at present enjoyed by the defendants. By a deed dated the 1st June 1808, the predecessor of the present plaintiff granted a *mokhassa patta* to three individuals of three villages without reserving any rent. There is no doubt, and it has been so held in some cases in this Court, that such tenures were formerly believed to be resumable on the death of the grantor. On the death of the grantor in this case when the estate came under the management of the Collector as manager in 1845, these villages were resumed. That is to say, the villages were attached or kept under *zuft* and the profits of the villages were enjoyed apparently by the *zemindar* for some years. Then in the year 1853 a petition was put in, Exhibit B, stating that the villages had been granted on service tenure to the ancestors of the petitioners and that the *zemindar* had been pleased to release them from attachment "to be enjoyed by us, nine sons of the aforesaid Vijiagopalarazu (one of the grantees). I agreed to pay a *kattubadi* of Rs. 300 a year newly fixed." Then Exhibit C is an order of the *zemindar* giving effect to this arrangement and Exhibit D is a further order addressed to the office *Amin* and it says: "Inasmuch as the said villages were not formerly charged with *kattubadi* and as Seetharamarazu, one of the sons of Vijiagopalarazu (that is to say, one of the original grantees), presented a *sanad* to us stating that the nine sons of late Kakarlapudi Vijiagopalarazu would pay the *kattubadi* of Rs. 300 every year from

the current *fasli* year 1263 and enjoy the same as before, and act in obedience to the orders of the *Sircar*, the said three villages should be released from attachment and given to the nine persons of the family to be enjoyed by all the members of the said family." Now the three villages have been enjoyed for the past sixty years subject to the payment of this *kattubadi* without any question being raised about it and we must take it, that the tenure on which they held is that they should hold the land subject to an annual payment of this *Kattubadi* of Rs. 300 and that in effect there was a re-grant of the three villages in 1853.

Those are the terms of the tenure with which we have to deal. Subsequently some years ago the *zemindar* sought to resume these villages and instituted a suit for that purpose, which was dismissed. He is now seeking to take advantage of Act I of 1876 for the purpose of getting these three villages separately registered in the names of the descendants of the grantees and having a proportionate *peishcush* or Government revenue charged upon them, thus entirely altering the terms upon which they had been held for so many years by the grantees, which terms are, that they should enjoy the villages on a payment of Rs. 300—*kattubadi*—annually, leaving the *zemindar* to pay the proportionate *peishcush* which, as the mere fact of the institution of this suit shows, is probably a considerably larger sum. Now there are, it is not denied, very numerous other villages in the Northern Circars and possibly elsewhere which are held on similar tenure and in which a similar operation might be attempted if the law allowed it. Therefore the question is one of considerable general importance as to whether grantees holding on perpetual grants subject to the payment of a small rent under the name of *jodi*, *kattubadi* or *poruppu*, are liable to have their lands separately registered under this Act and separate assessment imposed upon them.

Now the history of the question is this. Regulation XXV of 1802 provided that proprietors of land should be at liberty to transfer without the consent of Government, that such transfers should be valid, but that "unless such sale, gift or transfer should have been regularly registered at the office of the Collector, and unless the public assessment shall have been previously determined and fixed on such separated portions of land by the Collector, such sale, gift or transfer shall be of no legal force or effect, nor shall such transaction exempt a *zemindar* from the payment of any part of the public land revenue assessed on the entire *zemindari* previously to such transfer, but the whole *zemindari* shall continue to be answerable for the total land-tax, in the same manner as if no such transaction had occurred." Notwithstanding the generality of the language of the latter part of this section, it has been held by the Privy Council in the Ettiapuram case of *Venkataswara Yettiapah Naicker* v. *Alagoo Moottoo Servagaren* (1) and elsewhere that this section does not affect the validity of transfers as between the parties, but only saves the rights of Government. The Regulation also provided for the manner in which the proportionate assessment was to be fixed and in Regulation XXVI, there was a provision as to the separate registration of portions of settled estates which had been alienated in a Court sale; so far as I know there was no specific legislative provision as to how separate registration was to be enforced in other cases though, no doubt, the right to such separate registration was recognized in certain cases. In that state of things Act I of 1876 was passed. It is described as "An Act to make better provision for the separate assessment of alienated portions of permanently settled estates," and it says: "whereas it is desirable to make better provision for the separate assessment to land revenue of portions of permanently settled estates alienated by sale or otherwise. It is hereby enacted as follows:—

"1. The alienor or alienee of any portion of a permanently settled estate, or the representative of any such alienor or alienee, may apply to the Collector of the District in which such portion is situate for its registration in the name of the alienee and for its separate assessment in respect of land revenue.

"2. The Collector shall thereupon hold an inquiry as to who is the present owner of the property in respect of which the application is made." So that what the Collector has to do is to find out who is the present owner; and the intention of the

(1) 8 M.I.A. 327; 4 W. R. (P.C.) 73; 1 Suth. P. C. J. 440; 1 Sar. P. C. J. 788; 19 Eng. Rep. 555.

Legislature is that it should be only where there has been a change of ownership that separate registration and assessment should take place. Now the question is, whether there can be said to have been a change of ownership by virtue of this grant of these three villages to the grantees subject to a reserved payment of *kattubadi* or favourable rent of Rs. 300. Assuming that the grant was a permanent one and was not liable to resumption, we do not think that it can stand on any higher footing than a permanent lease. It is a grant subject to a reservation of annual money payment or rent and, therefore, it seems to us to be of the charactor of a permanent lease. Now there is no authority for saying that a permanent lease is included in the meaning of the term 'owner' and if it had been intended to include such a person within the term 'owner,' we think there would have been a definition clause including him. Numerous authorities may be cited in support of this view. It was expressly held by the Privy Council that a permanent lease by a *zemindar* is not a transfer of his proprietary right within the meaning of section 8 of Regulation XXV of 1802 in the case of *Vencataswara Yettiapah Naiker* v. *Alagoo Moottoo Servagaren* (1), where their Lordships observed: "This is not an alienation of the *zemindari* or any part of it. It is a perpetual lease of a distinct portion of the *zemindari*, which constituted a distinct portion before the appellant's title to the *zemindari* accrued and such an estate could not, without great violence to the language, be considered as a transfer within the words of the Regulation." The reference is to section 8 of Regulation XXV of 1802 which deals with the transfer by proprietors of their proprietary right and is, therefore, express authority for the proposition that a perpetual lease is not a transfer of proprietary right or ownership and does not constitute the lessee the proprietor or owner within the meaning of Regulation XXV of 1802. As already pointed out, Act I of 1876 is supplementary to Regulation XXV of 1802 which must be read with reference to it. The same view has been taken in *Kshetrabaro Bissoyi* v. *Sobhanapuram Hari Krishna Naidu* (2) with regard to the language of Act III of 1895, section 5. There the learned Judges say: "The question then remains whether the grant of a permanent lease is a transfer of ownership," and following the ruling of the Privy Council which we have just referred to, the learned Judges held that a permanent lease is not a transfer of the prorpietary right or ownership. We may refer also to two recent decisions of the Privy Council, one in *Kumar Hari Narain Singh* v. *Striram Chakravarti* (3) and another, *Durga Prashad Singh* v. *Brajo Nath Bose* (4), in which it has held that a permanent grant at a favourable rent of the nature of the *kattubadi* reserved in this case, was not a transfer of ownership so as to deprive the grantor of his mining rights in the land which are incidental to his character as owner. And in the first case, *Hari Narain Singh* v. *Striram Chakravarty* (3), his right is distinctly based upon his possessing the character of owner. The Subordinate Judge has quoted various authorities to the same effect in his judgment: "Markby in his Elements of Law (5th Edition) observes: 'however numerous and extensive may be the detached rights, however insignificant may be the residue, it is the holder of this residue of right whom we always consider as the owner.'" This is, of course, from the legal point of view; from the economic point of view a permanent lease or a condition of fixity of tenure may, no doubt, be spoken of as a condition of divided ownership, but we are merely considering the accepted meaning of the word 'owner' in the language of the law. The decision of the Privy Council in Fischer's case, *Robert Fischer* v. *Secretary of State for India in Council* (5), does not affect the present case, because there what was contemplated from the first was an out and out gift of the village to Mr. Fischer to be separately registered and according to the construction put upon the various documents, their Lordships came to the conclusion that the *peishcush* or *poruppu*, as it was called in different documents, was only intended to be a temporary payment to the *zemindari* pending the separate registration and assessment

(2) 5 Ind. Cas. 125; 7 M. L. T. 94; 20 M. L. J. 417; 33 M. 340.

(3) 6 Ind. Cas. 785; 14 C. W. N. 746; 11 C. L. J. 653; 7 A. L. J. 633; 8 M. L. T. 51; 12 Bom. L. R. 495; 20 M. L. J. 569; 37 C. 723; (1910) M. W. N. 309; 37 I. A. 136.

(4) 15 Ind. Cas. 219; 16 C. W. N. 482; (1912) M. W. N. 425; 11 M. L. T. 337; 9 A. L. J. 462; 15 C. L. J. 461; 14 Bom. L. R. 445; 23 M. L. J. 26; 39 C. 696; 39 I. A. 133.

(5) 22 M. 270 (P. C.); 26 I. A. 16; 3 C. W. N. 161.

which was contemplated from the very first. With regard to the case in *Kamalammal* v. *Raju Naiker* (6) and the observations there cited, we may point out that that was a case of gift, and obviously where there is a case of gift, that is, a case of out and out alienation, the donee becomes the owner. But those cases are quite different from the present case which is, in our opinion, merely that of a permanent lease at a favourable rent. We think that it would be giving an extension which was never intended and which would be of very dangerous consequence to the Act I of 1876, if we were to hold that the creation of a perpetual lease at a favourable rent rendered the lessee the owner so as to subject him to the liability of having the land included in the lease separately registered and separately assessed. I may also add that a decision to the same effect has already been given by this Court by Mr. Justice Miller and Mr. Justice Munro in an unreported case, Appeal 141 of 1905.

In the result the appeal fails and is dismissed with costs. No order as to costs of the Secretary of State.

Appeal dismissed.

(6) 19 M. 308; 6 M. L. J. 179.

MADRAS HIGH COURT.

CIVIL APPEAL No. 238 OF 1911.

September 22, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.

Sri Rajah Saheb Meharban Dostan Sri Rajah RAVU VENKATA KUMARAMAHIPATHI SURYA ROW BAHADUR GARU SIRDAR, RAJAHMUNDRY SIRCAR, RAJAH OF PITTAPUR, THROUGH HIS DEWAN AND AUTHORIZED AGENT, P. SEETHARAMIAH PANTULU—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF GODAVARY—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), ss. 69 and 70—Improvement—Benefit conferred without knowledge or consent—Contribution, right of.

A person should not be made liable to pay for a benefit conferred on him without his knowledge or consent, without giving him an option of declining to accept the benefit, inasmuch as no one can be said to enjoy a benefit which he gets without any option of rejecting or accepting it. But the acceptance or rejection should not precede the conferring of benefit.

Therefore, by putting up a masonry dam across a river and thereby increasing the flow of water to other riparian owners a *zemindar* cannot claim contribution from them for the improvements effected by him, unless they are given an opportunity of accepting the benefit and they adopt the benefit with that knowledge.

Gajapathi Kristna Chandra Deo v. *Srinivasa Charlu*, 20 Ind. Cas. 445; 25 M. L. J. 433 at p. 436; 14 M. L. T. 20 at p. 22; (1914) M. W. N. 99, *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Marakayar*, 3 Ind. Cas. 110; 33 M. 15; 6 M. L. T. 162; 19 M. L. J. 489 and *Lampleigh* v. *Braithwait*, 1 Sm. L. C. 141; Hob. 105; Moore 866; Brownl. and Gold. 7, followed.

Damodara Mudaliar v. *Secretary of State for India*, 18 M. 88; 4 M. L. J. 205, distinguished.

Jarao Kumar v. *Basanta Kumar Roy*, 32 C. 374 at p. 377, *Mohendra Ghoshal* v. *Bhuban Mardana*, 6 Ind. Cas. 810; 38 C. 1; 12 C. L. J. 566; 14 C. W. N. 945, *Smith* v. *Dinonath Mookerjee*, 12 C. 213, *Abdul Wahid Khan* v. *Shaluka Bibi*, 21 C. 496 at p. 504 (P.C.); 21 I. A. 26, *Khetra Nath Roy* v. *Mahomed Uzir Mukteer*, 21 Ind. Cas. 102; 19 C. L. J. 525; *Mahatha Harsankar Sahai* v. *Bandhu Sahu*, 22 Ind. Cas. 720, *Joy Narain Singh* v. *Badri Das*, 13 Ind. Cas. 144; 16 C. L. J. 156 and *Bhagwan Singh* v. *Muhammad Mazhar Ali Khan*, 23 Ind. Cas. 339; 36 A. 273 at p. 276; 12 A. L. J. 394, referred to.

Appeal against the decree of the Court of the Subordinate Judge of Cocanada, in Original Suit No. 53 of 1909.

FACTS appear clearly from the judgment of Spencer, J.

Mr. *V. Ramesam* for Mr. *S. Srinivasa Aiyangar*, for the Appellants:—Referred to the Board's proceedings directing contributions to be levied from others: the Raja of Pittapur paid the amount and collected it from others.

He referred to *Mohendra Ghoshal* v. *Bhuban Mardana* (1) which is a case under section 310A, Civil Procedure Code, 1882.

[SANKARAN NAIR, J.—In that case there is some difference of opinion. The Chief Justice says that section 70 applies while Justice Dass says section 69 applies. If that be the case, 34 Madras has no application.]

Mr. *V. Ramesam*.—Yes it is so. In the Calcutta case the person who refused to pay was not a party.

[SANKARAN NAIR, J.—Are you prepared to face this? Suppose on the fact we come to the conclusion that the construction of it was necessary in the interest of the estate and if it turns out to the benefit of all, would you

(1) 6 Ind. Cas. 810; 38 C. 1; 12 C. L. J. 566; 14 C. W. N. 945.

say that Government will still remain bound? As I understand the facts, both wanted to construct but you constructed it under the impression that you will be able to get a contribution. You would have gone on, whether you got a contribution or not.]

Mr. *V. Ramesam.*—The officers wishing to do it, acted in a dual capacity; all the officers of Government knew it and subsequently adopted the measure.

In *Jog Narain Singh* v. *Badri Das* (2) there is an express reference to the Madras case and this is a case under section 310A.

[SANKARAN NAIR, J. —Do they put it under section 69 or 70?]

Mr. *V. Ramesam.*—Under section 70. It is the case of a mortgagee.

[SANKARAN NAIR, J.—Then it is a case of section 69 and not of 70.]

Mr. *V. Ramesam.*—*Ajodhya Singh* v. *Jannoo Lal* (3); *Khettra Nath Roy* v. *Mahomed Uzir Muktear* (4); *Prosonno Kumar Bose* v. *Jamal-ud-Din Mahomed* (5) are also on the same point.

[SANKARAN NAIR, J.—According to the above case, there is a liability].

Mr. *V. Ramesam.*—*Mahatha Harsankar Sahai* v. *Bandhu Sahu* (6); *Jarao Kumar* v. *Basanta Kumar Roy* (7); *Gajapathi Kristna Chandra Deo* v. *Srinivasa Charlu* (8) are also of the same effect.

Mr. *T. Rangachariar*, for the Respondent:—Referred to the portion of the evidence which established that the Government villages are benefited.

[SANKARAN NAIR, J.—The effect of building up the *dam* is to secure the supply to all the four channels.]

Mr. *T. Rangachariar* referred to Exhibit K and contended:—Benefit has already existed. It has substituted another machinery for it. I was not benefited by the arrangement. The water which I was getting I am already bound to get under a duty. The Government were not consulted prior to the construction of the work. In order to have the legal liability of Government fixed, there must be evidence to show that Government knew it.

A man does a thing to protect himself which enures also to the benefit of somebody else; there is nothing to show that I have adopted it.

This is not a case under section 69; nor can it come under section 70 of the Indian Contract Act. I have no option in the matter. The water comes on to me out of its own accord.

[SANKARAN NAIR, J.—Do you mean to say that the compensation is for the sluice built, and not for the benefit of water which I enjoyed?]

Mr. *T. Rangachariar.*—There is nothing which I can restore to him. That implies a discretion to take or refuse which is essential for the application of the section.

[Mr. SPENCER, J.—How can there be restoring a thing done when the thing restored is not something else?]

Mr. *T. Rangachariar.*—In *Ram Tuhul Singh Biseswar Lal Sahoo* (9) it is said that it is not in all cases where one man is benefited by another that one can expect return of the benefit.

Abdul Wahid Khan v. *Shaluka Bibi* (10). No civil obligation is incurred unless it is expressly or impliedly entered into. *Keighley Marsted & Co.*, v. *Durant* (11); Lord Macnaghten dealing with the above case says:—

"No civil obligation can be created by or founded upon undisclosed intentions."

Yogambal Boyee Ammani Ammal v. *Nyana Pillai Marakayar* (12) again cited: merely enjoying the benefit does not give rise to obligation.

Damodara Mudaliar v. *Secretary of State* (13) and *Natesan Chetty* v. *Vengu Nachiar* (14).

JUDGMENT.

SPENCER, J.—This suit was brought by the Rajah of Pittapur against the Secretary

(2) 13 Ind. Cas 144; 16 C. L. J. 156.
(3) 6 Ind. Cas. 341; 14 C. W. N. 699.
(4) 21 Ind. Cas. 102; 19 C. L. J. 525.
(5) 15 Ind. Cas. 55.
(6) 22 Ind. Cas. 720.
(7) 32 C. 374 at p. 377.
(8) 20 Ind. Cas. 445; 25 M. L. J. 433 at p. 436; 14 M. L. T. 20 at p. 22; (1914) M. W. N. 99.
(9) 2 I. A. 131 at p. 143; 15 B. L. R. 208 (P. C.); 23 W. R. 305.
(10) 21 C. 496 at p. 504(P. C.); 21 I. A. 26.
(11) (1901) A. C. 240 at p. 247; 70 L. J. K. B. 662; 84 L. T. 777; 17 T. L. R. 527.
(12) 3 Ind. Cas. 110; 33 M. 15; 6 M. L. T. 162; 19 M. L. J. 489.
(13) 18 M. 88; 4 M. L. J. 205.
(14) 3 Ind. Cas. 701; 20 M. L. J. 20 at p. 22; 6 M. L. T. 313; 33 M. 102.

of State for India in Council to compel the Government to pay a contribution towards the cost of a permanent head sluice at Timmapuram, which the Pittapur Estate constructed at a cost of Rs. 18,606-14-9 to take the place of the temporary dams that used to be put up to regulate the flow of water in the river Yeleru at intervals of 18 days, when the turn of the Pittapur Estate *ryots* came round. It is alleged in the plaint that the *ryots* of certain Government villages in the Peddapur *Taluk*, who cultivate their lands with the aid of the water of the Yeleru lower down for a turn of 4-7/40 days in each month, have been benefited by getting a more copious supply owing to this construction, and it is claimed that Government being a lower riparian owner is on this account bound by virtue of section 70 of the Contract Act to bear its share of the expense.

From the correspondence, which is the only evidence in the case, it appears (see Exhibit IV) that in 1893 certain Peddapur *ryots* objected that the *bunds* put up during the turn of the Pittapur Estate were not strong enough. I think, therefore, that it may be safely concluded that the cultivators lower down the stream including the Government *ryots* received some benefit by the Pittapur Estate regulating the supply and preventing wastage of water. The Collector of Godavari in his letter, Exhibit XI, dated 8th April 1909, states that the utility of the work to all the riparian owners below was always recognised, that its construction by Government itself in the first instance was advocated by him, and that there can be no question of the moral obligation of Government to bear its *quota* of the cost.

There can also be no doubt, as observed by the Subordinate Judge, that the work was lawfully done. Whether it was done without an intention of being a gratuitous act depends on the inferences to be drawn from the following observations of the Subordinate Judge which seem to be fully supported by the evidence. He says in paragraph 9 of his judgment:—"No doubt the Court of Wards and its officers expected to receive contribution from the Government for the above work, but there is nothing to show that the fact that the construction of the work was undertaken with such an expectation of contribution from the Government, was ever made known to the Government. * * * * * The matter went to the notice of the Government only after the work was completed and the Government declined to be liable to pay the contribution. * * * * * * The work was done chiefly in the interests of the plaintiff himself to avoid the recurring waste of money in the raising and removal of the temporary *bunds* from time to time." He also refers to Exhibit K, in which the manager states:—"The Pittapur Estate is annually incurring large expenditure on account of this particular *bund* and it will be cheap for it to bear the whole expenditure of the sluice even if it should amount to Rs. 20,000."

When the Board of Revenue recommended, the Government should pay Rs. 5,168-5-11 as a contribution for the construction of this sluice, the Government pointed out in Exhibit XI that they had constructed at their own cost certain other masonry dams and regulators by which the Pittapur Estate was relieved of trouble and expense and inquired whether their contribution to the estate could not be reduced proportionately. This was on April 7th, 1908, after the construction had reached completion, which appears to have occurred on some date prior to Exhibit VIII, which is dated September 21st, 1906. In a letter to the Executive Engineer, Exhibit VII, dated December 8th, 1904, the Collector stated that the regulating works at the head of Timmapuram channel were for the benefit of the Pittapur Estate and in consequence the cost would be solely borne by that Estate. The question of set-off raised by the Government in Exhibit XI and in paragraph 8 of their written statement forms the subject of the 3rd issue in this suit which has not as yet been decided.

As for the application of section 70 of the Contract Act, if a person does a thing primarily for his own benefit and is benefited thereby, it must always be a question whether he did not intend to do it gratuitously as regards others who happen to be benefited by the same act. In this respect I agree with the observations of Miller, J., in *Gajapathi Kristna Chandra Deo* v. *Srinivasa*

Charlu (9): "He will then have to show that what he did was done for the defendant, and it clearly may be very difficult for him to show that in some cases, especially in cases where his own interest is manifestly predominant. If he pays in his own interest he will not ordinarily be held to have made the payment for the defendant; but whether he did so or not it seems to me, is a question of fact in each case."

As a question of fact in the present case I find that the plaintiff's own interest was predominant, that his intention did not amount to more than a hope or expectation that Government would contribute something and, therefore, that it was not an intention not to do the work gatuitously.

In this case it was conceded at the hearing of the appeal that there was no express or implied contract between the parties. Therefore, the plaintiff could not succeed by showing that section 70, which deals with relations resembling those created by contract was applicable, and as the lower Court dismissed the suit on the ground that defendant was not given the option of accepting or rejecting the benefit arising from the plaintiff's work, basing its opinion on the law as laid down in *Yogambal Boyee Ammani Ammal* v. *Nyana Pillai Marakayar* (13), it is necessary that I should deal with this aspect of the case, seeing that it has been urged that this view goes beyond the strict words of the section and has been dissented from in later decisions here and elsewhere.

The English Law is that no legal obligation arises from past consideration, *i.e.*, an act already done not under a contract, unless there has been a precedent request, but a request is implied if (1) *A* does voluntarily what *B* was legally bound to do; (2) *A* is compelled to do what *B* was legally bound to do; (3) *B* accepts the benefit of something done by *A*, *having an option to* refuse; or (4) *A* does an act of public necessity or charity. An instance of (3) would occur if *A* sends goods to *B* for sale which *B* did not order and *B* keeps them. An instance of (4) would be the burial by *A* of a corpse, which would give him the right to recover the cost from the deceased's executors.

I agree with the opinion of Sankaran Nair, J., in *Yogambal Boyee Ammani Ammal* v. *Nyana Pillai Marakayar* (13) that section 70 of the Indian Contract Act is based upon the English Law as laid down in *Lampleigh* v. *Braithwait* (16) and that a person can be said to enjoy a benefit under this section only by accepting the benefit when he has the option of declining or accepting. In thus stating the law there does not seem to be any departure from what was laid down in *Damodara Mudaliar* v. *Secretary of State for India* (14). The learned Judges who decided that case distinctly state that as a general rule a man cannot be made liable for good services rendered under circumstances giving him no option of declining or accepting, and that there can be little doubt that the statement of the law in section 70 is derived from the notes to *Lampleigh* v. *Braithwait* (16) and that that is the law which the Courts in India have to apply.

The case in *Damodara Mudaliar* v. *Secretary of State for India* (14) was a case of a tank, which irrigated lands in the defendant's *zemindari* as well as *ryotwari* villages, being repaired at the cost of Government, and it was decided upon the findings called for from the lower Court (1) that the Government did not intend to do the repairs gratuitously for the defendants and (2) that the defendants enjoyed the benefit of them. In *Yogambal Boyee Ammani Ammal* v. *Nyana Pillai Marakayar* (13) Sankaran Nair, J., points out that on the facts of *Damodara Mudaliar* v. *Secretary of State for India* (14) there would have been *no water* in the tank for irrigation but for such repairs, and, therefore, when the *zemindar* elected to use the water available on account of such repairs, he adopted the plaintiff's act and enjoyed the benefit thereof. The tank was, as stated in Civil Revision Petition No. 273 of 1902 (unreported), the property of the *zemindar*. Different considerations arise when the irrigation work concerned is the property of the party who seeks to recover compensation. *Damodara Mudaliar* v. *Secre-*

(16) 1 Sm. L. C. 141; Hob. 105; Moore 866; Brownl. and Gold. 7.

tary of State for India (14) is quoted with approval in *Jarao Kumar* v. *Basanta Kumar Roy* (8), which was a case of one co-owner suing another for contribution after doing under compulsion what the other co-owner was legally bound to do.

It was again referred to with approval in *Mohendra Ghoshal* v. *Bhuban Mardana* (2), and the caution against so reading the section as to countenance acts of officious interference with the affairs of another was repeated. That was a case of a payment under section 310A, Civil Procedure Code, by a tenant releasing the liability of other co-tenants.

The learned Judges, Jenkins, C. J., and Doss, J., differed on the question whether section 70 applied to the facts of the case, but they agreed as to the result, for Doss, J., found that though section 70 did not apply yet section 43, paragraph 2, did, and he referred with disapproval to the dictum in *Smith* v. *Dinonath Mookerjee* (17) as putting a narrow interpretation on the words of section 69, but the decision in *Yogambal Boyee Ammani Ammal* v. *Nyana Pillai Marakayar* (13) was not noticed though it was published earlier.

The decision of the Privy Council in *Abdul Wahid Khan* v. *Shaluka Bibi* (11) which was cited in *Yogambal Boyee Ammani Ammal* v. *Nyana Pillai Marakayar* (13) in support of the view there taken, dealt with the right of a co-sharer in Oudh to pre-emption which is a matter governed by the Statutory Law of that Province.

In dealing with the question of costs which came within the general law, their Lordships observed that where the proceedings were taken by the defendant for his own benefit without any authority from the plaintiff, the fact that the result benefited the plaintiffs did not create any implied contract or give the defendant any equity to be paid a share of the costs by the plaintiff. This is a general statement made without any reference to sections of the Contract Act, but so far as it goes it supports the conclusion in *Yogambal Boyee Ammani Ammal* v. *Nyana Pillai Marakayar* (13).

Khettra Nath Roy v. *Mahomed Uzir Muktear* (5), *Mahata Harsankar Sahai* v. *Bandhu Sahu* (7) merely follow *Mohendra Ghoshal* v. *Bhuban Mardana* (2).

I turn next to two decisions in which expressions of dissent to *Yogambal Boyee Ammani Ammal* v. *Nyana Pillai Marakayar* (13) occur. In *Jog Narain* v *Badri Das* (3) two learned Judges of the Calcutta High Court, Mokerjee and Carnduff, JJ., declared that they were not prepared to adopt the "narrow construction" of section 70, by which the term "enjoys" was construed in *Yogambal Boyee Ammani Ammal* v. *Nyana Pillai Marakayar* (13) as meaning "accepts and enjoys." The reason they give is that the effect would be to exclude the operation of the section in all cases where statutory payments are made for the protection of a property by a person who, but for such payment, might be seriously prejudiced. But if the person who pays is himself interested in the payment, such cases would fall under section 69, and if he is a joint owner or joint debtor he could recover contribution under section 43, clause 2, as pointed by Doss, J., in *Mohendra Ghoshal* v. *Bhuban Mardana* (2). Such cases and cases of payments under section 310A, one of which formed the subject of consideration in *Jog Narain* v. *Badri Das* (3), stand on a different footing and do not alter the law that a person cannot be said to enjoy a benefit which he gets without any option of rejecting or accepting it.

When in *Damodara Mudaliar* v. *Secretary of State for India* (14) and in *Yogambal Boyee Ammani Ammal* v. *Nyana Pillai Marakayar* (13) certain principles were laid down to be followed in applying section 70 to the facts of particular cases, the learned Judges who decided those cases should not be taken to have intended to furnish an exhaustive category of all possible cases which the section might govern. In my opinion the wording of the section has been intentionally made sufficiently wide to cover cases of the nature of salvage which, strictly speaking, are not included in the common law of contract. but have been borrowed from the domain of Maritime Law [see *Damodara Mudaliar* v. *Secretary of State for India* (14)] and are governed by considerations of equity. Such will include, among others, cases of rescuing property from fires (see illustration B to

(17) 12 C. 213.

section 70), payments under section 310 A (now Order XXI, rule 89) [see observations in *Bhagwan Singh* v. *Muhammad Mazhar Ali Khan* (18)] and protection of crops from withering by the kindly act of a neighbouring cultivator in defraying the cost of irrigation for an absent owner [see *Gajapathi Kristna Chandra Deo* v. *Srinivasa Charlu* (9)]. It is recognised in *Jarao Kumar* v. *Basanta Kumar Roy* (8) that in such ways the section goes beyond the English Law of Contract in creating an obligation to pay for services voluntarily rendered, and I do not find in *Damodara Mudaliar* v. *Secretary of State* (14); *Yogambal Boyee Ammani Ammal* v. *Nyana Pillai Marakayar* (13) any denial of this proposition.

The latter case was, it is true, a case of payment under section 310A, but it was a speculative payment made by the plaintiff acting in his own interest as reversioner, and not from a *bona fide* desire to save the title to property, belonging to an estate in which he as well as defendant were interested, from passing to strangers.

Of the two learned Judges who decided *Gajapathi Kristna Chandra Deo* v. *Srinivasa Charlu* (9) one said that he would go somewhat farther than *Yogambal Boyee Ammani Ammal* v. *Nyana Pillai Marakayar* (13) and expressed an opinion that section 70 of the Contract Act does not warrant the view that the defendant must have an option of declining the benefit, if that means that *before* the benefit is conferred he must be given the choice of accepting or declining it.

Certainly there is no law that the acceptance must precede the conferring of the benefit and there is nothing in the judgment in *Yogambal Boyee Ammani Ammal* v. *Nyana Pillai Marakayar* (13) to suggest it. In fact the use of the word "adopt" implies that the acceptance follows the deed.

The other learned Judge dissented from the observations in *Yogambal Boyee Ammani Ammal* v. *Nyana Pillai Marakayar* (13) which tended to restrict "the beneficent provisions" of section 70 and to interpret them in the light of the English Law. He further observed that the decision in *Damodara Mudaliar* v. *Secretary of State* (14) did not favour such restrictions and that it was stated in *Yogambal Boyee Ammani Ammal* v. *Nyana Pillai Marakyar* (13) that the decision in *Damodar Mudaliar* v. *Secretary of State* (14) was opposed to the decision of the Privy Council in *Abdul Wahid Khan* v. *Shaluka Bibi* (11).

I have already tried to show that the words used at page 91 in *Damodara Mudaliar* v. *Secretary of State for India* (14) indicate that the Chief Justice and Shephard, J., took the same view which was expressed in other words later by Sankaran Nair, J., in *Yogambal Boyee Ammani Ammal* v. *Nyana Pillai Marakayar* (13).

There remains the observation that it was stated in *Yogambal Boyee Ammani Ammal* v. *Nyana Pillai Marakayar* (13) that the earlier Madras decision was opposed to the Privy Council decision.

In order to test how far this is sound, it is perhaps better to quote the exact words which were used in *Yogambal Boyee Ammani Ammal* v. *Nyana Pillai Marakayar* (13) about the earlier decision. They are: "It was contended that it was decided therein that if two persons are interested in doing anything and one of them does it, he can recover the proportionate share of his expenses incurred in doing it from the other who has benefited by it under section 70 of the Contract Act. If such is the decision it is opposed to the decision of the Judicial Committee in *Abdul Wahid Khan* v. *Shaluka Bibi* (11). *But the case does not lay down any such broad proposition.*"

I understand from this that so far from finding disagreement between the two decisions, the learned Judge on being pressed by arguments from the Bar examined the two cases and found that they agreed in principle.

It cannot be said in the present case that the Government adopted the act of the plaintiff by the Peddapur *ryots* using the water which came down the stream, as they would in the ordinary course take such water as they needed and could get for irrigating their lands, whether the quantity was more or less and whether the dam higher up the stream was a temporary or permanent one.

As the plaintiff failed to establish that he intended not to act gratuitously and also that the defendant adopted and

(18) 23 Ind Cas. 339; 36 A. 272 at p. 276; 12 A. L. J. 394.

enjoyed the benefit of the act which plaintiff did, I think that the suit was rightly dismissed.

The appeal will be dismissed with costs.

SANKARAN NAIR, J.—I agree. I propose to add only a few words.

A person should not be made liable to pay for a benefit conferred on him without his knowledge or consent, and without giving him an option of declining to accept the benefit. The cases that differ from *Yogambal Boyee Ammani Ammal* v. *Nyana Pillai Marakayar* (13) ignore this principle. Take the 2nd illustration to section 70 of the Indian Contract Act If *A* saves *B*'s property from fire, it is unjust to make *B* pay the cost incurred by *A* in saving the property, if in his opinion it is not worth his while to pay that amount to secure that property. The property may be of less value. He may not be able to raise the money. The imposition of the liability on him, might result not only in his losing his property which has been saved, but also in losing other property as well. This is not right.

On the other hand, there is no injustice in telling *B* that, but for *A*'s act in saving his property, he would have lost it and, therefore, he cannot have it if he does not choose to pay *A* the costs incurred by him. If, therefore, he uses the property which but for *A* would not have existed, he consciously accepts the benefit of *A*'s act and must pay for it. But where he reaps the benefit in circumstances which do not show any election on his part, he is not bound to pay for it.

In the case before us, if no water would have flowed down the stream but for the construction of the *bund* by the Pittapur Raja, and the Government and their *ryots* use the water which is due solely to it, they must compensate the Raja, but if water would have flowed even without the Pittapur Raja's *bund*, and the Government and their *ryots* in using the customary water had to take also willy-nilly the additional volume of water that came down on account of the *bund*, they are not bound to compensate the Raja for the additional water. If the Raja by some mechanical contrivance or otherwise enables the Government and the *ryots* to use water as they were doing before without being under the necessity of taking the additional water and they utilise the same, the case perhaps might be different. It is unnecessary to express any opinion on this point. The right of a person to get rid of his obligation by restoring the thing delivered to him supports this view. I concur in dismissing the appeal with costs.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 20 OF 1911.

December 18, 1913.

Present:—Mr. Hayward, J. C., and Mr. Crouch, A. J. C.

SHINHOMAL *walad* JIALDAS AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

THE MANAGER, ENCUMBERED ESTATES IN SIND AND OTHERS— DEFENDANTS—RESPONDENTS.

Fraud—Decree obtained by fraud—Contract Act (IX of 1872), s. 17.

A Court shall not declare a decree to be a nullity on the ground of fraud, unless it can define in clear terms the fraudulent act or acts by which the decree was obtained. But it will not take "fraud" in the narrow sense in which it is defined in section 17 of the Contract Act.

Duchess of Kingston's case, 2 Sm. L Cas. 731; 20 How. St. Tr. 537; 94 H. L Jo. 655; 1 Leach. C C. 146, *Patch* v. *Ward*, (1867) 3 Ch. 203; 18 L. T. 134; 16 W. R. 441; *Mahomed Golab* v. *Mahomed Sulliman*, 21 C. 612 at p. 617, referred to.

Appeal from the decision of the District Judge, Sukkur-Larkana.

Mr. *Wadhumal Oodharam*, for the Appellants.

Mr. *Dipchand T. Ojha*, for Respondent No. 1.

JUDGMENT.

CROUCH, A. J. C.—Plaintiffs filed this suit in 1909 praying for possession of certain specified numbers in Deh Walisabad, Naushahro Abro District—described in the plaint—and for mesne profits, alleging that the lands had been purchased from defendant No. 2 and that they had been wrongfully deprived of them by the Manager. Defendant No. 3 is a lessee, holding under a lease granted by the Manager subsequently to plaintiffs' ejectment;

Defendant No. 2 did not put in any separate defence, but the Manager, in his written statement, paragraphs Nos. 2 and 3, makes the following allegations:—

2. The decree, the reference and the award are fraudulent and fabricated. Defendant No. 2 has just attained majority, is extravagant and a drunkard not understanding his own profit and loss; by fraud and treachery he had been got to execute false documents and a false reference which neither bind him nor his estate.

3. The consideration shown in the award is false. Plaintiffs have taken advantage of defendant No. 2's mental weakness and with the help of sham arbitrators and moneylenders have got a false award and a fraudulent decree. The value of the property and the consideration are not as shown.

The following issues were settled:—

1. Is decree No. 10 of 1908 fraudulent and if so, what is the result ?

2. Can the defendants take the objection of fraud to decree No. 10 of 1908 without first suing to have it set aside ?

3. Is the Manager entitled to bring under his protection the land in suit and if so, is the lease to defendant No. 3 valid and binding on plaintiffs ?

4. What is the amount of the produce realised by defendant No. 3 and are not plaintiffs entitled to it ?

5. What decree should be made ?

The lower Court found that the decree was fraudulent and not binding on the defendants; that defendants could take the objection of fraud ; that the lease to defendant No. 3 was valid, and directed under section 19A of the Indian Contract Act that defendants Nos. 1 and 2 repay Rs. 10,800 to the plaintiffs without interest. Plaintiffs were ordered to pay all costs on the ground that the litigation had been caused and formented by the plaintiffs on a basis of trickery and fraud.

A brief statement of the events leading up to the suit is necessary.

July 1st, 1907: Plaintiff Shinhomal Jialdas took a lease from defendant No. 2 of over 300 acres of land in *Dehs* Walisabad and Abid; the term being seven years, the rent Rs. 3,000 a year; the first year's rent being paid in cash on execution of the lease (Exhibit 150).

October 28th, 1907 : By a deed of this date (Exhibit 165) defendant No. 2 mortgaged with possession to Shinhomal Jialdas certain land included in the lease of 1st July 1907 and other lands in *Deh* Sangi for Rs. 1,700.

November 2nd, 1907: By a deed of this date (Exhibit 144) defendant No. 2 acknowledged that he owed to Sajan Bania Rs. 2,500 of which Rs. 565 were due on an account and Rs. 1,935 had been received in cash, and mortgaged to Sitaldas without possession a large quantity of land including some of the leased land.

Early in December, defendant agreed apparently orally to sell to plaintiffs Nos. 1 and 2 about 139 acres of land included in the lease.

On 9th December 1907, a reference (Exhibit 155) was signed by both parties submitting their disputes to one Gopaldas. The reference purports to give the objections of both parties. Each party admitted the contract of sale for Rs. 21,000, but defendant No. 1 contended that Rs. 3,000, and not Rs. 4,000 as claimed by plaintiffs, should be allowed as compensation for surrender of the lease. Each alleged that the other party was backing out of the agreemet and the arbitrator was to decide the disputes and all matters connected therewith, with or without taking evidence.

On the same date, 9th December 1907, the arbitrator delivered his award (Exhibit 183). Thereby he confirmed the sale and declared Shinhomal to be owner of a 10-annas share and Sajandas owner of a 6-annas share in the land. He awarded a net sum of Rs. 10,800 to defendant No. 2, the balance being made up as follows :—

	Rs.
Due on mortgage of 2nd November 1907 ...	2,500
Rent paid in advance under lease	3,000
Profits for surrender of the lease	3,000
Due on mortgage of 28th October 1907 ...	1,700
Total Rs.	10,200

It was ordered in the award that the necessary mutations of names should be effected.

On the 17th January 1908, an application was made to the Sub-Court, Sukkur, under section 525, Civil Procedure Code, to file the award. Defendant No. 2 put in a

written statement (Exhibit 159), admitting the award and agreeing to a decree being drawn up in accordance therewith. On the same day the decree was drawn up and on the same day also defendant No. 2 put in an application that the sum of Rs. 10,800 due to him under the award and paid into Court should be paid out to him at once, and under orders of Court payment was forthwith made.

In dealing with this case, it must be borne in mind that we are concerned with several independent and distinct acts in the law and that none can be set aside, or treated as a nullity, unless there be good ground shown for so treating that particular act. Either of the two mortgages or the lease may be tainted with fraud, but the reference and award may nevertheless be valid; and, again, either the reference or award may be so tainted, but yet the decree of the Court may be unassailable. And the issue before the lower Court was not—were the mortgage or the lease or the reference or the award tainted with fraud, but—was the decree obtained by fraud?

Now, it is a rule of procedure, long recognised as necessary and now embodied in Order VI, rule 4, that in all cases in which a party relies on any fraud, particulars (with dates and items, if necessary) shall be stated in the pleadings; and it is a corollary of this rule that no Court shall declare a decree to be a nullity on the ground of fraud, unless it can define in clear terms the fraudulent act or acts by which the decree was obtained.

Mr. Wadhumal has argued that a decree can be set aside only on the ground of fraud, as defined in section 17, Indian Contract Act. This argument was raised in a previous case that came before this Court for disposal (First Appeal No. 39 of 1906) and was disposed of by the judgment in the following terms:—Mr. Dipchand has ingeniously endeavoured to persuade the Court that in dealing with this case we must hold that the decree can be set aside only on the ground of fraud, within the very narrow meaning of the word given to "fraud" by the definition in section 17 of the Indian Contract Act. But we are not dealing with a Common Law case of contract: we are called on to exercise our equitable jurisdiction and apply the equitable principles which have by force of Regulation IV of 1827 been made part of the law of this country. The ruling case on the point is the *Duchess of Kingston's* case (1), in which it was held that the effect of a judgment may be avoided by proving the same to have been obtained by fraud or collusion (*cf.* Indian Evidence Act, section 44). As fraud is infinite in its varieties, the Courts have always refused to define it (Snell, page 519); nor is the word defined for the purposes of the Indian Evidence Act (See Ameer Ali and Woodroffe, notes to section 44). But a reference to any standard text-book on equity will make it obvious that "fraud" has a wide meaning, far wider than the definition in the Contract Act. It is unnecessary to investigate into the full meaning of the word for the purposes of this case, for we have it declared by Lord Cairns that a decree can be set aside if there be fraud "such that there is in the person chargeable with it, the *malus animus* putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him," *Patch* v. *Ward* (2) cited in *Mahomed Golab* v. *Mahomed Sulliman* (3). The question, therefore, in this case is—did Mowlabaksh take an undue advantage of Khudabaksh for the purpose of defrauding him?

Mr. Dipchand argues, and cites authorities in support of his argument, that if a decree be based on a compromise or be passed by consent, then if it be proved that the agreement was bad or that the consent was obtained by fraud, the decree itself is bad. But this only takes us one very short step back, namely, to the agreement to file the award, that is, the question is—was defendant No 2's consent to the award being filed obtained by means which would invalidate

(1) 2 Sm. L. Cas. 731; 20 How. St. Tr. 537; 34 H. L. Jo. 655; 1 Leach. C. C. 146.
(2) (1867) 3 Ch. 203; 18 L. T. 134; 16 W. R. 441
(3) 21 C. 612 at p. 617.

an agreement? But as defendants in this case rely on fraud and fraud as defined for the purposes of this case is more than wide enough to include any fraud which could be alleged as invalidating a contract, this question appears on examination to be practically that which we have already stated to constitute the main issue in this appeal. The award which formed the subject of the suit terminating in the decree, was not a contract or compromise within the cases cited.

An examination of the pleadings, the depositions and the judgment discloses that the fraud on which the defendants relied as vitiating the decree was at no time clearly defined and that no fact was proved from which it could be directly inferred that plaintiffs were guilty of fraud in obtaining the decree. But a large amount of evidence was admitted tending to indicate that fraud had been practised by plaintiffs in connection with previous transactions. Defendants were in fact permitted to surround plaintiffs with an atmosphere of prejudice, which was intended to convince and did actually convince the trying Judge that though proof might not be forthcoming that fraud was practised by plaintiffs in obtaining the decree, their character and previous conduct and their relations with defendant No. 2 were such as to make it extremely probable that the decree itself was obtained by fraud.

Now what are the facts as found by the lower Court from which we can deduce an answer to the question—did or did not plaintiff obtain the decree by taking an unfair advantage of defendant for the purposes of defrauding him? The learned Judge finds that defendant No. 2 is a man addicted to, and whose mental organisation is completely enfeebled by, excesses of all kinds in the way of drugs and liquor taking.

The learned Judge then goes into the history of old transactions involving Rs. 20,200 (of which Rs. 13,000 does not form the subject of the award) and comes to the conclusion that it would be rash to assume that defendant No. 2 did not actually, in sober fact, receive this sum. There is no definite finding that he did not receive it; nor is there material on the record for such a finding, for the question was not in issue. The learned Judge then relates all the facts leading up to the reference and award and expresses the opinion that the reference and the award were a bogus, sham and colourable transaction.

Now, the award was passed on 9th December and the application to file it in Court was not made till the 9th January. Though the learned Judge holds that the decree itself has been obtained by a carefully planned and skilfully carried out fraud, there is no definite finding of any fact which justifies this inference. The suspicious series of events relied on leads logically to nothing more than a conjecture that plaintiffs would not have hesitated to act fraudulently in obtaining a decree; it does not amount to proof that they actually did so.

Before dealing with the evidence on record directly leading to the decree, we will consider briefly what the position was immediately before the reference to arbitration. Defendant No. 2 had agreed to sell plaintiff certain land for Rs. 21,000. The lower Court held this to be a fair, though not at all a high, price. It is admitted that Rs. 10,800 was actually received in cash through the Court and of the balance, the learned Judge was of opinion, that Rs. 3,000, the first year's rent for the lease, and Rs. 1,700 due on the mortgage of 28th October 1907 and Rs. 1,385 of the Rs. 2,500 due on the mortgage of 2nd November 1907, were really paid. That is to say, out of the total of Rs. 21,000, Rs. 16,885 were, beyond reasonable doubt, paid in cash.

Now of the balance of Rs. 2,500, Rs. 565 were said to be due to Shinhomal on an account and Rs. 550 to have been paid to one Manu in discharge of an old debt. The bond itself has been put in evidence, (Exhibit 223) and in it defendant No. 2 acknowledges receipt of consideration. Plaintiff appears as a witness (Exhibit 113) and swears to the receipt of Rs. 565. He has produced his *roznama* (Exhibit 156) and his *khata wahi* (Exhibit 157). Tikio (Exhibit 182) deposes that defendant No. 2 received Rs. 1,935 in cash and admitted Rs. 565 to be due on an account. Sunderdas, the writer (Exhibit 178) gives similar evidence. Manu (Exhibit 179) swears to the receipt of Rs. 565 and produces his

accounts in corroboration (Exhibits 180 and 181). It is difficult to see what better proof could have been given as to the receipt of this Rs. 1,115, and it is to be noted that the evidence as to it is not definitely discredited in the judgment.

There remains only Rs. 3,000 repaid as profit to be dealt with. Now the plaintiffs, when negotiating for purchase of the land, already held a lease for seven years at a rent which they allege allowed of considerable margin of profit. It is most unlikely that they would have taken up the land unless there had been such margin. They, therefore, contended that there should be deducted from the price a sum which represented a fair consideration for the surrender of this lease. Plaintiffs claimed Rs. 4,000 in respect of this anticipated profit, while defendant No. 2 according to the reference put it at Rs. 3,000 and the arbitrator allowed Rs. 3,000. Now though we may be of opinion that defendant No. 2 made a bad bargain, there seems no ground whatever for imputing fraud to plaintiffs for insisting on this reduction of price.

We find then that out of the total of Rs. 21,000 awarded to defendant No. 2 as consideration for the land, Rs. 16,885 have been found by the Court to have been actually paid in cash, Rs. 11,015 have been proved to have been paid by the best evidence that could be produced and Rs. 3,000 were in respect of a claim that a perfectly honest man might have made and pressed. It is impossible, therefore, to hold that the reference and award were so obviously fraudulent as to lead to the inference that the decree embodying the award was obtained by fraud. We would go further and say that we consider that it has not been shown that the award was fraudulent at all.

Mr. Dipchand can point to nothing in the judgment which amounts to a finding that there was any deceit or undue influence exercised after the date of the award. There is no evidence whatever that plaintiff exercised any undue influence as a direct result of which defendant No. 2 put in his application to have the award filed. Defendant No. 2 had been persuaded, practically compelled, by his relations to put in an application to have his estate brought under management. This was on the 14th December. The immediate result of his application being granted would be to deprive him of all control over his estate and of any power to raise money. It is extremely probable that a vicious and unprovident man, such as defendant No. 2 is represented, would be not only willing but eager to obtain a plentiful supply of hard cash before putting himself under the severe restrictions imposed by the Manager. He went to Shikarpur accompanied by his cousin for the purpose of having the award filed. He engaged an independent Pleader, and it is not even alleged that he was drunk or under the influence of drugs when he signed his application. The Pleader engaged by him was examined as a witness (Exhibit 188) and nothing suspicious was elicited. The clerk who wrote defendant's application was also produced (Exhibit 232). Chellaram, who seems to be a law agent and was consulted by defendant No. 2 and advised the engagement of a Pleader, was also a witness. All the circumstances attending the purchase of stamps, preparation of the application, etc. were quite consistent with the theory that plaintiffs were acting honestly in co-operation with defendant No. 2 who was as keen as themselves to have the award filed. Unless we yield to the suspicion that plaintiffs are unconscionable knaves who can exercise indefinite control over defendant No. 2, there is nothing to lead us to the conclusion that the decree was obtained by fraud.

On the 1st issue the finding must be that it has not been proved that the decree in suit No. 10 of 1908 was obtained by fraud. From this finding it follows that the Manager was not entitled to bring under his protection the land in suit and that the lease to defendant No. 3 was not valid as against plaintiffs. The appellants have not at the hearing disputed the finding on the 2nd issue. The case will have to go back to the lower Court for a finding on the 4th issue.

HAYWARD, J.C.— I concur. Plaintiffs' money dealings with defendant ripened into mortgages and led eventually to the sale award of 9th December 1907. Plaintiffs have been held to have proved payment in cash of the full consideration except Rs. 3,000 and put in proper claim for damages for surrender of the lease. The consideration Rs. 21,000 has been held not

an unreasonable price for the land sold under the award. It has not, in my opinion, been established that defendant was drunk at the time of the reference and the award. The only direct evidence was that of his servant Wahid, a boy of 17 years of age only, and his father-in-law Gahikhan. On the other hand Ghulam Husein and Chellaram, the drafters of the documents, denied that he was drunk, and so did the arbitrator Gopaldas and more particularly Tulsidas, a retired Pleader and *zemindar* who was considered a reliable witness by the Judge. There was in any case no evidence to show defendant was drunk when he consented a month later to the award being converted into a decree and when he recovered the very considerable sum as the balance of the consideration from the Court.

I do not consider there is any reliable evidence to establish the exercise of undue influence or fraud in the obtaining of the award and decree and to justify our treating as a nullity the proceedings of the Court. The evidence, no doubt, has established that defendant was extravagant and dissolute, but it seems to me clear he had a very good idea of what he was about from the evidence of his general dealings given by a crowd of witnesses including the Sub-Registrar. There is against this merely his own assertion of his being a drunkard and the evidence of the *zemindar* Shah Nawaz supported by particular instances by the Mukhtyarkar Tolaram and the Assistant Manager. It seems to me, therefore, that whether the reference be or be not regarded as part of the transaction leading up to the award consent decree, there is not sufficient ground for us to treat as a nullity that decree of the Court.

We must accordingly reverse the decision of the learned District Judge and grant a decree against defendants Nos. 1 to 3 for possession with costs. We must direct an inquiry by the learned District Judge into mesne profits due from the date of the award decree by defendants Nos. 1 to 3 and report in three months to this Court under Order XX, rule 12 (1) (c), Civil Procedure Code.

Decision reversed; Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 121 OF 1911.

August 7, 1914.

Present:—Sir John Edward Power Wallis, Offg. Chief Justice, and Mr. Justice Seshagiri Aiyar.

ASAM RAGHAVULU SETTY AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

PELLATI SITAMMA AND ANOTHER— DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92, O. I, r. 10—Trust property alienated - Suit against trustee—Alienee, whether necessary and proper party - Procedure.

In a suit under section 92 of the Civil Procedure Code neither a decree for possession nor even for a mere declaration can be given against the alienees of trust property.

Per *Wallis, J.*—In a suit under section 92, Civil Procedure Code, the alienees of trust property ought not to be made parties against their will, for the suit involves a great variety of other matters and cannot effectually and completely adjudicate upon and settle their rights, but if they desire to be made parties an order adding them is proper.

Per *Seshagiri Aiyar, J.*—The proper course to adopt in cases where an alienation by a trustee is in question, is to implead the person in whose favour the alienation was made and to decide the case in his presence, inasmuch as he is a proper if not a necessary party. It is necessary in the interests of justice and to avoid a conflict of decisions that he should be a party.

Suits of every description are controlled as regards the array of parties by Orders I and II. The fact that section 92 provides for a particular class of litigation will not take it away from the purview of these Orders.

Miyaji alias *Mahomed Ghouse Sahib* v. *Sheik Ahmed Sahib*, 31 M. 212; 18 M. L. J. 205, distinguished.

Gazaffar Hussian Khan v. *Yawar Hussain*, 28 A. 112; 2 A. L. J. 591; A. W. N. (1905) 208; *Collector of Poona* v. *Bai Chanchalbai*, 12 Ind. Cas. 30; 35 B. 470; 13 Bom. L. R. 690; *Budh Singh* v. *Niradbaran Roy*, 2 C. L. J. 431; *Attorney-General* v. *Pretyman*, (1845) 8 Beav. 316; 50 Eng. Rep. 124; 55 R. R. 142, followed.

Appeal against the preliminary decree of the District Court of Nellore in Original Suit No. 27 of 1909.

Mr. *M. O. Parthasarathy Iyengar*, with him Mr. *M. G. Kuppusamy Iyer*, for the Appellants.

Mr. *P. Nagabushanam*, for the Respondents.

JUDGMENT.

WALLIS, OFFG. C. J.—The question argued in this appeal is, whether in a suit under section 92 of the Code of Civil Procedure for the removal of a trustee and the settlement of a scheme the District Judge was right in dismissing the suit with costs as regards

the 3rd and 4th defendants, who had been joined by the plaintiffs on the ground that the lease granted to them by the trustees of the charity, defendants Nos. 1 and 2, was a breach of trust. It is well settled that in a suit under section 92 a decree for possession could not be given against persons in the position of defendants Nos. 3 and 4, and it seems to follow that the contention of the appellants that a mere declaration might be given against them is unsustainable as if any relief could properly be given against them in such a suit, there is no reason why it should be limited to a mere declaration and should not award possession as well. The question then is, whether they were properly made parties by the plaintiffs as no reliefs were obtainable against them. The decisions in *Gazaffar Husain Khan* v. *Yawar Husain* (1) and in *Collector of Poona* v. *Bai Chanchalbai* (2) were on one side and the Calcutta decision in *Budh Singh* v. *Niradbaran Roy* (3) on the other. It seems to me that the view of Mookerjee, J., in *Budh Singh* v. *Niradbaran Roy* (3) is right and that these defendants have been wrongly impleaded. If they had desired to be made parties, I agree that an order adding them might properly have been made: *cf. Attorney-General* v. *Pretyman* (4), but I do not think they ought to be made parties against their will to a suit under section 92 which may involve a great variety of other matters and cannot, to borrow the language of Order I, rule 10 (2), of the Civil Procedure Code, effectually and completely adjudicate upon and settle their rights. The case is very different from suits for partition in which according to the settled practice of this Court, it is usual to make the alienees of joint family property parties when the alienation is questioned. In such a case the Court completely adjudicates on and settles the whole matter. Here it is precluded from doing so. I would dismiss the appeal with costs.

SESHAGIRI IYER, J.—Two worshippers sued under section 92 of the Code of Civil Procedure for the removal of defendants Nos. 1 and 2 from the trusteeship of the plaint temple, for the settlement of a scheme and for other consequential reliefs. The main allegation against them was that they improperly granted a lease of the temple properties to defendants Nos. 3 and 4 for a low rent and for an unconscionably long period. The District Judge found that defendants Nos. 1 and 2 committed serious breaches of trust during their management and directed their removal; he gave directions for the appointment of new trustees; and declared that the suit against defendants Nos. 3 and 4 should be dismissed with costs.

Plaintiffs have appealed. It was argued by Mr. M. O. Parthasarathy Iyengar that on the finding of the District Judge that the leases in favour of the 3rd and 4th defendants were not binding on the temple, he ought to have directed possession to be given to the plaintiffs on behalf of the temple. The decisions of all the High Courts are against giving possession to any but the lawful trustee and against ejecting persons in possession in a suit under section 92. The learned Counsel argues that even if possession cannot be given there should be a declaration embodied in the decree that the lease is not binding on the trust, so that the question may not be raised again by defendants Nos. 1 and 2. I was at first inclined to think that this relief may be given by the decree under clause (*h*) of section 92, and I had in mind the observation of the learned Judges in *Miyaji* alias *Mahomed Ghouse Sahib* v. *Sheik Ahmed Sahib* (5) to the effect "that the question to whom the possession is to be transferred is an incident of the declaration that the defendant is removed from the trusteeship." On closely examining that case, I find that one of the plaintiffs was a lawful trustee and that possession was directed to be given to him by the defaulting trustee. Moreover, the pronouncement of the learned Judges was under Act XX of 1863 and not under the Code of Civil Procedure. I think Mr. P. Nagabushanam is right in his contention that a declaration against defendants Nos. 3 and 4 must stand on the same footing as a direction to give possession. I, therefore, hold that plaintiffs are not entitled to the declaration.

There remains the further question whether the Judge was right in holding that the

(1) 28 A. 112; 2 A. L. J. 591; A. W. N. (1905) 208.
(2) 12 Ind. Cas. 30; 35 B. 470; 13 Bom. L. R. 690.
(3) 2 C. L. J. 431.
(4) (1845) 8 Beav. 316; 50 Eng. Rep. 124; 55 R. R. 142.
(5) 31 M. 212 at p. 214; 18 M. L. J. 205.

suit against defendants Nos. 3 and 4 should be dismissed. This amounts to saying that they were not proper parties to a suit of this description. There has been a conflict of views upon this question. I shall first examine the provisions of the Code before dealing with the case-law. Suits of every description are controlled as regards the array of parties by Orders I and II. The fact that section 92 provides for a particular class of litigation will not take it away from the purview of these Orders. Order I, rule 10, sub-clause (2), gives to the Court and to the party ample powers in this behalf. "The name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, may be added". If the plaintiffs could have moved the Court under this Order to make defendants Nos. 3 and 4 parties, I can see no objection on principle to their being impleaded therein at the outset. To my mind a more reasonable application of this rule cannot be had than by impleading persons in whose favour the defaulting trustee conveyed properties as defendants. It is said that he can be examined in the case as a a witness. That will not enable the Court to give a proper decision. His witnesses also should be examined, and the arguments of his Pleader should be heard, if a right conclusion is to be arrived at. It may and does very often happen that the trustee after having alienated properties to others feels no interest in upholding his alienation, and he may not choose to examine any witness. Moreover, the non-intervention of the alienee may result in a conflict of decisions. In the suit under section 92, the trustee may be removed on the ground that he has made an improper alienation; and in a suit to recover possession, after hearing the alienee, it may be found that the alienation was binding on the trust. It is not necessary to avoid this possible conflict to hold that the decision under section 92 will be *res judicata* in the subsequent litigation. I express no opinion on the question. But certainly the judgment in the scheme suit will be one *inter partes* if the alienee is held to be a proper party, and will be very strong evidence against him in the subsequent litigation. I am, therefore, of opinion that the proper course to adopt in cases where the alienation by a trustee is in question is to implead the person in whose favour the alienation was made and to decide the case in his presence. Even if he is not a necessary party, I have no hesitation in holding that he is a proper party. This view is supported by the observations of Sir John Stanley, C. J., in *Ghazaffar Husain Khan* v. *Yawar Husain* (1), by the decision of the Bombay High Court in *Collector of Poona* v. *Bai Chanchalbai* (2) and by that of the Calcutta High Court in *Sajedur Raja Chowdhuri* v. *Gour Mohun Das* (6). Mr. Justice Mookerjee in a later case in *Budh Singh Dania* v. *Niradbaran Roy* (3) holds that alienees who have an interest adverse to the trust are not proper parties, and dissents from the view taken in *Sajedur Raja Chowdhuri* v. *Ghour Mohun Das* (6). The learned Judge for whose opinion I have the highest respect has not considered the effect of Order I, rule 10, and I find that Mr. Justice Harrington who took part in the decision does not say that the alienees are not proper parties. The balance of authority, therefore, is in favour of the view I have taken. I have already said that in the interests of justice and with a view to avoid a conflict of decisions, the alienee must be a party. For all these reasons, I am of opinion that that portion of the decree of the District Judge which directs the dismissal of the suit against defendants Nos. 3 and 4 should be set aside. I will make no order as to costs either here or in the Court below.

BY THE COURT.—As there is a difference of opinion, the decree of the lower Court stands and this appeal must be dismissed with costs.

Appeal dismissed.

(6) 24 C. 418.

GUNNAM DORAYYA v. VADAPALLI AYYAMACHARYULU.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 632 OF 1913.

August 18, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

GUNNAM DORAYYA—PLAINTIFF—APPELLANT

versus

VADAPALLI AYYAMACHARYULU AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption - Mortgagee, whether entitled to land revenue paid for other land in mortgagor's patta - Irrigation and other cesses, whether land revenue - Redemption before time specified, if allowed—Provision that no redemption till mortgage-money paid up by usufruct, whether legal—Transfer of Property Act (IV of 1882), s. 76 (c)—Madras Revenue Recovery Act (II of 1864), s. 42 - Madras Irrigation Cess Act (VII of 1865), s. 2

Government revenue due upon other than mortgaged lands contained in the *patta* issued in the mortgagor's name is revenue due upon the mortgaged land also

Therefore, a mortgagee who pays such revenue under section 76 (c) of the Transfer of Property Act in order to preserve the mortgaged land, is entitled to the amount on redemption of the mortgage

Irrigation and other cesses charged upon the land are part of the land revenue itself and as such section 42 of the Madras Act II of 1864 applies to sales for recovery of these cesses. Section 2 of Act VII of 1865 is superfluous and does not restrict, or modify or repeal the provisions of section 42 of Act II of 1864 as regards sales for arrears of irrigation cesses.

Ordinarily and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period.

Therefore, where the mortgagor and the mortgagee both agreed that the principal mortgage-money and the interest thereon cannot be paid up except through the enjoyment of net profits by the mortgagee, the mortgagee cannot be redeemed until the amount is so paid up.

A provision in a mortgage-deed that the mortgage shall be redeemed only after payment by usufruct of the mortgaged properties, is not illegal unless the terms of the mortgage are such that future redemption is made practically impossible.

Secretary of State for India in Council v. *Pisipati Sankarayya*, 8 Ind. Cas. 414; 34 M. 493; 20 M. L. J. 794; 8 M. L. T. 323; (1910) M W N. 722; *Ramachandra* v. *Pitchaikannu*, 7 M 434, *Mussammat Bakhtawar Begam* v. *Mussammat Husaini Khanum*, 23 Ind. Cas. 355; 26 M. L. J. 474; 18 C. W. N. 586; 12 A L. J. 473; 36 A. 195; 19 C. L. J. 477; (1914) M. W. N. 411; 15 M. L. T. 389; 16 Bom. L. R. 344; 1 L. W. 813 (P. C.), followed.

Second appeal against the decree of the Court of the Subordinate Judge of Cocanada, in Appeal Suit No. 248 of 1911, preferred against that of the District Munsif of Cocanada, in Original Suit No. 588 of 1910.

Mr. *B. Narasimha Rao*, for the Appellant.

Mr. *M. Patanjali Sastri* for Mr. *P. Narayanamurthi*, for the Respondents.

JUDGMENT.—The second mortgagee is the plaintiff (appellant) and he seeks to redeem the 1st mortgagee, the 2nd defendant. The 2nd defendant has succeeded in the lower Appellate Court on the following conclusions :—

(*a*) that 60 and odd rupees of the principal sum of Rs. 200 (1st mortgage amount) was still due to the 2nd defendant on date of suit ; and (*b*) that under the terms of the first mortgage, the 2nd defendant was entitled to hold possession of the lands till that 60 and odd rupees was also wiped out by the usufruct.

The contention of the plaintiff in second appeal is (*a*) that as the 60 and odd rupees represent irrigation cesses and other cesses due upon other lands of the mortgagor (contained in the same *pattah* as the mortgaged land) and not cesses due on the mortgaged land (No. 183) itself, the 2nd defendant was not entitled to add that sum to the principal of the mortgage amount and cannot claim a right to remain in possession till that sum of Rs. 60 and odd is also discharged out of the usufruct;

(*b*) that even if the irrigation and other cesses are treated as due upon the mortgaged land (No. 183) also, section 42 of Act II of 1864 under which sales held for arrears of land revenue are free of prior incumbrances, does not apply to sales held for recovery of irrigation cesses etc., and hence the mortgagee was not bound to pay them under clause 72 (*b*) of the Transfer of Property Act (which requires a mortgagee to spend money for the preservation of the mortgaged property from forfeiture or sale and empowers him to add that sum to the principal money); and

(*c*) that even if the contention (*b*) is wrong, the 2nd mortgagee is entitled to redeem the 1st mortgage on payment of the said sum of Rs. 60 and odd notwithstanding that the first mortgage-deed fixes no definite term for the redemption of the mortgage and provides for the mortgagee remaining in possession of the land till the principal sum with interest is satisfied out

of the net usufruct after paying assessments etc.

As regards the first contention, the case of *Secretary of State for India in Council* v. *Pisipati Sankarayya* (1) is clear authority that, though for the sake of convenience, separate amounts are entered as the revenue due upon separate numbers held under a single *pattah*, the demand of the Sircar and the liability of the land-holder is a consolidated demand, and liability for the entire sum mentioned in the *pattah* is charged upon every land contained in the revenue *pattah*, that "we must construe section 2 as declaring all the land of a land-holder to be security for all the land revenue payable by him." It follows that the Government revenue due upon other lands contained in the same *pattah* issued in the mortgagor's name is revenue due upon the mortgaged land also.

Coming to the next contention, there are two answers to it. The first is that under section 76 (*c*) of the Transfer of Property Act, the mortgagee must, in the absence of a contract to the contrary, pay the Government revenue and all other charges of a public nature accruing due in respect thereof. Hence, whether the mortgaged property is liable to be sold for these cesses free from prior incumbrances or not, these cesses formed part of the Government revenue accruing due in respect of the property and the mortgagee is bound to pay them in the absence of a contract to the contrary. There is no such contract to the contrary gatherable from the terms of Exhibit I; and, on the other hand, there is a special clause which says that "in case the mortgagor fails to pay Sircar assessment, the mortgagee should pay the same to the village officials" out of the net profits.

The second answer to this contention is that irrigation and other cesses charged upon the land are part of the land revenue itself and, in our opinion, Madras Act II of 1864, section 42, does apply to sales for the recovery of those cesses. Mr. B. Narasimha Rao, Counsel for the appellant, ingeniously argued that, as section 2 of Madras Act VII of 1865 says, "arrears of water cesses shall be realized in the same manner as arrears of land revenue are or may be realized,' that as similar expressions in the Abkari and Income Tax Acts have been construed [see *Ramachandra* v. *Pitchaikanni* (2)] to mean that only the procedure as to the attachment and bringing to sale of the defaulter's property mentioned in Act II of 1864 was intended to be applied to sales for the recovery of arrears due by defaulting *abkari* renters and income tax payers, and not that the sales of properties held for the recovery of such arrears was free from prior incumbrances: that, therefore, the sale held for the recovery of arrears of irrigation cesses could not have the benefit of section 42 of Act II of 1864. We think, however, that this argument ignores the distinction between irrigation cesses and the sums due by *abkari* and income tax defaulters. Under sections 1 and 2 of Act II of 1864 irrigation cesses have been made part of the public revenue due on the land itself and the provisions of Act II of 1864 apply, therefore, to the recovery of irrigation cesses; and the Government need not have recourse to section 2 of Act VII of 1865 at all to claim the powers of attachment and sale, etc, given under Act II of 1864 for the recovery of arrears of public revenue charged upon the land. Section 2 of Act VII of 1865 must, in our opinion, be treated as superfluous and not as restricting or modifying or repealing the provisions of section 42 of Act II of 1864 as regards sales for arrears of irrigation cesses, etc. Our above view is supported by the circumstance that the appellant's learned Counsel, Mr. B. Narasimha Rao, who argued his client's case with much ability and strenuousness, was unable to refer us to any case in which it had been held that section 42 of Act II of 1864 did not apply to sales held for the recovery of arrears of irrigation cesses though it is now almost fifty years since the Irrigation Cess Act was passed. On the other hand there is a case, *Veeranan Ambalam* v. *Karuppayya Pillai* (3), in which Benson and Sundara Aiyar, JJ., directly decided that section 42 of the Revenue Recovery Act did apply to sales for recovery of irrigation cesses.

Coming to the last contention, it has been recently held by the Privy Council in *Musammat Bakhtawar Begam* v. *Musammat*

(1) 8 Ind. Cas. 414; 34 M. 403; 20 M. L. J. 794; 8 M. L. T. 323; (1910) M. W. N. 722.

(2) 7 M. 434.

(3) 19 Ind. Cas. 386; 24 M. L. J. 511; 37 M. 49.

Husaini Khanam (4) that "ordinarily and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period." On the true construction of Exhibit I, we are satisfied that the mortgagor and the mortgagee both agreed that the principal mortgage-money and the interest thereon cannot be paid up except through the enjoyment of net profits by the mortgagee; and this provision in favour of the mortgagee is not illegal according to Indian Law unless perhaps the terms of the mortgage are such that future redemption is made practically impossible.

In the result, the second appeal is dismissed, but under the circumstances there will be no order as to costs in the second appeal.

Appeal dismissed.

(4) 23 Ind. Cas. 355; 26 M. L. J. 474, 18 C. W. N. 586; 12 A. L. J. 473; 36 A. 195; 19 C. L. J. 477; (1914) M. W. N. 411; 15 M. L. T. 389; 16 Bom. L. R. 344; 1 L. W. 813 (P. C.).

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL NO. 22 OF 1913.

July 24, 1913.

Present:—Sir Henry Hartnoll, Offg. Chief Judge, and Mr. Justice Young.

A. K. A. S. JAMAL—APPELLANT

versus

MOOLA DAWOOD SONS AND COMPANY—RESPONDENTS.

Contract Act (IX of 1872), s. 107—After giving notice under the section, whether seller bound to follow the procedure of section—Seller obtaining higher price by selling later than date of breach.

The words of section 107 of the Contract Act are permissive and not compulsory. Therefore, a seller of goods, who gives notice of his intention to re-sell the goods in pursuance of the provisions of section 107, is not bound to carry out such intention and can change his mind if he likes.

If on the date of the breach of a contract to buy goods the price of goods is lower than at a later date when the seller sells them and realizes a higher price, he is bound in claiming damages from the buyer to account for the higher price obtained by him.

Mr. *Giles*, for the Appellant.

Mr. *N. M. Cowasjee*, for the Respondents.

JUDGMENT.

HARTNOLL, OFFG. C. J.—In this suit appellant sued to recover from the respondents Rs. 1,09,218-12-0 compensation for breach of contract. His case was that by six contracts between April and August 1911 he contracted to sell 23,500 shares in the British Burma Petroleum Company at certain rates per share, which were set out, and for delivery on or before the 30th and 31st December 1911.

The market price on the 30th December was Rs. 4-3-0 a price that was very much less than the prices contracted for. The shares were tendered to respondents, but not taken delivery of or paid for.

Appellant, therefore, sued to recover Rs. 1,09,218-12-0 the difference calculated on the amount due taking the contract prices and the market value of the shares on the 30th December calculated at Rs. 4-3-0 a share.

The appellant sold 100 of the shares on the 28th February 1912 at Rs. 4-3-0 and the rest of the 23,500 on dates between April and October 1912 at prices higher than Rs. 4-3-0 but lower than the contract prices arranged between him and respondents except in one instance.

In this way appellant realized for the shares Rs. 1,04,261-10-9. At contract prices appellant should have received Rs. 1,84,125-10-0. The difference is Rs. 79,862-15-3 and this is the sum for which a decree has been given him by the learned Judge on the original side. Appellant lays this appeal claiming a further sum of Rs. 29,355-14-9, the difference between the amount claimed and the sum awarded.

On the 30th December 1911, when appellant tendered the shares to respondents his Advocates wrote: "Failing compliance with this request by to-day our client will be forced to sell the said shares by public auction on or about the 2nd proximo and you will be held responsible for all losses sustained thereby." On the 2nd January 1912 he again through his Advocates expressed the intention of re-selling the shares and instituting a suit against respondents for the recovery of any loss which might result from that course. On the 4th January he reiterated his intention to do so. Nothing was then done till the 26th February 1912 when appellant's Advocate wrote to respondents and claimed

Rs. 1,09,219-6-0, the amount arrived at by deducting Rs. 74,906-4-0, the value of the 23,500 shares at Rs. 4-3-0 a share, from Rs. 1,84,125-10-0, the agreed price of the shares. In assessing the damages the learned Judge on the original side has given respondents the benefit of the higher prices realized by appellant when he sold the shares. His reasons for doing so were as follows:—

"One of the 'rules' on back of the contract notes states that in default of payment for the shares on the date of settlement or by noon on the day following, the seller shall have the option of re-selling the shares by auction at the exchange at the next meeting, and any loss arising shall be recoverable from the buyer. The plaintiff had no other right of re-sale beyond that. At the time that he first gave notice of his intention to re-sell he still had that right, but he subsequently failed to exercise it, *i. e.*, though he has sold these shares at a higher rate than the rate of the due date, he did not purport to re-sell them as against the defendant. Can then the defendant-firm claim to have the benefit of the higher prices realized by the plaintiff? I think they can. If a seller having the right of re-sale elects to exercise such right, he must give notice of his intention to re-sell, and having done so he has made his election between the two measures of damages that were opened to him. After giving such notice, it is his duty to re-sell either at the time (if any) appointed by the contract or within a reasonable time after the date of the breach. If he delays, he takes upon himself all risks arising from further depreciation. And if he sells at a higher rate, such sale will be taken to be a re-sale in pursuance of his notice: for otherwise he would be allowed to benefit by his own wrong."

The grounds of appeal are—

"1. For that the learned Judge on the original side erred in law in holding that the appellant having expressed an intention to re-sell the shares but not having sold the same in pursuance of such expression of intention, was precluded from recovery as damages the difference between the contract prices and the market rate at the time of the breach.

"2. For that the learned Judge on the original side erred in law and in fact in holding that the appellant had exercised a binding election to re-sell the shares.

"3. For that the learned Judge on the original side erred in law in holding that the sales in fact made by the appellant should be taken to be re-sales in pursuance of his notice to re-sell.

"4. For that the learned Judge should have awarded as damages the difference between the contract prices and the market rate at the time of the breach, namely, Rs. 1,09,218-12-0 instead of the sum of Rs. 79,862-15-3.

"5. In the alternative that if the said expression of intention to re-sell amounted to a binding election, the learned Judge should have awarded as damages the difference between the contract prices and the market rate at the time when the shares should have been re-sold.

"6. That the decision of the learned Judge in awarding the sum of Rs. 79,862-15-3 only as damages was otherwise wrong in law and in fact."

There is no doubt as to what appellant's true measure of damages is. It is the difference between the contract prices and the market price when the contracts ought to have been completed,—that is, in this case the date of the breach, the 30th December 1911—for the appellant could then have taken the shares into the market and obtained the current price for them. This was the principle followed in the case of *Pott* v. *Flather* (1). But it was argued that as in the beginning appellant chose to proceed under section 107 of the Indian Contract Act, he should be kept to such choice. It is clear that though at first he expressed the intention of pursuing the course set out in section 107 he did not keep to his intention for, when he brought his suit, he had only sold 100 shares and this was on the 28th February and he sued for his whole measure of damages. Appellant's Counsel urged that, though appellant at first expressed the intention of following the course laid down by section 107, he was not bound to carry out such intention and could change his mind if he liked. This view appears to

(1) (1847) 16 L. J. Q. B. 366; 5 Railw. Cas.85; 73 R. R. 804.

be correct. The words of section 107 are permissive and not compulsory. In the case of *Buldeo Doss* v. *Howe* (2) the view was taken that section 107 does not deprive an unpaid vendor of goods of any other remedy he may have. I am, therefore, unable to agree with the views expressed by the learned Judge on the original side as to appellant being bound to proceed under section 107.

But I think that there is abundant authority for holding that the respondents are entitled to the benefit of the higher prices realized by appellant in mitigation of the sum payable by them as damages. The subject is dealt with at pages 771 and 772 of Leake on Contracts, 6th Edition, and page 207 of Mayne on Damages, 8th Edition.

I would especially refer to the following cases: In *Oldershaw* v. *Holt* (3), where the plaintiff claimed as damages certain moneys from the defendant owing to his failing to carry out certain terms of a building lease and where plaintiff entered into a new agreement with another tenant, the Jury were directed to have regard to the new and ultimately more advantageous agreement entered into in calculating the amount of damages due. In *Smith* v. *M'Guire* (4), which was a suit to recover damages for failure to carry out the terms of a charter-party, that is, to load a ship with a cargo of oats, Martin, B., said: "It may be doubtful whether a party who breaks a contract has a right to say: 'I will not pay you the damages arising from my breach of contract, because you ought to have done something for the purpose of relieving me.' I am not satisfied that the person who breaks a contract has a right to insist on that at all; *but if the ship had earned anything the defendant would be entitled to a deduction in respect to that.*" Again in *Brace* v. *Calder* (5), where the plaintiff was employed by the defendants, a partnership consisting of four members, as Manager of a branch of their business and the agreement was that he was to be employed for a certain period, but before that period had expired two of the partners retired and the business was transferred to and carried on by the other two, in an action for wrongful dismissal it was held that the plaintiff was only entitled to nominal damages, as the continuing partners were willing to employ the plaintiff on the same terms as before for the remainder of the period and so the plaintiff would have suffered no damage. In that in the present case the appellant reduced his loss by selling the shares at a higher price than obtained at the date of the breach, I think it only equitable to give the respondents the benefit of the higher prices realized. I would, therefore, dismiss the appeal with costs.

YOUNG, J.—I concur.

Appeal dismissed.

(2) 6 C. 64; 6 C. L. R. 582.

(3) (1840) 12 A. & E. 590; 4 P. & D. 307; 1 A. & H. 1; 11 L. J. Q. B. 221; 4 Jur. 1012; 113 Eng. Rep. 935; 54 R. R. 624.

(4) 27 L. J. Ex. 465; 3 H. & N. 554; 6 W. R. 726; 31 L. T. (o. s.) 248; 1 F. & F. 199; 177 R. R. 853.

(5) (1895) 2 Q. B. D. 253; 64 L. J. Q. B. 582; 14 R 473; 72 L. T. 829; 59 J. P. 693.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 25 OF 1913.

January 15, 1914.

Present:—Mr. Hayward, J. C., and Mr. Boyd, A. J. C.

THE SECRETARY OF STATE FOR INDIA—PLAINTIFF——APPELLANT

versus

SAHIJRAM ASANMAL—DEFENDANT—RESPONDENT.

Railways Act (IX of 1890), s. 47—"Day," definition of—Coaching Tariff Rules, North Western Railway—Notice.

The provision in rule 74 that the interval between the time of issue of a return ticket and the midnight of the same day shall be counted as one day, is neither unreasonable nor *ultra vires*.

The fact that the day of expiry of the return ticket is specified on the ticket, is enough notice of the Regulations of the Company.

Appeal against the decision of the District Judge, Sukkur.

Mr. *E. Raymond*, Government Pleader, for the Appellant.

Mr. *Wadhumal Oodharam*, for the Respondent.

JUDGMENT.—The plaintiff, the North Western Railway Company, sued the defendant for excess fare and penalty in respect of a six days' return ticket issued to him from Sukkur station. The defendant bought the ticket at 7 P.M. on the 22nd of April

and the allegation was that the six days' period for the return journey expired by midnight of the 27th April. The defendant, however, returned by 6-15 A. M. on the 28th of April and contended that the six days period of return did not expire until 7 P. M. on the 28th of April, and that he was entitled to return on that ticket within that time to Sukkur.

It appeared that the ticket itself showed expressly that it was available up to the 27th of April only, and that it was issued subject to the ordinary regulations of the Railway. One of those regulations was rule 74 of the Coaching Tariff which provided, in respect of return-tickets, that the interval between the time of issue and midnight of the same day should be regarded as one day, and that the return journey must be completed by midnight of the day of expiry. This regulation was framed in due conformity with law under section 47 of the Railways Act. But it was held by the learned District Judge that the defendant was entitled to return by the 28th April, inasmuch as he had no proper notice of the rule and inasmuch as the rule was unreasonable and so *ultra vires* : *cf.* section 47 of the Railways Act.

It has been urged in this appeal that these two questions of notice and *ultra vires* have been wrongly decided. With regard to the question of notice there is the fact that the day of expiry was specified on the ticket, which also referred to the ordinary regulations of the Railway. No evidence was offered that demand was made and refused for inspection of the regulations or that no copy of those regulations was kept at the station, as required by clause 6 of section 47 of the Railways Act. We must in the circumstances hold that the defendant had due notice of the regulations of the Railway. With regard to the question of *ultra vires* there is the fact that the word "day" as used in ordinary conversation is ambiguous and has ordinarily to be defined in documents of precision. One of the definitions of the word "day" not infrequently so given is a period of 24 hours ending at midnight and that is the particular definition adopted in those regulations of the Railway. We can hardly, therefore, hold that the definition is unreasonable and *ultra vires*, *cf.* section 47 of the Railways Act.

There is a further question raised in this appeal, *viz.*, as to costs. It has been pointed out that the defendant made an offer of payment under protest. But the offer was not in full and was accompanied by a denial of the legality of the claim. We do not think, under the circumstances, that we should be justified in departing from the ordinary rule as to costs.

We must accordingly reverse the decree of the learned District Judge and grant a decree against the defendant for Rs. 7-5-3 with costs both of the Original and Appellate Courts.

Decree reversed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 586 OF 1911.

August 6, 1914.

Present:—Mr. Justice Oldfield.

YALAMANCHILI PURNAYYA—DEFENDANT—PETITIONER

versus

PAMU RAMASWAMY—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), s. 9—Suit for possession—Prayer for mesne profits, how far inconsistent.

The mere fact that mesne profits cannot be recovered in a suit under section 9 cannot in any way affect the Court's ability to grant restoration to possession. It can reject the one prayer and grant the other without immediate or probable inconsistency.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the decree of the Court of the Subordinate Judge of Masulipatam, in Original Suit No. 25 of 1909 (transferred from the file of the District Court of Kistna).

Mr. *T. V. Muthukrishna Aiyer*, for the Petitioner.

Mr. *V. Ramadoss*, for the Respondent.

JUDGMENT.—The petition is argued first on the ground that the lower Court applied section 14 of the Limitation Act without considering whether the plaintiff had been litigating in the other Court in question with due diligence. It does not appear that the defendant ever alleged the contrary or put this matter in issue.

Next it is said that the defendant's having objected to the jurisdiction of the District Munsif's Court did not debar him from his similar objection in the lower Court. It has not been shown how this is sustainable and in fact the jurisdiction of the lower Court appears sustainable on its merits.

The third objection is that the plaintiff having joined with his prayer for restoration to possession one for mesne profits, cannot be treated as having sued under section 9 of the Specific Relief Act, at least until he abandoned the latter claim, when his suit under section 9 would have been barred. The plaint has not been printed and I must, therefore, take it to have been, as the lower Court describes it, one appropriate in its terms to section 9. Then it has not, in my opinion, been shown how the prayer for profits was inconsistent with its possessing that character or deprived it of it. For the mere fact that the profits cannot be recovered in a suit under section 9 need not in any way affect the Court's ability to grant restoration to possession. It can reject the one prayer and grant the other without immediate or probable inconsistency. In the two cases cited, *Ramasami Chetti* v. *Paraman Chetti* (1) and *Lachman* v. *Shambu Narain* (2), the plaints were not appropriate to section 9, the claims being based on title.

Lastly, though the lower Court's finding is not clearly expressed, it must, interpreted in the light of the evidence, amount to a conclusion that the defendant dispossessed the plaintiff and that the document relied on by the former was a forgery and that, therefore, the dispossession was otherwise than in course of law. The objection that there is no finding on this point, therefore, fails.

This petition is dismissed with costs.

Petition dismissed.

(1) 25 M. 448; 11 M. L. J. 403.
(2) 7 Ind. Cas. 495; 7 A. L. J. 1078; 33 A. 174.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 40 OF 1911.

January 15, 1914.

Present:—Mr. Hayward, J. C., and Mr. Boyd, A. J. C.

MAHARALI *walad* MITHO AND OTHERS—APPELLANTS

versus

Diwan MUSHTAKSING *walad Diwan* PARSRAM—RESPONDENT.

Land Acquisition Act (I of 1894), ss. 18, 30—Apportionment of compensation—Reference on zemindar's application—Tenant's right to dispute apportionment.

Where definite apportionment was made by the Collector between the *zemindar* and his tenant, and the matter was referred to the Court on the application of the *zemindar* and not of the tenant:

Held, that the tenant could not dispute the Collector's award before Court.

Appeal against the order of the District Judge, Hyderabad.

Mr. *Hirdaram Mewaram*, for the Appellants.

Mr. *Mathradas Ramchand*, for Respondent No. 1.

Mr. *Lalchand Hassomal*, for Respondent No. 2.

JUDGMEMT.—This is an appeal against the order of the District Judge, Hyderabad, holding that the appellants had no *locus standi* in a reference in a land acquisition matter before the District Court.

It is clear, and apparently admitted, that, as the appellants made no written application to refer as expressly required, they had no *locus standi* under section 18 of the Act. But it has been contended that there was no apportionment of compensation by the award, and that the disputes as to apportionment arose after the award and were referred, not on application by the appellants under section 18, but by the Collector of his own motion under section 30 of the Act.

It appears, however, from the copy of the reference that compensation for trees was refused to the *hari* appellants and granted to the *zemindar* by statement No. 2 attached to the award, and that compensation in respect of wells and buildings was granted to the *hari* appellants and refused to the *zemindar* by statement No. 3 attached to the award. It, moreover, appears from the copy of reference that objections as to the compensation to be awarded in respect of wells and buildings were made on the 14th of March 1906.

It appears, therefore, that there were definite apportionments of compensation by the award and that the disputes, if any, as to the apportionments were prior to the award and there was no subsequent dispute as to the apportionments which could have been referred of his own motion by the Collector to the Court under section 30 of the Act. That at all events is the only conclusion deducible from the record, the award itself and other papers having unfortunately been burnt in the fire which destroyed the District Court.

We must, therefore, dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 266 OF 1913.

July 22, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

RANGA RAMANUJACHARIAR AND ANOTHER—DEFENDANTS NOS. 1 AND 2—PETITIONERS

versus

SRINIVASA AIYANGAR AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 3 TO 5—RESPONDENTS.

Landlord and tenant—Occupancy tenant—Transfer of interest—Liability for rent subsequent to transfer.

An occupancy tenant is not liable for rent after he has transferred his holding and given notice of the transfer to the landlord.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Conjeevaram, in Small Cause Suit No. 1487 of 1912.

Mr. P. R. Srinivasa Iyengar, for the Petitioners.

Mr. *Arumainatha Pillay*, for the Respondents.

This petition coming on for hearing before the Hon'ble Mr. Justice Sadasiva Iyer the Court passed the following

ORDER.—(*April 30th*, 1914.)—The only arguable ground in this revision petition relates to the contention that as defendants Nos. 1 and 2 had sold their occupancy rights on lands Nos. 67 and 68 to the 4th defendant in the beginning of *fasli* 1321 (1st August 1911) and gave notice of that sale at once to the plaintiff, the defendants Nos. 1 and 2 are not liable for the rent of *fasli* 1321.

Both sides admit that the Estates Land Act does not apply to the relations between the parties, so section 146, clause (1), and section 145 of that Act cannot govern the rights of parties. Nor can section 108, clause (*j*), of the Transfer of Property Act, apply as agricultural tenancies are outside the scope of that Act (see section 117), unless the Local Government notifies to that effect.

Dr. Rash Behari Ghose in his argument as the appellant's Advocate in *Sasi Bhushan Raha* v. *Tara Lal Singh Deo Bahadur* (1) contended that in the case of a tenant with rights of permanent occupancy the tenant is entitled to sell the holding and that "it is the Common Law of India that on transfer of a tenure with notice, the lessee ceases to be liable for rent." The validity of that contention was not decided upon by the Court in that case as it was unnecessary to do so. I am inclined to agree with that contention and I think that that principle of the Common Law of India is practically adopted in the Estates Land Act with a slight variation in favour of the landlord.

If it is a correct principle to apply, the defendants Nos. 1 and 2 will be liable only for about one month's rent (between 1st July and 1st August 1911) due proportionately on lands Nos. 67 and 68, so far as *fasli* 1321 is concerned, the 4th defendant being liable for the balance of the rent due on those lands in that *fasli*.

As the question of law above discussed is, however, an important one, let the case be posted before a Bench.

The petition coming on for hearing again in accordance with the above direction, the Court delivered the following

JUDGMENT.

SADASIVA IYER, J.—(*July 22nd*, 1914)—I have already given some reasons (while admitting the petition) for holding that an agricultural tenant owning the *kudivaram* right ceases

(1) 22 C. 494.

to be liable for subsequent rent after he gives notice to the landlord of the sale of his interest. The decision in *Monica Kitheria* v. *Subbaraya* (2), turned upon the existence of a privity of contract between the landlord and the *mulgeni* tenant in that case, but the relationship of landlord and tenant with permanent occupancy right was not created by any contract in this case.

Section 55, clause (*j*), of the Transfer of Property Act, also makes it clear that the vendee becomes liable for rent due on the property sold from the date of his acquisition of title by purchase. In the result the lower Court's decree will be modified by making defendants Nos. 1 and 2 liable for only Rs. 78 of the amount decreed and three-fourths of the costs of the suit. The petitioners must pay three-fourths of the respondents' costs here.

TYABJI, J.—The question involved in this petition is whether the original tenant is responsible for rent on the holding, after he has transferred his holding to a third person and has given notice of the transfer to the Melvaramdar (landlord.)

The Madras Estates Land Act does not apply in terms, but the provisions of sections 146 (2) and 147 (3) supply an analogy. The other rules of Statutory Law that may possibly be applied are the Transfer of Property Act, section 55 (1) (*j*). Section 108, clause (*j*), of the Transfer of Property Act, however, refers to relations arising out of contract. In the case of tenants with occupancy rights those rules do not, it seems to me, furnish a sufficiently close analogy. The law has, it may also be pointed out, always leaned in favour of allowing free transfers of interests in land. This may be exemplified by the attitude of English Judges towards under-leases even in cases where there are covenants not to under-let. See *West* v. *Gwyune* (3).

On the whole, therefore, it seems to me that the rule of law which is indicated as being applicable in the present case is that an occupancy tenant is not any more liable for rent after he has transferred his holding and given notice of the transfer to his landlord.

I agree, therefore, in the order proposed by my learned brother.

Decree modified.

(2) 30 M. 410; 17 M. L. J. 258; 2 M. L. T. 363.
(3) (1911) 2 Ch. 1; 80 L. J. Ch. 578; 104 L. T. 759; 55 S. J. 519; 27 T. L. R. 444.

LOWER BURMA CHIEF COURT.

CIVIL REVISION NO. 138 OF 1912.

December 4, 1913.

Present:—Mr. Justice Parlett.

THE BRITISH INDIA STEAM NAVIGATION CO., LTD., AND OTHERS—DEFENDANTS—APPELLANTS

versus

M. N. FAKIR MAHOMED AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Pleadings, falsification of, whether punishable.

Pleadings are statements required by law to be true; and, therefore, a wilful falsification is punishable by the criminal law.

Mr. *Hartnoll*, for the Appellants.

Mr. *Bilimoria*, for the 1st Respondent.

Mr. *Giles*, for the 2nd Respondent.

JUDGMENT.—The original plaint sets out in paragraph No. 1 that 15 casks of oil were shipped by plaintiffs' agents in good order and condition in the British India Steam Navigation Company's steamer "Tara," of which 14 casks were delivered in good order and condition and one, being tendered practically empty and damaged, was refused. The British India Steam Navigation Company's first written statement admits that the 15 casks were shipped in good order and condition, alleges that they were all landed in good order and condition at one of the Port Commissioners' jetties and that the damage to the cask occurred after it had been so landed, and pleads that they are not liable for damage which may have subsequently occurred. Later on they obtained leave to file an amended written statement in which they say that, though shipped in good order and condition, 5 of the 15 casks were certified on landing as leaking by the Port Commissioners and that under the endorsement on the bill of lading the Company is not liable for damage by ordinary leakage.

It is admitted that an auger-hole had been bored in the cask through which the contents were abstracted, but the written statement

contains no allegation as to when that hole was bored. The plaint was eventually amended so as to join the Port Commissioners as defendants. In their written statement the latter pleaded *inter alia* that the cask was landed in a damaged and leaky condition and that no damage occurred to it while it was in their custody. The Superintendent of the Wharf gave evidence that on landing the five casks, which were old, were leaking through the joints; the one referred to in this suit was at the time less than half full. The auger-hole was not noticed, but the cask does not appear to have been closely examined and as the hole is only one-quarter of an inch in diameter, it might easily have escaped notice unless on close scrutiny. The British India Steam Navigation Company's witness states that he examined the cask on landing, that it was one of about a dozen which were leaking, but though especially examined for breakage, none was found and the auger-hole was not in it. This witness has been disbelieved and damages have been decreed against the Company. It is now urged that it was for plaintiffs to prove their case and that, unless they did so which it is claimed they did not, a decree could not be given in their favour although the defence was disbelieved. It is clear, however, that the damage occurred when the cask was in the custody of one or other of the defendants. The question as to which of them was liable was one to be determined as between the defendants. I am unable to agree that the lower Court had not the materials for its determination. The Port Commissioners' written statement clearly alleges that no damage occurred to the cask while it was in their custody, and this has never been challenged save by discredited evidence. The Wharf Superintendent's evidence, so far from showing that there was no hole in the cask when landed, strongly supports the contrary; for it is admitted that, whether leaking through the joints or not, the bulk of the oil was abstracted through the auger-hole, and the evidence is that more than half the oil was gone when the cask was landed. Next it is argued that the endorsement on the bill of lading raises the presumption that this cask was shipped already leaking. The written statements and the bill of lading show it to have been shipped in good order and condition: a leaking cask cannot be said to be in good order and condition. The bill of lading says the 15 casks were shipped in good order and condition and the endorsement runs: "Casks old. Not responsible for leakage or breakage and for leakage from plugged holes or otherwise." The Company's witness indeed does not shrink from suggesting that even with a hole bored in it, the cask is still in good order and condition in the terms of the bill of lading. The meaning of the whole is, however, in my opinion clear; the casks, though old, were when shipped not leaking, but in view of their age, the Company disclaimed responsibility for leakage, etc., which might occur in transit. The Company explicitly pleaded that all 15 casks were landed in good order and condition. It is now suggested that this was "a formal plea to put the burden on the plaintiffs." No such excuse can be accepted for reckless disregard of facts; pleadings, so far from being mere formalities, are statements required by law to be true, the wilful falsification of which is punishable by the criminal law. The plea was verified by a representative of the Company as true to his own knowledge, and he swears that he had personally examined all the casks. Finally it is argued that the Company should not have to pay the Port Commissioners' costs. It is obvious, however, that the latter were joined as defendants in consequence of the Company's plea throwing the liability on to them.

I decline to interfere with that order. The application is dismissed with costs, two gold *mohurs* to each respondent.

Application dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 146 OF 1912.

July 22, 1914.

Present:—Mr. Kendall, A. J. C., and Mr. Kanhaiya Lal, A. J. C.

Musammat KANCHAN KUNWAR—DEFENDANT—APPELLANT

versus

Thakur AMAR SINGH—PLAINTIFF—RESPONDENT.

Hindu widow, transfer by, for legal necessity—Con

sideration-money left with transferee—Transferee to satisfy necessity—Legal necessity otherwise discharged —Transfer void—Next reversioners entitled to recover property—Application of money to be seen by transferee —Transfer not entirely for legal necessity—Voidable transfer—Purchaser entitled to money paid by him to meet legal necessity.

Where a Hindu widow transfers a property for legal necessity and the consideration-money is left with the transferee to satisfy that necessity, but owing to his failure to do so it is otherwise satisfied, the transfer becomes void and the next reversioners are entitled to recover property without paying him anything; for he, having the control and application of the consideration-money, is bound not only to satisfy himself as to the existence of the necessity but also to see that the money is properly applied.

Hunoomanpersaud Panday v. *Musammat Babooee Munraj Koonwaree*, 6 M. I. A. 393 at p. 424; 18 W. R. 81 *note*; Sevestre 253*n*; 2 Suth P. C. J. 29, 1 Sar. P. C. J. 552; 19 Eng. Rep. 147 and *Hurro Nath Rai Chowdhri* v. *Randhir Singh*, 18 C. 311 (P. C.); 18 I. A. 1, referred to..

Where a sale by a Hindu widow is not entirely for legal necessity, it is voidable at the instance of the next reversioners. But where the purchaser has *bona fide* parted with some money to meet a legal necessity, that money should be refunded to him with interest.

Gobind Singh v. *Baldeo Singh*, 25 A. 330; A. W. N. (1903) 57 and *Ram Dei Kunwar* v. *Abu Jafar*, 27 A. 494; A. W. N. (1905) 68, referred to.

Appeal from the decree of the Subordinate Judge, Kheri, dated 30th July 1912.

Mr. *John Jackson*, for the Appellant.

The Hon'ble *Rai Sri Ram Bahadur*, for the Respondent.

JUDGMENT.—One Sheonandan Singh died some eight years before this suit was instituted, leaving *Musammat* Sobaran Kuar who came into possession of his property as his widow. He was indebted to various persons including Mahant Bishambhar Das, *sarbarahkar* of the Rajgopal temple in Lakhimpur. The property in village Gobindpur was sold by *Musammat* Sobaran Kuar to discharge the debt due to one Parmai Sah and to that transfer there has been no objection. The property in villages Sahaspur, Gugawan, and Paharapur was mortgaged to Mahant Bishambhar Das; and he, in 1907, brought a suit upon his mortgage-deed in the Court of the Subordinate Judge, Kheri. While that suit was pending *Musammat* Sobaran Kuar sold the Gugawan property to her husband's brother's widow, *Musammat* Kanchan Kuar, who incidentally was also her sister, for Rs. 30,000 by a registered deed, dated 5th of July 1907. In that deed it was set out that the money due on the mortgage to Mahant Bishambhar Das was to be discharged *by the purchaser*; and that any balance left was to be paid to one Ode Sah on account of a debt due to him; and that, if he declined to take, it was to be paid to *Musammat* Sobaran Kuar. *Musammat* Kanchan Kuar did not, however, pay the mortgage-money due to Mahant Bishambar Das which amounted to Rs. 26,205 and he, obtaining a decree on the 24th of July 1907, brought to sale the property in villages Sahaspur and Paharapur. The sale realised Rs. 1,194-1-3 more than was necessary for the full discharge of his mortgage-debt. This amount was deposited in the Revenue Court at Kheri. Meanwhile *Musammat* Sobaran Kuar died on the 30th August 1911. The plaintiff, Thakur Amar Singh, claimed this money as a reversioner to Sheonandan Singh, husband of Sobaran Kuar. But his claim was disputed by *Musammat* Kanchan Kuar, the widow of Sheonandan Singh's brother, and by *Musammat* Bhagwati Kuar, defendant No. 2. The plaintiff, therefore, brought this present suit for possession of the Gugawan property, alleging that defendant No. 2, by reason of custom, had no right in that property, and that the sale-deed of the 5th of July 1907 was without consideration and that whatever right was transferred by *Musammat* Sobaran Kuar under it was extinguished on her death. He also claimed a declaration of his title to the surplus sale proceeds, Rs. 1,194-1-3, referred to above; but that portion of his claim is not in dispute in this appeal.

Musammat Kanchan Kuar defendant in reply repudiated the custom on which the plaintiff relied. She also alleged in paragraph 24 of the written statement, that the sale-deed in her favour was executed for legal necessity and that the transfer should not be, therefore, impugned; and that, even if it be supposed that the plaintiff were entitled to any relief, he could not make a claim to the return of the property or for the cancellation of the sale-deed.

In his replication the plaintiff did not admit paragraph 24 of the written statement and pointed out that the money due to Mahant Bishambhar Das was not paid.

That a legal necessity, the discharge of the mortgage-debt to Mahant Bishambhar Das, was in existence on the date of the transfer in question is not disputed. The

lower Court framed issues, two of which run as follows :—

(2) Whether *Musammat* Kanchan Kuar paid the purchase (money); if so, to whom and when ?

(3) If not, is she still entitled to hold the property sold to her ?

On issue No. 2 it found that she did not pay the money; and it is admitted for her in appeal that this is a fact. On the third issue the lower Court found that although the sale was made ostensibly for legal necessity, the necessity was not satisfied. It referred to a case reported as *Deputy Commissioner of Kheri representing the Court of Wards* v. *Khanjan Singh* (1) and finding an analogy with that case, found that the defendant No. 1 was not entitled to hold possession of the property under the sale-deed. It says: "The consideration was not to receive so such money, but to have other property disencumbered and saved from the clutches of the mortgagee, which cannot be done now as it has been sold for the mortgagee's debt and which cannot be compensated now." The wording of this sentence is decidedly faulty. The lower Court also found the alleged custom, by which defendant No. 2 was excluded, to be proved, and with that finding we are not concerned.

Musammat Kanchan Kuar has brought this appeal on the ground that the appellant being found by the lower Court to be the purchaser in possession of the property in suit under a sale-deed executed for legal necessity, it should have held that the only remedy was a suit for the recovery of the purchase-money. Another ground of appeal is that the lower Court has erred in finding that the plaintiff is a preferential heir to the appellant.

On this latter ground no arguments were addressed to us by the learned Counsel who appeared for the appellant. The evidence recorded by the Court below is sufficient to prove the *locus standi* of the plaintiff.

It has been first urged on behalf of the appellant that the sale in question was a completed sale although the purchase-money was not paid over ; and we have been referred to various authorities in which it has been held that in such a case the remedy of the vendor is to sue for the purchase-money. These arguments are, no doubt, perfectly sound; but they do not apply at all to the present case. The vendor was a Hindu widow; and she was not entitled to make a complete transfer of her husband's property except for a legal necessity. It is in fact the sale itself, and not the events subsequent to the sale, which has to be considered. It is next argued that, as at the time this sale-deed was executed there was a legal necessity in existence, therefore, the sale cannot be set aside. It is an unsound argument. The question is, was this sale conducted to meet a legal necessity? Here again our attention has been called to a series of authorities in which it has been ruled that it is the duty of the purchaser, by making such inquiries as may be necessary, to satisfy himself that the sale is being made for a legal necessity; if such were the case the sale will be allowed to stand; and it is not incumbent on the purchaser to follow the money in the hands of the vendor, and to make certain that it has been actually applied in meeting that legal necessity. Here again we recognize that the argument is perfectly sound so far as it goes. But this present case can be differentiated from the cases to which the above principle applies. There is no question in the present case of the absence of obligation on the purchaser to seek out, or not to seek out, the ultimate destination of the purchase-money. In the present case the purchase-money was left with the purchaser herself to discharge the legal necessity. In *Hunooman-persaud Panday* v. *Musammat Babooee Munraj Koonwaree* (2) the rule is thus laid down:— "Their Lordships think that if he does so inquire, and acts honestly, the *real* existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge; and they do not think that, under such circumstances, he is bound to see to the application of the money." But let us see what are the reasons which prompted their Lordships to lay down such a rule. Further on in their judgment they say: "The purposes for which a loan is wanted are often future, as respects the actual

(1) 10 O. C. 117; 29 A. 331; 5 C. L. J. 344; 11 C. W. N. 474; 4 A. L. J, 232; 2 M. L. T. 145; 17 M. L. J. 233; 9 Bom. L. R. 591 (P. C.); 84 I. A. 72.

(2) 6 M. I. A. 393 at p. 424; Sevestre 253*n*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 18 W. R. 81 *note*; 19 Eng. Rep. 147.

application, and, lender can rarely have, *unless he enters on the management*, the means of controlling and rightly directing the actual application."

Following the above ruling their Lordships laid down in *Hurro Nath Rai Chowdhri* v. *Randhir Singh* (3): "In this case the plaintiff did have the control and actual application of the money, and having that control and application, he was bound to see that the money was properly applied." That is exactly the case here. The purchaser took this property by the sale-deed, understanding that the only legal necessity for the transfer was the satisfaction of the mortgage-debt, on which a suit was pending at the time in the Civil Court. This fact is specifically enunciated in the sale-deed, and the purchaser took the property on the understanding that she was not to pay the money to the vendor, but would herself discharge the necessity. She failed to do so, and the necessity was discharged by the mortgagee bringing to sale other property. It is as if the vendor were saying to the purchaser: "I am a Hindu widow with a limited power of transfer. I am selling you this property for Rs. 30,000, but you must remember that, unless you pay the consideration money to Mahant Bishambhar Das mortgagee, the sale will not be for legal necessity."

In fact the purchaser, knowing that no legal necessity existed for the sale unless he devoted the consideration money to paying money due on the mortgage, for which a suit was pending, did not discharge the necessity, and cannot be allowed to say that he had purchased this property, which was sold by a Hindu widow, for a legal necessity. It is strenuously argued for the appellant that the fact of the existence of a legal necessity is admitted and is found by the lower Court. The existence of a legal necessity at the time of this sale was indeed admitted, and admits of no dispute: but it is perfectly clear, on reading the plaint, the written statement and the replication, as we have set out a portion of them above, that the defendant distinctly denied that the sale in question was made for the discharge of that legal necessity: and on this the parties were at issue.

There is yet another way of looking at the matter by which also we are justified in holding that the plaintiff is entitled to recover this property without making any payment to the appellant. It is not disputed that, even if this sale had been made for the discharge of a legal necessity, namely the mortgage-debt of Mahant Bishambhar Das, even then that necessity would have been discharged by payment of Rs. 26,205; for the balance Rs. 3,000 odd, no legal necessity of any kind has been proved. It is not known who Ode Sah was, or what sort of debt might have been due to Ode Sah. Again it is seen that payment was not made to Ode Sah in any case, nor any balance paid to *Musammat* Sobaran Kuar: the defendant admits that she has made no payment of any portion of this Rs. 30,000 for payment to *Musammat* Sobaran Kuar, the vendor herself. In such circumstances the principles laid down in *Gobind Singh* v. *Baldeo Singh* (4) and *Ram Dei Kunwar* v. *Abu Jafar* (5) will apply. In the latter case where the next reversioner sought to recover property on the death of the widow, and it was found that one of two sales had been effected partly for legal necessity and partly not, the Court decreed the plaintiff's claim as to that sale on payment by him of such amount of the consideration for the sale as was supported by legal necessity. This is on the principle of 'one who seeks equity must do equity.' The sale not being entirely for legal necessity is voidable at the instance of the next reversioner. But where the purchaser has *bona fide* parted with some money to meet a legal necessity, equity demands that that money should be refunded to him; and refunded with interest, according to the *dictum* of the learned Judges in *Govind Singh* v. *Baldeo Singh* (4). In those rulings the learned Judges of the Allahabad High Court followed, and approved of, a former decision of the Calcutta High Court. If that principle be applied to the present case, and it be ordered that the plaintiff may recover the property transferred by the widow on the re-payment with interest to the purchaser of such sums as he has disbursed for legal necessity, it is clear that he becomes entitled to a decree with no reservation at all; for it is not denied that the defendant-appellant has paid nothing whatever.

(3) 18 C. 311 (P. C.); 18 I. A. 1.

(4) 25 A. 330; A. W. N. (1903) 57.
(5) 27 A. 494; A. W. N (1905) 68.

Whichever of the two views be taken, therefore, we are of opinion that the plaintiff is entitled to the decree he sought.

This appeal is dismissed with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL NO. 220 OF 1912.

December 11, 1913.

Present:—Mr. Justice Ormond.

MYAT GALE—PLAINTIFF—APPELLANT

versus

SAN THA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 66—Property purchased benami—*Real purchaser obtaining and remaining in possession—Declaratory suit by real purchaser, whether barred—Specific Relief Act (I of 1877), s. 42.*

A real purchaser at an auction sale who purchases the property sold through a *benamidar* but remains in uninterrupted possession of the same, is not precluded by section 66, Civil Procedure Code, from suing for a declaration that he is the owner of the property.

Mr. *J. N. Lentaigne*, for the Appellant.

Mr. *Po. Han*, for the Respondents.

JUDGMENT.—The plaintiff-appellant bought land with her own money at an auction sale in execution of a decree through her son-in-law, the 1st defendant, and a certificate was made out in his (1st defendant's) name. She has been in uninterrupted possession of the land since 1902 until the institution of the suit. About a year before the institution of the suit 1st defendant transferred the land into the names of his children, the other defendants. The plaintiff stated these facts in the plaint and sued for a declaration that she was the owner. The plaintiff obtained a decree in the Sub-Divisional Court, but on appeal the Divisional Court held that the suit was barred under section 66 of the Civil Procedure Code. That section states that, no suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff.

The case of *Bishan Dial* v. *Ghazi-ud-Din* (1) is very similar to the present case. In that case it was held that the plaintiff based his claim on the *benami* purchase from the Court and although he alleged he had been in uninterrupted possession, the Court held that the suit was barred by the corresponding section of the old Code, section 317. The case of *Sasti Churn Nundi* v. *Annopurna* (2) is also a very similar case. There the plaintiff asked that his right might be declared and possession confirmed and that defendant might be restrained from interfering with his tenants. In that case it was held that the suit was not barred by section 317, because the plaintiff was entitled to rely upon his title by possession only; that the defendant had to set up the sale certificate which stood in his name, and that plaintiff was entitled to rebut the defendant's case by showing that the certificate was *benami* and that she was in fact the real purchaser as against the defendant. I think it is the duty of the Court to grant such relief as is warranted by the facts stated in the plaint—if those facts are true. It is admitted that the plaintiff has been in uninterrupted possession. It would, therefore, be for the defendant to make use of this *benami* certificate; and if he had to sue the plaintiff for possession, he would not be allowed to succeed under that certificate: the defendant would be entitled to say that he was not entitled to possession because the certificate was *benami*. So too in this case the plaintiff is entitled to show that the certificate set up by the defendant is *benami*. The decree of the lower Court is set aside and a decree will be passed declaring that the plaintiff is entitled to possession as against the defendants. Each party to bear their own costs.

Decree set aside.

(1) 23 A. 175; A. W. N. (1891) 44.

(2) 23 C. 699.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL NO. 286 OF 1912.

May 7, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

JADU NATH ACHARJYA—DEFENDANT NO. 2—APPELLANT

versus

TARAK CHANDRA CHATTERJEE—PLAINTIFF AND ANOTHER—DEFENDANTS—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), s. 29—Sale of ward's property by guardian with Court's permission, validity of—Pardanashin *lady, capacity of, to execute documents—Purchase of infant's property under authority*

JADU NATH ACHARJYA v. TARAK CHANDRA CHATTERJEE.

of Court from female guardian, whether fraud—Presumption—Transfer of Property Act (IV of 1882), s. 41 — Bona fide purchaser for value.

Ladies in this country, *pardanashin* or otherwise, are under no such disability that they cannot execute any document.

A sale by a guardian of the property of his minor ward with the permission of the Court, transfers a good title to the vendee unless the Court's permission was obtained by fraud.

The mere fact that the guardian of an infant, who obtained leave of the Court to sell the infant's property, was a female, does not raise any presumption that fraud was practised on the Court.

A person who purchases property from such a purchaser and pays consideration, is a *bona fide* purchaser for value without notice of fraud.

Appeal against the decree of the Subordinate Judge, first Court, 24-Perganas, dated the 31st of May 1912.

Dr. *Dwarka Nath Mitter* and Babu *Rishendra Nath Sirkar*, for the Appellants.

Babus *Harendra Krishna Mukerjee* and *Hari Bhusan Mukerjee*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendant No. 2. The suit was brought by the plaintiff to recover *khas* possession or, in the alternative, compensation from the defendants Nos. 1 and 2. The defendant No. 2 is the purchaser from the defendant No. 1. The defendant No. 1 purchased the property in suit in the month of November 1897 and, having held it for eight years, he sold it on the 28th November 1905 to the defendant No. 2 for the sum of Rs. 1,200. In the meantime before the sale to the defendant No. 2 the defendant No. 1 had borrowed certain moneys on a mortgage of the property and those moneys were paid out of the purchase-money by the defendant No. 2 and the evidence is conclusive that the defendant No. 2 paid the balance of the purchase-money to the defendant No. 1.

In these circumstances, it looks at the first blush that the title is a fairly clear one, so far as the defendant No. 2 is concerned. But it appears from the finding of the learned Judge—and that finding we do not see any reason to dissent from—that the purchase by the defendant No. 1 was tainted with fraud. The defendant No. 1 purchased from the mother and guardian of one Taruck Chunder Chuckerbutty, who was then an infant, and leave of the Court according to the view of the learned Judge was obtained by the fraud of the defendant No. 1. However, the Judge did, in fact, grant leave to the guardian to sell the property and the property was, in fact, sold, at any rate the evidence of defendant No. 1 shows, at far more than the amount at which the Court authorized the guardian to sell. It turns out now in the view of the learned Judge of the Court below that that transaction was a fraudulent one and the learned Judge has decreed the suit as against the second defendant. The second defendant is a man apparently of respectability, he having been once a servant of the Government of India drawing a pay of Rs. 300 a month and apparently having served his full time retired on pension and having purchased this piece of land has erected a house on it. The learned Judge in finding that this gentleman had either express or constructive notice of the fraud, ought to have required some evidence in support of that. The learned Judge dealt with the case in this way. He expressed a doubt as to the *bona fide* nature of the transaction and thought that the defendant No. 1 had done all these in order to secure the property. As regards the question whether the defendant No. 2 was a *bona fide* purchaser without notice, he said that he could not find for him. The learned Judge was not entitled to find that a person who had paid money for the property, purchased it with notice of the fraud unless there was evidence fixing the subsequent purchaser with notice of the fraud, and the only ground for the learned Judge's fixing the second defendant with notice of the fraud is that the property was sold by a female as the guardian of her minor son. Ladies in this country, whether *pardanashin* or otherwise, are under no such disability that they cannot execute any document. As a matter of fact a recent decision of the Privy Council* in an appeal from a judg-

*See *Kali Bakhsh Singh* v. *Ram Gopal Singh*, 21 Ind. Cas.985; 36 A. 81 at p. 92; 18 C.W.N. 282; 16 O. C. 378; (1914) M. W. N. 112; 12 A. L. J. 115; 15 M. L. T. 130; 19 C. L. J. 172; 1 O. L. J. 67; 26 M. L. J. 121; 16 Bom. L. R. 147 (P. C.).—*Ed.*

ment of the Allahabad High Court shows that *pardanashin* ladies in this country, although there are certain rules established by the Court for their guidance, are under no such incapacity.

The second ground put forward by the learned Vakil for the respondent is much more dangerous and that is that, although there was an order of the Court for the sale of the property, the subsequent purchaser ought to have inquired whether any fraud had been committed. I have not looked into the Transfer of Property Act to see whether there is a corresponding section to the English Conveyancing Act protecting persons who purchase properties under orders of the Court, but under the Conveyancing Act the law and the established rule is that, when a person purchases a property under the authority of the Court, he gets a good title unless he knows that fraud has been practised on the Court. That the guardian of the infant in this case was a female who obtained leave of the Court to sell the property and that, therefore, fraud was practised on the Court, I have never heard it before. In my opinion, the learned Judge came to a wrong conclusion when he held that the defendant No. 2 was not a *bona fide* purchaser for value without notice of the fraud; and, in that view, the decree of the Court below so far as it decrees *khas* possession against the defendant No. 2 must be set aside and the present appeal allowed with costs both here and in the Court below.

RICHARDSON, J.—I agree.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 47 OF 1911.

September 9, 1914.

Present:—Sir John Edward Power Wallis, Offg. Chief Justice, and Mr. Justice Seshagiri Aiyar.

SRINIVASA AIYANGAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

RANGASAMI AIYANGAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 108 (a)—Limitation Act (IX of 1908), Sch. I, Art. 115—Lessor and lessee—Breach of covenant for quiet enjoyment—Disturbance by trespasser, whether breach—Trespasser acting under lessor's instructions—Breach—Deposit money, suit to recover—Limitation.

A covenant for quiet enjoyment, as between lessor and lessee, even in its more extended form, is only a covenant against disturbance by somebody claiming under a lawful title, and does not extend to disturbance by trespasser.

Section 108 (*c*) of the Transfer of Property Act, though made inapplicable to agricultural leases, can still be made applicable to such leases, as embodying the rules of equity, justice and good conscience.

Tayawa v. *Gurshidappa*, 25 B. 269; 2 Bom. L. R. 1070, followed.

Where a trespasser, acting under instructions from the lessors themselves, interferes with the peaceful enjoyment by the lessees and harvests crops on the land and the lessors themselves accept delivery of such crops from him, there is a clear breach of the covenant for quiet enjoyment, and the lessors are not entitled to recover anything from the lessees for the period during which they were so kept out of enjoyment.

A suit to recover deposit amount payable on the execution of lease by the lessees is a suit to recover compensation for breach of contract within the meaning of Article 115 of the Limitation Act, Schedule I, and such a suit must be brought within three years from the date of the breach.

Balakrishnudu v. *Narayanswamy Chetty*, 22 Ind Cas. 60; (1914) M. W. N. 264, referred to.

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam, in Original Suit No. 11 of 1909.

FACTS.—The facts of the case are fully set out in the judgment.

Mr. *T. Narasimha Iyengar* for Mr. *T. Natesa Aiyar*, for the Appellants:—The appellants are not liable to pay anything as they were out of possession on account of the breach of the covenant for quiet enjoyment on the part of the lessors. The principle of section 108 (*c*), Transfer of Propety Act, is applicable. *Tayawa* v. *Gurshidappa* (1). The lessors were also bound to re-pay the Rs. 500 deposited with them prior to the bidding for the lease.

Mr. *S. Muthia Mudaliar*, for the Respondents:—The covenant for quiet enjoyment only covers disturbance by the lessor and those claiming through or under him and not by trespassers. Srinivasa Iyengar's lease having been found to be not valid, he was only a trespasser and any disturbance by him is not available as a defence to the present suit. Section 108 (*c*) of the Transfer of

(1) 25 B. 269; 2 Bom. L. R. 1070.

Property Act is not applicable to the present lease which is an agricultural one. The claim to recover Rs. 500 has become barred under Article 115, Limitation Act. *Balakrishnudu* v. *Narayanasawmy Chetty* (2).

JUDGMENT.—In this case the plaintiffs, who are the trustees of a temple, sued for the rent for five *faslis* of certain lands which were leased to the defendants Nos. 1 to 4. The procedure adopted by the trustees was to auction the lease and one Srinivasa Aiyengar, the sixth witness for the plaintiffs in this case, was the successful bidder at the first auction. Under the conditions of the auction he was bound to execute an agreement in favour of the trustees on certain terms. He did execute an agreement in favour of the trustees and got it registered and according to the well-known decision of the Full Bench of this Court in *Syed Ajam Sahib* v. *Meenatchi Devastanam* (3), by which we are bound, this registered agreement by the lessee was a registered lease within the meaning of the Transfer of Property Act so as to render the lease effectual. However, the majority of the trustees were not satisfied with the terms of this document and said that it was not the sort of lease which they had bargained for. They accordingly declared it cancelled and held a fresh auction at which the defendants Nos. 1 to 4 in this suit were the successful bidders and they in turn executed another registered agreement, which must be regarded as a registered lease, in favour of the plaintiffs and became the lessees of the plaintiffs. This was in July 1902, at the beginning of *Fasli* 1312. It is disputed whether these defendants ever got into possession in *Fasli* 1312. In any case, the sixth witness for the plaintiffs, Srinivasa Aiyengar, the successful bidder at the first auction, within a few days after the beginning of the *fasli*, instituted a suit for an injunction restraining these defendants from interfering with his possession of the lease-hold premises. These defendants appeared and gave an undertaking that they would not collect any rents pending the disposal of the suit; and, when the time came to harvest the crops, the Court appointed a Receiver. Ultimately it was held that this man Srinivasa Aiyengar was not the lessee, but that these defendants were.

In the present suit, among other things, the plaintiffs seek to recover from these defendants the rent of the suit lands for *Fasli* 1312. The defendants rely on the fact that they were out of possession and upon the lessor's implied covenant of a quiet enjoyment. Under section 108 (*c*) of the Transfer of Property Act, which, however, does not apply to agricultural leases, "The lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption." That is what is generally known as the covenant for quiet enjoyment. The usual covenant for quiet enjoyment in England is a covenant for quiet enjoyment against disturbance by the lessor or those claiming through or under him, as distinct from an unconditional covenant for quiet enjoyment which also extends to disturbance by some one claiming by a title paramount to the lessor. It is, however, perfectly well settled in England that even in the more extended form the covenant for quiet enjoyment is only a covenant against disturbance by somebody claiming under a lawful title. It does not extend to disturbance by a trespasser. In the present case the result of the litigation between the parties in the suit already referred to has been that this Srinivasa Aiyengar has been found to have been a trespasser. The disturbance of these defendants was by Srinivasa Aiyengar, not by the plaintiffs. So far as this *fasli* is concerned, it was a disturbance by a trespasser and, therefore, it would not come within the covenant for quiet enjoyment under section 108 (*c*) of the Transfer of Property Act. Although section 108 does not in terms apply to this case, which is an agricultural lease, yet, nonetheless, we think it ought to be followed as embodying the rules of justice, equity and good conscience. It is what the Legislature thought was applicable to other leases, and there is no reason why it should not be applied as a matter of justice, equity and good conscience to agricultural leases also, as has been done in the case of several other provisions of the Transfer of Property Act relating to leases which have been applied to

(2) 24 Ind. Cas. 852; 37 M. 175.
(3) 8 Ind. Cas. 668; 35 M. 95; (1910) M. W. N. 766; 8 M. L. T. 437; 21 M. L. J. 202.

agricultural leases which were not directly within the scope of the Act. As regards the scope of this section the same view was taken in *Tayawa* v. *Gurshidappa* (1).

With regard to *Fasli* 1313 the facts are more complicated. Towards the end of *Fasli* 1312, Srinivasa Iyengar, who claimed to be the lessee, applied to the Court to be appointed Receiver for the ensuing *fasli*, and these defendants also applied to be appointed Receivers. On the 24th July 1903, when there was no Judge for the Court, the trustees put in a counter-petition, Exhibit F: "What we submit regarding the petition which the plaintiff has presented in respect of the cultivation during this year so that the cultivation business may be done hereafter without delay, is we have no objection to plaintiff and 6th defendant cultivating. In the end we are ready to admit it as the cultivation of that lessee whose lease is established." The sixth defendant in that case was the fourth of the defendants in the present case, but he was apparently acting in opposition to defendants Nos. 1 to 3. On the same day the trustees delivered a letter, Exhibit VII, to Srinivasa Iyengar and the present 4th defendant: "As mentioned in the petition we presented today in Original Suit No. 60 of 1902 of the Kumbakonam Sub-Court, we have no objection whatever to your cultivating the Mekkarimanglam village yourselves. We consent to your doing so. You should take action accordingly." And by Exhibit VII (*a*) they practically made an advance to these two people for the cultivation expenses. What happened is made still clearer by a paragraph in the affidavit filed by Srinivasa Iyengar, Exhibit VIII, on the 26th January 1904. All these facts he has spoken to in his evidence in this case. "While matters stood thus, as no Judge was appointed to this Court till the 25th August last year, as the season was over to begin cultivation, and as the lands in the village were lying waste, the trustees (that is, the present plaintiffs) requested me and the 6th defendant to cultivate the village so that none might sustain loss and wrote and gave us *varthamanams* (letters) marked A and B [that is, Exhibit VII and VII (*a*) in this case] and presented herewith in support of the same. As the 6th defendant stated that it would not be convenient for him to cultivate in accordance with that arrangement, I have myself solely carried out the cultivation, etc., in reference to the arrangement separately made with the trustees and not in accordance with the arrangement of the lease in question." Later on in the year, when the time came to harvest the crop, the present plaintiffs obtained an order from the Court that "the crops of the plaint village, now ready for harvest, will be gathered by the plaintiff" (that is Srinivasa Iyengar) "and the trustees or by any one of them or by the agent deputed by them in writing for the purpose and that the produce gathered will be taken possession of by the trustees or any one of them or their agent after delivery of the portion due to cultivating tenants and incidental expenses." On these facts we are of opinion that the action of the plaintiffs in asking this Srinivasa Iyengar and the present 4th defendant to go into possession not in right of the defendants' lease, and their subsequent action in obtaining an order for the gathering of the crops by Srinivasa Iyengar himself and for the delivery to them of the crops and the acceptance of such delivery, constitutes a disturbance of these defendants under their lease, and it is a breach of the covenant for quiet enjoyment and disentitles the plaintiffs to recover anything in respect of rent for this *fasli* from these defendants.

The only other question argued before us by Mr. Narasimha Aiyangar was as to a sum of Rs. 500 which was paid by these lessees prior to bidding for the lease. Under the terms of the notice all bidders were required to deposit Rs. 500. The unsuccessful bidders were entitled to get back their deposits at once. The successful bidder was to get his deposit back after executing a lease and a security bond. Under the terms of the contract between the parties the money became payable to these defendants on the execution of the lease and the security bond and there was a breach of contract in not paying it to them then, and if no other Article is applicable, Article 115 applies to the case which is "for compensation for the breach of any contract, express or implied, not in writing registered and not herein specifically provided for." Sitting on the original side one

of us recently held that that was the Article applicable to a deposit of money which was payable on the happening of a certain event but had not been paid. That case, *Balakrishnudu* v. *Narayanasawmy Chetty* (2), is reported in 37 Madras 175 and that decision has been affirmed on appeal on this point in *V. Balakrishnudu* v. *G. Narayanasawmy Chetty* (4) by the learned Chief Justice and Mr Justice Oldfield. Following that decision we must hold that the defendants' claim in respect of this Rs. 500 is barred. They claim that they had placed this money in the hands of the plaintiffs and that the plaintiffs appropriated it in satisfaction of a debt due from the 4th defendant. It appears, however, that before that appropriation, if it could avail them, the debt had become barred.

As regards the question argued on the memorandum of objections we think the Court below was right.

In the result the appeal will be allowed so far as the claim for *Fasli* 1313 is concerned, and the decree modified accordingly. The party will pay and receive proportionate costs throughout.

The memorandum of objections is dismissed with costs.

Appeal allowed in part;
Memo. of objections dismissed.

(4) 22 Ind. Cas. 60; (1914) M. W. N. 264.

LOWER BURMA CHIEF COURT.

CIVIL REVISION NO. 108 OF 1912.

January 27, 1914.

Present:—Mr. Justice Twomey.

PO KIN—DEFENDANT—APPELLANT

versus

MAUNG KALA—PLAINTIFF—RESPONDENT.

Master and servant—Misconduct of servant—Dismissal.

Misconduct inconsistent with the due and faithful discharge by a servant of the duties for which he was engaged is a good cause for his dismissal.

Mr. *Hay*, for the Applicant.

Mr. *Palit*, for the Respondent.

JUDGMENT.—The plaintiff-respondent, Maung Kala, was engaged by the defendant-applicant, Maung Po Kin, as a field labourer to work for the season for sixty baskets of paddy to be paid at harvest. When Maung Kala had performed about two-thirds of the work, he was turned out of his employer's house as he was caught in an intrigue with his employer's daughter. Maung Kala sued for his wages and Po Kin in his written statement set up only one defence, namely, that Maung Kala had left the work of his own accord. The Township Court found as a matter of fact that Maung Kala was not dismissed by his employer, Po Kin, but left of his own accord and the suit was dismissed on this ground. There can be no doubt, however, that Maung Kala was turned out by his uncle at the request of Po Kin's wife, Ma Paw. Maung Po Kin himself was away from home at the time and in requesting Maung Kala's uncle to turn him out, Ma Paw was acting as her husband's agent. When Po Kin returned he appears to have approved of Maung Kala's dismissal, took no steps to re-instate him and engaged another man to complete the work.

Maung Kala appealed to the District Court. The District Judge appears to have misread the evidence, for the defendant Maung Po Kin made no admission that he complained to Maung Kala's uncle. But the learned Judge was right in finding that Maung Kala was really turned out by Ma Paw, who was angry with him on discovering the intrigue with her daughter. As stated above, Maung Po Kin was bound by his wife's action in the matter. On this ground the District Judge dissented from the Township Court's decision and decreed the plaintiff's suit. The learned Judge failed, however, to consider the question whether the dismissal was justified. It is true that this defence was not raised in the written statement and no direct issue was framed as to justification. But it has not been urged before me and it cannot be held that the defendant is on this account debarred from relying on the defence of justification. He, no doubt, acted in good faith in setting up the defence that he did not actually dismiss Maung Kala, for the actual ejection of Maung Kala from the house was effected by Maung Hmat Kyauk. Maung Po Kin may very well have thought that this defence would hold good and that it was unnecessary for him to publish the facts about his daughter's intrigue with Maung Kala,

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The Township Court having learnt from the examination of the parties that the plaintiff's uncle, Ko Hmat Kyauk, had come and turned him out of Po Kin's house at the instance of Po Kin's wife, might well have questioned the parties further as to the explanation of this incident, and the Judge would then have perceived the importance of framing an issue as to justification. The facts as to the intrigue between Maung Kala and Po Kin's daughter are not disputed, and it cannot be said that the plaintiff-respondent was prejudiced by the absence of a definite issue on the legal question of justification. It is an established rule of English Law that misconduct inconsistent with the due and faithful discharge by a servant of the duties for which he was engaged, is good cause for his dismissal. This rule is in accordance with justice, equity and good conscience and may, therefore, be adopted in the absence of any specific Indian enactment inconsistent with the rule.

A field labourer in this country usually lives in his employer's house almost on the footing of one of the family, and it appears that Maung Kala was living in this way in Po Kin's house ever before he was engaged for field work. Such an arrangement enables the employer to keep close supervision over his labourer. Maung Kala grossly abused his employer's hospitality by seducing his daughter. A petty cultivator like Po Kin has to live in close personal relations with his one or two hired men and it would be highly unreasonable to expect him to continue such relations with the man who had brought shame to his household.

I, therefore, hold that the plaintiff-respondent's misconduct was inconsistent with the due discharge of his duties and that his dismissal was justified. As the dismissal took place before Maung Kala had completed his work and earned the stipulated wages for the season, he was not entitled to any remuneration for the broken period.

The decree of the lower Appellate Court is set aside and the plaintiff's suit is dismissed with costs in all Courts.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 165 OF 1912.

April 20, 1914.

Present:—Mr. Stuart, A. J. C.

NIAMAT KHAN, DECEASED, AND AFTER HIS DEATH ABDULLA KHAN AND OTHERS —PLAINTIFFS—APPELLANTS

versus

DEPUTY COMMISSIONER, KHERI, FOR MEHEWA ESTATE—DEFENDANT—RESPONDENT.

Redemption, suit for—Original mortgage-deed or its copy not produced—Secondary evidence—Existence of mortgage admitted and mentioned in certain documents—Terms of mortgage not proved—Mortgage whether still redeemable, no proof as to—Mortgagors accepting certain benefits from mortgagee in full settlement of all their claims, effect of—Estoppel.

Where the descendants of the original mortgagors, being unable to produce the original deed of mortgage or its copy, relied upon secondary evidence in the shape of the existence of such a deed being either mentioned or admitted in certain documents (*viz.*, *Wajib-ul-araiz* of the villages in which the mortgaged properties were situate, a judgment of the Settlement Court and the deposition of a son of one of the original mortgagors), and sought redemption on the strength of this evidence:

Held, that the descendants of the original mortgagors could not succeed, inasmuch as they had not been able to establish the existence of the alleged mortgage by evidence that carried them further than the statements contained in the documents filed, or to establish clearly the terms of the alleged mortgage, or to show how it came into being, or to prove that the mortgage was still in force of which redemption was now possible.

Where the mortgagors claimed proprietary and then under-proprietary rights in respect of the mortgaged properties and at last a compromise was arrived at between them and the mortgagee, whereby the latter handed over certain lands to the former in full settlement of all their claims:

Held, that the acceptance of the benefits under the compromise effectually estopped the mortgagors from subsequently setting up the right to redeem the mortgage.

Appeal against the decree of the Subordinate Judge, Kheri, dated 21st September 1912.

Messrs. *St. G. Jackson* and *Muhammad Siddique*, for the Appellants.

Babus *Nagendra Nath Ghoshal* and *Ram Chandar*, for the Respondent.

JUDGMENT.—This suit was brought by Niamat Khan and others against the *Talukdar* of Mehewa on the allegation that the predecessors-in-interest of the plaintiffs had mortgaged *Kasba* Karanpur and *Mauza* Chauraha with possession to the predecessor-

in-interest of the defendant by an instrument of mortgage, dated the 5th June 1856, for a sum of Rs. 7,049. The case for the plaintiffs was that the profits of the mortgaged property were to be enjoyed by the mortgagee in lieu of interest, and that, no period being fixed for the redemption of the mortgage, the plaintiffs were entitled to redeem it at any time subject to the provisions of the Law of Limitation. The defendant denied the allegation as to the execution of the instrument of mortgage, and asserted that he was superior proprietor of the aforesaid areas.

The learned Subordinate Judge found that the question in dispute had already been decided between the parties and that it could not be re-opened. He, therefore, dismissed the suit for redemption.

The plaintiffs appeal. The third ground of appeal is to the effect that the learned Subordinate Judge did not give the appellants a proper opportunity of proving their case. I find that the appellants were given a proper opportunity of proving their case, and decide the third ground against them. It is necessary for the appellants, in order that their appeal may succeed, to establish that a mortgage existed and that it is still in force. No deed of mortgage has been produced. In view of the presumption that, if a deed of mortgage had been executed, the deed would not have been procurable by the appellants, it was open to them to prove its terms by secondary evidence and I have to decide whether they have succeeded in proving its terms in this manner. They have not produced any evidence as to the exact terms of the alleged deed. They plead on the allegation that the mortgage was executed in 1856 that they have not been able to produce a copy, and they rely upon evidence of admission of the existence of such a deed shown in certain documents. The most important piece of evidence so produced is a certified copy of the *Wajib-ul-arz* of the village Karanpur filed, Exhibit 3. In this it is stated that in 1265 *Fasli*, a year corresponding to 1858, Mangal Khan and Ahmed Khan mortgaged Karanpur and Chauraha for Rs. 7,049 to Thakur Gajraj Singh, *Talukdar* of Mehewa. A similar entry appears in Exhibit 4, which is a certified copy of the *Wajibul-ul-arz* of Chauraha. The next piece of evidence is a certified copy of a deposition of a certain Ramzan Khan, son of Mangal Khan, to the effect that a portion of this property had formerly been in the proprietary possession of his predecessor-in-title and had been mortgaged with possession to the *talukdar*. The remaining evidence, upon which the appellants rely, is contained in a certified copy of a judgment of a certain Mr. Clark, dated 3rd September 1875, which refers to the existence of such a mortgage. The appellants have not been able to establish the existence of the alleged mortgage by evidence that carries them further than the statements contained in the documents in question. They have thus been unable to establish clearly the terms of the alleged mortgage or to show how it came into being. It will be observed that, while they alleged that the mortgage was executed on 5th June 1856, the entry in the *Wajib-ul-arz* appears to show that a mortgage was executed in 1858. The latter entry states that the amount of the mortgage money was Rs. 7,049; but there is nothing to show what were the terms of the mortgage, and it is impossible to decide upon the evidence the rate of interest upon which the parties might have agreed if such a mortgage had really been executed, or that the parties agreed that profits should be enjoyed in lieu of interest. Although the Court has discretion to arrive at a decision on deductions derived from materials which are not absolutely complete, it does not seem possible in this case to arrive at any conclusion upon the materials that I have before me. Even if such a mortgage existed, I do not consider that I could decide the amount payable for its redemption upon such *data*. There is presumption that, if such a mortgage existed, the deed, if any, would have been in possession of the mortgagee; but such presumption would not be of the strongest and there is nothing upon the record to justify a conclusion that the respondent has held back any information which he could have given. I find that the parties are both ignorant as to what actually happened. I can go so far as to find that some transaction took place between the *talukdar* on the one hand and Mangal Khan and Ahmad Khan on the other hand, but I am unable to decide what that transaction was. I cannot go so far as to find that that transaction amounted to a mortgage of which redemption could now be possible. In view of evidence as to subsequent transactions

between the parties it is not a matter of importance whether such a mortgage was or was not executed, for I find it proved distinctly that the successors-in-interest of Mangal Khan and Ahmad Khan gave up any rights which they might have possessed under such a mortgage in favour of that *talukdar* in consideration of substantial benefit which they received from him. A member of the family applied during the first Regular Settlement for proprietary rights with regard to the area in question. His application was refused and he then sued for under-proprietary rights, being joined in the subsequent application by another member of the family. The claim for under-proprietary rights was withdrawn on the basis of a compromise by which the *talukdar* handed over certain lands to the applicants in full settlement of all their claims. The acceptance of these benefits by the applicants effectually estops their descendants from setting up the right to redeem that alleged mortgage, and in the decree based upon this compromise the benefits were conferred not only upon the applicants, Ali Bakhsh Khan and Ramzan Khan, but also upon the remaining members of their family. Further, when the village papers were prepared with regard to the benefits transferred under the terms of the compromise, the remaining members of the family are shown to have had their names entered as participants in these rights. One of the applicants was Ramzan Khan, son of Mangal Khan. Mangal Khan, as has been stated, is alleged to have been one of the two mortgagors. In the village papers subsequently executed Niamat Khan, who is admitted to have been the only other son of Mangal Khan, had his name entered. Ali Bakhsh Khan was the other applicant. He was one of the four sons of Ahmad Khan. We find that Musahab Khan, another son of Ahmad Khan, who is the person alleged to be the remaining mortgagor, had also his name entered. Ahmad Khan is alleged to have had two other sons. One of these, Sher Ali Khan, died childless, and I cannot assume that he was alive at the time that these papers were prepared. The remaining son was Makhdum Bakhsh Khan. His son was Wazir Khan and it is shown by Exhibits A51 to A54 that Wazir Khan sued in 1882 Ali Bakhsh and Musahab Khan for a share in these very benefits and obtained it. The above facts show sufficiently that all the descendants of Mangal Khan and Ahmad Khan agreed to accept the benefits given by the *talukdar* under the compromise in lieu of any rights that they might have possessed by virtue of the alleged deed of mortgage. The learned Subordinate Judge has rightly held that Ali Bakhsh Khan and Ramzan Khan represented the whole family when they accepted the terms of the compromise. No assumption can be made that a member of a Muhammadan family has a right to pledge other members to the withdrawal of their rights by virtue of his position as a member of the family. But Ramzan Khan and Ali Bakhsh Khan are proved on the evidence to have represented other members of the family, not by virtue of their position as elder members, but by virtue of the fact that other members of the family empowered them to act on their behalf in the transaction. The fact of such empowering is proved by the evidence of the conduct of the other members of the family. Thus it is established that no right exists in favour of the appellants, inasmuch as all right under the alleged deed of mortgage, even had it been all that the appellants claimed to be, had become extinguished by the acceptance of the benefits from the *talukdar* to which I have already referred. This conclusion disposes of all the remaining grounds raised in the appeal.

The appeal is accordingly dismissed. The appellants will pay their own costs and those of the respondent.

Appeal dismissed.

KUNJA BEHARI SEAL *v.* RAJA DURGA PRASAD SINGH.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL No. 197 OF 1911.

April 24, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

KUNJA BEHARI SEAL—PLAINTIFF—APPELLANT

versus

RAJA DURGA PRASAD SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Grant, Mogoli Brahmottar—*Ancient and permanent—Mines unopened at date of grant, right in, whether also passes.*

A *Mogoli Brahmottar* grant, more than 100 years old, though permanent, does not pass the mines unopened at the date of the grant.

Kumar Hari Narayan Singh Deo v. *Sriram Chakravarty*, 6 Ind. Cas. 785; 14 C. W. N. 746 (P. C.); 11 C. L. J. 653; 7 A. L. J. 633; 8 M. L. T. 51; 12 Bom. L. R. 495; 20 M. L. J. 569; 37 C. 723; (1910) M. W. N. 309; 37 I. A. 136; *Raja Jyoti Prosad Singh* v. *Lachipore Coal Co.*, 12 Ind. Cas. 482; 14 C. L. J. 361; 38 C. 845; 16 C. W. N. 241 and *Durga Prasad Singh* v. *Brojo Nath Bose*, 15 Ind. Cas. 219; 16 C. W. N. 482; (1912) M. W. N. 425; 11 M. L. T. 337; 9 A. L. J. 462; 15 C. L. J. 461; 14 Bom. L. R. 445; 23 M. L. J. 26; 39 I. A. 133; 39 C. 696, followed.

Sonet Koer v. *Himmut Bahadur*, 1 C. 391 (P. C.); 25 W. R. 239; 3 I. A. 92; 3 Sar. P. C. J. 608; 3 Suth. P. C. J. 257, distinguished.

Appeal against the decree of the Subordinate Judge of Manbhoom, dated the 11th of March 1911.

Mr. *B. Chakrabarty*, Babus *Shib Chunder Palit* and *Hira Lal Sanyal*, for the Appellant.

Babus *Mohendra Nath Roy*, *Lalit Mohan Ghose* and *Tarkeshwar Pal Chowdhury*, for the Respondents.

JUDGMENT.

FLETCHER, J.—The only question arising for our decision in the present appeal is whether the minerals lying beneath the *Mauza* Jitpore in the *Pergana* of Jheria passed to the ancestor of the Tewari defendants by a *Mogoli Brahmottar* grant at a rent of Rs. 16 a year by the ancestor of the defendant No. 1. The plaintiff has acquired annas 15-2¼ *gandas* in the sub-soil of the *mauza* from the Tewaris and brought the suit for the declaration of his title to such share. His claim was resisted by the contesting defendants on various grounds, the only one of which it is now material to consider is the defence that the *Brahmottar* granted by the ancestor of the defendant No. 1 to the ancestor of the Tewari defendants, did not pass the minerals to the grantee. The evidence before us is small and the case largely depends upon what are the proper inferences of fact to be drawn from certain admitted facts.

There is no document evidencing the grant of the *Brahmottar* although it would appear that it was granted more than 100 years ago. At that time it is not probable that any one thought of there being coal under these lands. In an attempt to prove the origin of the *Brahmottar* grant the plaintiff called the defendant No. 17 to prove the origin of the grant. His statement was that he heard from his grandmother that his ancestor had become degraded for some spiritual services rendered to the ancestor of the defendant No. 1 and, therefore, the former Raja made a gift of the whole of his rights in the *mauza*. The learned Judge very properly refused to accept this statement as proving the origin of the grant.

The only facts proved are, *first*, that the grant was a *Mogoli Brahmottar* grant and *secondly*, that it has been held for more than 100 years at the same rent of Rs. 16. From these facts the learned Judge drew the inference that the *Brahmottar* was a permanent tenure held at a rent of Rs. 16 a year. He, however, came to the conclusion that such a grant did not transfer the minerals to the grantee. It is not suggested in the present case that there were any mines opened on the property at the date of the grant, nor that the plaintiff or the persons from whom he derives title have a prescriptive right to work any of the minerals under the property. The learned Judge, therefore, came to the conclusion that the plaintiff had not shown that the former Raja parted with the minerals when he made the *Brahmottar* grant to the Brahmin Bekari Tewari.

I think the learned Judge in this view was correct. The present case appears to me to be covered by authority.

The first case to which we have been referred is the case of *Kumar Hari Narayan Singh Deo* v. *Sriram Chakravarty* (1) which is a decision of the Judicial Committee of the Privy Council. The contest in that case was between the *zemindar* and certain Goswamis, the *shebaits* of an idol. Lord Collins in delivering the opinion of their Lordships made the following remarks: "On

(1) 6 Ind. Cas. 785; 14 C. W. N. 746 (P. C.); 11 C. L. J. 653; 7 A. L. J. 633; 8 M. L. T. 51; 12 Bom. L. R. 495; 20 M. L. J. 569; 37 C. 723; (1910) M. W. N. 309; 37 I. A. 136.

the whole it seems to their Lordships that the title of the *zemindar* Rajah to the village Petina as part of his *zemindari* before the arrival of the Goswamis on the scene, being established as it has been, he must be presumed to be the owner of the underground rights thereto appertaining in the absence of evidence that he ever parted with them, and no such evidence has been produced". I think that decision covers the case now before us. There can be little if any distinction between the case of a *mogoli Debutter* and a *Mogoli Brahmottar* grant. It has, however, been argued before us that that decision does not apply to the present case having regard to certain remarks made by Lord Collins in an earlier portion of the judgment. But a perusal of the judgment convinces me that in using the expression "occupancy right" their Lordships were not considering whether the idol was a tenure-holder or a *ryot* with an occupancy right or a *ryot* with a non-occupancy right. It seems manifest to me that their Lordships were using this expression as opposed to the right of the *zemindar* who had the proprietary interest.

The next case that was cited to us was that of *Rajah Jyoti Prosad Singh* v. *Lachipore Coal Co.* (2). The facts in that case are undistinguishable from the present. The grant in that case was a *Mogoli Brahmottar* grant, The learned Judges held that such a grant even though permanent, did not pass the mines unopened at the date of the grant.

Next comes the case of *Durga Prosad Singh* v. *Brojo Nath Bose* (3), which was also a decision of the Judicial Committee of the Privy Council. The contest in that case was between the persons claiming title from a *digwar* and the *zemindar* and it was held that the minerals were vested in the *zemindar*. Against these decisions the appellant relies on the a se of *Sonet Kooer* v. *Himmut Bahadur* (4). But the only point decided in that case was that on the failure of heirs of a person to whom a permanent tenure had been granted the escheat was to the Crown and not to the *zemindar*. But that case has nothing to do with the question of what was granted to the tenure-holder in the first instance. I think, therefore, that the learned Subordinate Judge came to a correct conclusion when he held that the *Mogoli Brahmottar* grant to the ancestor of the Tewari defendants did not pass the minerals under the *mauza*.

Accordingly the present appeal fails and must be dismissed with costs. We allow only one set of costs to be divided between the different sets of respondents who have appeared. The respondents are not entitled to the paper-book costs incurred by them.

RICHARDSON, J.—I agree that the case is covered by authority and that the appeal must be dismissed.

Appeal dismissed.

(2) 12 Ind. Cas. 482; 14 C. L. J. 361; 38 C. 845; 16 C. W. N. 241.

(3) 15 Ind. Cas. 219; 39 C. 696; 16 C. W. N. 482; (1912) M. W. N. 425; 11 M. L. T. 337; 9 A. L. J. 462; 15 C. L. J. 461; 14 Bom. L. R. 445; 23 M. L. J. 26; 39 I. A. 133.

(4) 1 C. 391 (P. C.); 25 W. R. 239; 3 I. A. 92; 3 Sar. P. C. J. 608; 3 Suth. P. C. J. 257.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 205 OF 1913.

February 16, 1914.

Present:—Sir Henry Hartnoll, Offg. Chief Judge, and Mr. Justice Ormond.

JANNAT ALLY—APPELLANT.

In the matter of the WILL OF MOHAMED ALLY—DECEASED.

Will—Appointment by implication.

The mere fact that a testator has appointed by Will his elder son to be trustee of his minor younger son and directed him to deal with a certain house as the trustee of the minor in the event of the testator's death during the younger son's minority is not sufficient to indicate that the elder son was appointed the executor of his Will.

Mr. *Auzam*, for the Appellant.

JUDGMENT.

HARTNOLL, OFFG. C. J.—The point for decision is whether appellant was appointed executor by implication of the Will of Mohamed Ally deceased. The Will is to the following effect:

"I write this Will voluntarily and with sense and consciousness (to the effect) that my one house is at Rangoon in No. 46th Street and the house is No. 66, that after my death, son Jannat Ally's share is one-half and son Hassan Ally's share is one-half in that house. The age of son Hassan Ally is twelve years at present and if after

my death, this son Hassan Ally has not reached the age of twenty-one years, I appoint son Jannat Ally as his 'trustee'. On deducting every expense from the rent of this house, son Jannat Ally shall pay to him—son Hassan Ally—the moneys in respect of his half share out of the balance moneys for rent and this son Hassan Ally shall live where he likes and when his marriage would take place, son Jannat Ally shall, after selling this house, spend his share of the moneys in his wedding expenses and if there is a surplus, son Jannat Ally shall pay it up to him on his reaching the age of twenty-one years. Son Hassan Ally's marriage should be performed after his reaching the age of eighteen years. If in case the sale of this house appear advantageous to son Jannat Ally before the marriage of son Hassan Ally has taken place, he can sell this house and shall invest his—son Hassan Ally's —half share of the moneys on interest at a good place and shall pay whatever is accrued out of this sum for board, education, etc., of son Hassan Ally. But if the money realised out of this sum be less than Rs. 20 (twenty) each month, he should pay out of the principal sum: as long as his marriage has not been performed, son Hassan Ally should not get less than Rs. 20 (twenty).

"In addition to this house, I may during my life give to any one in charity, gift, whatever the cost, immoveable property, shares, etc., I may have got and after paying for whatever expenses I may have asked to incur after my death, one-half share of whatever is left is of son Jannat Ally and one-half share is of son Hassan Ally.

"Whatever moneys, property, etc., that son Jannat Ally may have got are of his own earnings, to which neither I nor Hassan Ally has a right."

I can see no reason to differ from the conclusion arrived at by the learned Judge on the original side. It is clear that by the terms of the Will appellant, Jannat Ally, was appointed to be trustee of his brother Hassan Ally with respect to a house described as No. 66 in 46th Street in the event of the testator dying before Hassan Ally attained the age of twenty-one years, and the Will contains detailed instructions as to how Jannat Ally was to deal with the house in such a case; but the Will gives no sufficient indication that Jannat Ally is appointed to generally execute the Will. He is given by the Will half of the property left by his father exclusive of such as may be given away and Hassan Ally is given the other half: but nothing is said as to who is to pay the debts, funeral expenses, etc., and to collect the assets. If the testator had died after Hassan Ally had attained the age of majority, could it be said that the Will appoints an executor? The case *In the goods of Punchard* (1) may be usefully considered in coming to a conclusion in the present one. Also the present case is not dissimilar to that of *Seshamma* v. *Chennappa*(2), where the Will provided that the plaintiffs should take care of the estate during the minority of a son who was to be adopted to the testator and imposed upon them the duty of providing for the maintenance of the persons therein named, and in which it was held that the plaintiffs were not appointed executors by implication.

There is to my mind no sufficient indication that the testator meant to confide the execution of his Will to Jannat Ally other than that he directed him to deal with a certain house as the trustee of a minor son in the event of the testator's death during such minority.

I would, therefore, dismiss this appeal.

ORMOND, J.—I concur.

Appeal dismissed.

(1) (1872) L. R. 2 P. 369; 41 L. J. P. 25; 26 L. T. 526; 20 W. R 446.
(2) 20 M. 467.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1528 OF 1913.
July 10, 1914.
Present:—Mr. Justice Sunder Lal.

GAYA PRASAD AND OTHERS—PLAINTIFFS —APPELLANTS

versus

Musammat LARETI KUAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 66—Civil Procedure Code (Act XIV of 1882), s. 317—Civil Procedure Code (Act VIII of 1859), s. 260—Benami purchaser—Actual purchaser—Defence—Procedure.

The special plea, which was available to a certified purchaser at a Court sale against the actual purchaser under section 260 of the Civil Procedure Code (Act VIII of 1859) and section 317 of the Civil Procedure

Code (Act XIV of 1882), was a rule of procedure and after the repeal of those Codes it is no longer available by way of defence, as no one has a vested right in a particular form of procedure.

Under section 66 of the New Code of Civil Procedure the plea is open not only to the certified purchaser personally but also to his assigns and heirs.

Sibta Kunwar v. *Bhagoli*, 21 A. 196; A. W. N. (1899) 30; *Dukhada Sundari Dasi* v. *Srimonto Jardar*, 26 C. 950; 3 C. W. N. 657, *Nokori Dhur* v. *Sarup Chunder Dey*, 5 C. W. N 341. *Piramanayagam Pillai* v. *Alwar Naicker*, 18 M. L. J. 305, *Muhammad Farough* v. *Abdul Hakim*, 4 P. R. 1904; 28 P. L. R. 1904, *Hari Govind Joshi* v. *Ramchandra Narayan Gole*, 31 B. 61; 8 Bom. L. R. 873; *Lokhee Narain Roy* v. *Kalypuddo Bandopadhya*, 2 I. A 154; 23 W. R 358; *Jan Muhammad* v. *Ilahi Bakhsh*, 1 A. 290, *Musammat Buhuns Kowar* v. *Lala Buhooree Lall*, 14 M. I A. 496; 18 W. R. 157; 10 B. L. R 159; 3 Sar. P. C. J. 69; 20 E. R. 871; *Ramakrishappa* v *Adinarayana*, 8 M. 511 and *Hazi Arjun Mullick* v. *Sheikh Farutullah*, 9 C. L. R. 295, referred to

Second appeal from the decision of the Subordinate Judge of Bareilly, dated 10th June 1913.

Mr. *Sarat Chandra Chaudhry* for Dr. *S. C. Banerji*, for the Appellants.

Mr. *Sital Prasad Ghose*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for partition brought by the plaintiffs against, among other persons, the heirs and assigns of Ram Kumar.

One Bhagirath was owner of 400 square yards of land. 100 square yards of land out of these were purchased in the name of Bhopal and Jodhu on the 20th January 1870. These persons were the tenants of the plaintiffs and the plaintiffs' case is that the names of these persons were entered in the sale certificate *benami* that the real purchasers were the plaintiffs and not Bhopal and Jodhu. They have died and their heirs have sold the land to defendants Nos. 1 to 3, who have begun to make certain constructions on the land. The present suit is for partition and for an injunction restraining defendants Nos. 1 to 3 from building on the land. They have urged that the suit is barred by section 66 of the Code of Civil Procedure, and that the plaintiffs cannot maintain this suit against them who are claiming title under a purchase certified by the Court within the meaning of section 66 of the said Code.

The Courts below have accepted the contention and have held that the plaintiffs cannot be permitted to maintain their suit against them on the ground that the real purchaser was a person other than the certified purchaser.

Two points have been argued by Mr. Sarat Chander Chaudhri on behalf of the appellants. The first is that the auction purchase took place while Act VIII of 1859 was in force. Under section 260 of that Act a suit against the certified purchaser is barred. That section runs: "The certificate shall state the name of the person who at the time of the sale is declared to be the actual purchaser; and any suit brought against the certified purchaser on the ground that the purchase was made on behalf of an other person not the certified purchaser, though by agreement the name of the certified purchaser was used, shall be dismissed." It is argued that this plea is open to the certified purchaser alone and is not available to his heirs and assigns.

There is no ruling of this or any other High Court, so far as I know, construing section 260 of Act VIII of 1859 on these lines, but there have been a number of cases under section 317 of Act XIV of 1882 in which similar words occur holding that the wording of section 317 protects only the certified purchaser and not any person claiming through him. These cases are *Sibta Kunwar* v. *Bhagoli* (1); *Dukhada Sundari Dasi* v. *Srimonto Jardar* (2); *Nokori Dhur* v. *Sarup Chunder Dey* (3); *Piramanayagam Pillai* v. *Alwar Naicker* (4); *Muhammad Farough* v. *Abdul Hakim* (5).

On the strength of these rulings Mr. Sarat Chunder has argued that the same construction ought to be put on section 260 of Act VIII of 1859, as the language of the two sections is practically identical in this respect. I may note that the Bombay High Court in *Hari Govind Joshi* v. *Ramachandra Narayan Gole* (6) has held that the plea is open to both the certified purchaser and persons deriving title through him.

Both Acts have now been repealed and their place has now been taken by Act V of 1908.

(1) 21 A. 196; A. W. N. (1899) 30.
(2) 26 C. 950; 3 C. W. N. 657.
(3) 5 C. W. N. 341.
(4) 18 M. L. J. 305.
(5) 4 P. R. 1904; 28 P. L. R. 1904.
(6) 31 B. 61; 8 Bom. L. R. 873.

The first point for consideration is, whether a plea based on the provisions of a defunct Statute can be raised in bar now. Both these Acts have been repealed. They barred a suit by the real purchaser against the certified purchaser, but if the certified purchaser had himself to sue as plaintiff, they did not prevent the real purchaser from setting up and proving that he was the real purchaser. *Lokhee Narain Roy* v. *Kalypuddo Bandopadhya* (7); *Jan Muhammad* v. *Ilahi Bakhsh* (8); *Musammat Buhuns Kowur* v. *Lala Buhooree Lall* (9). It has also been held that where the certified purchaser did not defend the suit, or confessed judgment, the plea was not available to other defendants. *Ramakrishnappa* v. *Adinarayana* (10), *Hazi Arjun Mullick* v. *Sheikh Farutullah* (11).

In other words, it was a special plea by way of defence available only to the auction-purchaser when he was a defendant to the suit and chose to avail himself of the plea. It was a plea in bar which such purchaser, when arrayed in the suit as a defendant, could use to exclude evidence of the fact that he was not a real purchaser. It was merely a rule of procedure applicable to the trial of a certain class of suits in which the certified purchaser had a certain position in the array of parties. With the repeal of the Code of Civil Procedure which contained that provision, it is no longer available by way of defence. As has been well-established, no one has a vested right in a particular form of procedure. I think that the suit must be governed by the Code of Civil Procedure now in force.

The next question is, whether the Code now in force precludes the real purchaser from proving his title as against the heirs and assigns of the certified purchaser. In section 66 of the new Code the rule is extended so as to protect "*any person claiming title under a purchase certified by the Court.*" In my opinion the section was amended to include a case like this and to make it quite clear that the interpretation placed upon section 317 of Act XIV of 1882 by the Bombay High Court was the right interpretation of that section. In that view of the law, the appeal fails and is dismissed with costs. I may note that this was the only point pressed in appeal.

Appeal dismissed.

(7) 2 I. A. 154; 23 W. R. 358.
(8) 1 A. 290.
(9) 14 M. I. A. 496; 18 W. R. 157; 3 Sar. P. C. J. 69; 10 B. L. R. 159; 20 Eng. Rep. 871.
(10) 8 M. 511.
(11) 9 C. L. R. 295.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 19 OF 1913.

August 28, 1914.

Present:—Mr. Stuart, J. C., and Mr. Kendall, A. J. C.

RAM DIN, DECEASED, AND AFTER HIS DEATH UMRAO SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KAYESTH PATHSHALA, ALLAHABAD, AND OTHERS—DEFENDANTS—RESPONDENTS.

Pleadings, statements made in, interpretation of—Admission of claim—Hindu Law—Reversioners to prove their nearest reversionary relationship to deceased—Pedigree filed in Settlement proceedings—Amissibility in evidence—Relevancy—Evidence Act (I of 1872), s. 32 (5)—Plaintiff's claim controverted by all defendants—Cross-examination of defendant, co-defendant not obtaining opportunity as to—Evidence of defendant not operative against co-defendant—Opinion, statement of, weight of.

Where plaintiffs claimed as reversionary heirs of a deceased person and in the written statement the defendant denied this allegation, but further on stated that they were near relations and heirs of the deceased.

Held, that the defendant not having admitted that the plaintiffs were the nearest reversionary heirs of the deceased, there was no admission in the written statement of the plaintiffs' claim.

In order to establish that certain persons are entitled to succeed as reversioners to a deceased person, they must prove their relationship to the deceased and also that they are the nearest reversioners to him.

Where a pedigree put forward in the Settlement proceedings was produced in evidence, and it was found that it had been prepared by a person who was neither a member of the family nor an official bound to record such pedigree, that there was not sufficient evidence that it had been signed by any member of the family, that its contents were adopted by the members of the family who were privy to its preparation, and that upon its basis the entries in the *khewat* made at the time of the Settlement were recorded:

Held, that the pedigree was relevant and admissible under section 32 (5) of the Evidence Act.

Where both the defendant and the co-defendant controvert the plaintiff's claim, the evidence of the defendant does not operate against the co-defendant

as the latter does not obtain an opportunity of cross-examining the former.

No attention can be paid to the mere statement of opinion of a witness.

Appeal from the decree of the Additional Subordinate Judge, Lucknow, dated 6th January 1913.

Mirza *Sami-ullah Beg*, for the Appellants.

Babu *Gulzari Lal* and Babu *Bisheshwar Nath*, for Respondent No. 1.

Mr. *S. N. Sinha*, for Respondent No. 3.

JUDGMENT.—In this case it was alleged that Ram Din, Patan Din, Sheo Balak and Brij Bhukan were the reversionary heirs of Gur Din Dube who was killed in a local affray in 1857. After the death of Gur Din Dube his widow Sitala obtained a decree from the Settlement Court, awarding her an eight-annas share in the village of Ratia Mau with *sir*, groves, a house and other appurtenances as widow of her deceased husband. On the 13th October 1865 she sold all the rights which she had so inherited to Jawahir Lal. She subsequently recovered certain plots of *sir* which she afterwards again transferred. The suit was instituted in the Court of the Additional Subordinate Judge by the alleged reversioners and persons to whom they had transferred a portion of their claim against the transferees. Sitala died in November 1910. The learned Additional Subordinate Judge dismissed the suit, finding that it failed, amongst other reasons, because it had not been proved that the persons in question were the reversioners of the late Gur Din. The present appeal is preferred.

It has been argued before us that the learned Additional Subordinate Judge should have decided in favour of the claim on one ground alone without going into the evidence. The ground set up is that the principal respondent, the Kayesth Pathshala, to whom the greater part of the property in question had been transferred, had admitted the reversionary relationship of certain of the plaintiffs. Reliance is placed in support of this contention on paragraph 19 of the written statement of the first respondent. We have exmined the paragraph, and we find that there was no admission of the nature suggested. The defendant therein stated that Debi Din, Sita Ram and Ram Din, (whose name was written by error as Ram Adhin) were near relations and heirs. The alleged admission with regard to Sita Ram and Debi Din could have no effect in the present case, as neither they nor their decendants are parties to the suit. With regard to either of these three persons there is no unequivocal admission; for there is nothing in that paragraph to show that the respondent admitted that the persons in question or any one of them were or was the nearest reversionary heirs or heir to Gur Din; and paragraph 7 of the written statement explicitly denies the allegation that the plaintiffs Nos. 1 and 2 were the reversioners of Gur Din, which is contained in the 7th paragraph of the plaint. There is nothing in the pleadings that can possibly be held to be an admission of the plaintiffs' claim; and the proceedings show not only that no such admission was made but that the claim was clearly and distinctly denied. In order to establish that the persons in question were entitled to succeed as reversioners to Gur Din it was necessary for them to prove their relationship to Gur Din, and also that they were the nearest reversioners to him. They endeavoured to prove their relationship in two ways. They put forward a pedigree with the plaint, and endeavoured to establish its accuracy by oral evidence. They further put forward a pedigree which had been filed in the Settlement proceedings, and attempted to prove its authenticity. Their attempt to prove the pedigree attached to the plaint has been an absolute failure. The declarations in that pedigree are in contradiction to the declarations made in the pedigree put forward at the time of the Settlement, and the contradictions are with regard to material particulars. There has been no satisfactory proof with regard to the allegations contained in the pedigree put forward with the plaint. The evidence to support it has been the oral evidence given by Ram Din himself and by his son Basant. The evidence of both these witnesses was rightly disbelieved by the learned Additional Subordinate Judge. We have examined their statements and find them absolutely unreliable. The plaintiff Ram Din is a very old man, and it is clear that his evidence on the point is valueless, It is full of contradic-

tions, and there is every reason to suppose that it is disingenuous and dishonest. The evidence of his son is even worse. The son is a man of bad character who has been convicted both of theft at the instance of the Kayesth Pathshala, defendant, and of perjury, and we can attach no value of any kind to his sworn statement. This disposes of the evidence put forward in support of the pedigree filed with the plaint. The learned Additional Subordinate Judge refused to admit the pedigree put forward in the Settlement proceedings in evidence. We consider that it may be admitted in evidence. We find that the pedigree in question was prepared by a person who was neither a member of the family nor an official whose duty it was to record such pedigree, and we further find that there is not sufficient evidence that it was signed by any member of the family. We are, however, satisfied that its contents were adopted by the members of the family who were privy to its preparation and that upon its basis the entries in the *khewat* made at the time of Settlement were recorded. Thus it may be considered to a certain extent to be proof of statements as to the existence of relationship between persons as to whose relationship the persons making the statements had special means of knowledge; and the statements in question were made before the question now in dispute was raised. Thus this pedigree is relevant and admissible under the provisions of section 32 (5), Act I of 1872. The entries in it are not, however, of great value, and in themselves are absolutely insufficient to support the appellants' case. While it must be granted that the members of the family who accepted the accuracy of the pedigree were in a position to know something of their own descent, there is nothing in it to show that they were in a position to know it accurately, the full details of that descent, or that the pedigree contains a full and complete account of all the branches. This much can be found upon it. There were two branches of the family, one founded by Jagdat and the other founded by Ram Din. Jagdat and Ram Din were the sons of Param. At the time of the preparation of the *khewat* the Jagdat branch was represented by a second Ram Din, who had disappeared from the village, Hub Lal, Gulal, and Ganga Din. The deceased Gur Din belonged to this branch. The Ram Din branch was represented by Sita Ram, Debi Din and Ram Din, plaintiff-appellant No. 1, and his two brothers, Prag and Lachman. Lachman was one of the original plaintiffs in this suit. He died after its institution. Sita Ram and Debi Din were the descendants of the Harbans and Tara branches respectively, and Ram Din, Lachman and Prag were the representatives of the Rup branch. But having arrived at this conclusion we find that the entries in this pedigree are insufficient to support the appellants' plea. In the first place, there may be other branches which were omitted either by accident or by design; and in the second place, this pedigree leaves in doubt the exact succession to the deceased Gur Din. Upon the plaintiffs-appellants' own showing, in so far as the entries in this pedigree are accepted, they cannot succeed unless they establish that the branch of Ram Din, Hub Lal, Gulal and Ganga Din, in the first place, and the branches of Sita Ram and Debi Din, in the second place, are extinct. They have absolutely failed to establish that point. The only evidence produced to support the suggestion that these branches are extinct is the evidence of Ram Din himself and his son Basant. Upon their evidence we have already commented. In addition reliance is placed upon the evidence of Baijnath, defendant-respondent No. 3. Baijnath asserted that he was the son of a cousin of Gur Din called Rattan, and that the father of Gur Din and his grandfather were brothers. The learned Additional Subordinate Judge disbelieved Baijnath upon this point and disbelieved him for good reasons. We find that Baijnath's statement is untrue. In the circumstances it is obvious that statements made by Baijnath as to the extinction of other branches of the Jagdat section of the family cannot be accepted as reliable, in view of the fact that it was necessary for the success of his unfounded claim that he should assert that such other branches were extinct. Apart from that fact, however, as defendant-respondent No. 1 and Baijnath were both controverting the claim, the defendant-respondent No. 1 did not obtain an opportunity of cross-examining Baijnath, and the evidence of Baijnath cannot be held to be operative against defendant-respondent No. 1. In any circumstances the evidence is valueless. We have further been referred to the

evidence of Gulab Rai, taken upon commission. That evidence is of no value in proving that the persons in question were reversioners. Gulab Rai stated that in his opinion Ram Din was the reversioner. But this was merely a statement of opinion to which no attention can be paid.

In the result after examining the evidence, we are satisfied that the appellants have failed to prove that the persons in question were the reversioners of Gur Din. Upon this finding the appeal fails.

We dismiss this appeal. The appellants will pay their own costs and those of the respondents.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 217 OF 1914.

April 24, 1914.

Present:—Mr. Justice Woodroffe and Mr. Justice Chapman.

SUKAR HAJAM AND ANOTHER—DEFENDANTS —PETITIONERS

versus

OLI MOHAMMAD MEA—PLAINTIFF— OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 24—Suit to enforce award—Jurisdiction.

A suit to enforce an award is not the same as a suit to enforce a contract; and the Small Cause Court has jurisdiction to take cognizance of such a suit.

Bhajahari Saha Banikya v. *Behary Lal Basak*, 33 C. 881, 4 C. L. J. 162 and *Simson* v. *McMaster*, 13 M. 344, followed.

The jurisdiction of the Small Cause Court is excluded only in respect of suits which are specifically mentioned in Schedule II of the Provincial Small Cause Courts Act, IX of 1887.

Rule against the decree of the Munsif at Dibrugarh with Small Cause Court powers, dated 17th December 1913.

FACTS.—The plaintiff sued the defendants in the Small Cause Court at Dibrugarh for recovery of a sum of Rs. 34-12-0 alleged to be due upon an oral award. There was some quarrel between the parties and, it was alleged, that instead of allowing the plaintiff to have recourse to the Criminal Court, certain neighbours made up the matter between them by directing the defendants to pay to the plaintiff the sum of Rs. 34-12-0. The defendants altogether denied this reference to arbitration and the making of the award and none of the alleged arbitrators was examined by the plaintiff, while one of them, Haji Abdulla, wholly denied the reference. The Small Cause Court gave a decree on 17th December 1913 for Rs. 10-12-0 and costs Rs. 20-1-9. It was against this decree that the defendants moved the High Court. The argument was that the suit to enforce an award is the same as a suit to enforce a contract.

Mr. *J. N. Bagchi* (with him Babu *Satya Charan Sinha*), for the Petitioners.

Mr. *N. C. Bardaloi*, for the Opposite Party.

JUDGMENT.

WOODROFFE, J.—In this case a Rule was granted on the ground that it was alleged that the Small Cause Court had no jurisdiction to try the case. The objection is based upon the ground that the suit which is one to enforce an award, is not within the jurisdiction of the Small Cause Court. It is noted in passing that this point of jurisdiction was not taken before the Judge. There appears to be no ground for it. The learned Counsel who appears on behalf of the parties who obtained this Rule, concedes that there is no direct statutory authority or precedent in support of his proposition. But it is argued inferentially that the suit is without the cognizance of the Small Cause Court, because we must take it that a suit to enforce an award is the same as a suit to enforce a contract.

Mukherjee, J., pointed out in the decision in *Bhajahari Saha Banikya* v. *Behary Lall Basak* (1) that a suit to enforce an award and a suit to enforce a contract are not the same. Moreover, the Small Cause Court has jurisdiction to take cognizance of suits mentioned in the Act other than those excluded in the Schedule. In the Schedule there is no Article excluding the Court's jurisdiction in this case. On the other hand there is an Article which deals with awards and, therefore, shows that the Legislature had the subject in mind and excludes the Court's jurisdiction only in the case where a suit is to contest an award. Moreover, there is express authority against the

(1) 33 C. 881; 4 C. L. J. 162.

contention raised. I may refer among the other cases to the decision in *Simson* v. *McMaster* (2), where it was held that the Small Cause Court had jurisdiction to try such a suit. This disposes of the only ground on which the Rule was granted. It is said that the judgment is not in accordance with law. The Rule was granted on the former ground and that ground has failed.

The Rule must be discharged with costs, two gold *mohurs*.

CHAPMAN, J.—I agree.

Rule discharged.

(2) 13 M. 344.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

CIVIL REVISION PETITION NO. 5 OF 1903-04 OF MIRZAPUR DISTRICT.

December 19, 1904.

Present:—Mr. Hardy, S. M., and Mr. Thomson, J. M.

Mirza MUHAMMAD MOHSIN AND OTHERS —APPELLANTS

versus

Mirza MUHAMMAD HADI AND OTHERS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), ss. 33 and 34—Mutation of names—Possession must be by succession or transfer—Benamidar's *name recorded in annual registers—Real purchaser, though in possession, not entitled to mutation on* benamidar's *death—Mutation granted under section not concerned with mutation, illegal—Heirs of deceased proprietor, not in possession, when entitled to mutation.*

Section 34 of the U. P. Land Revenue Act does not provide for the record of possession of a proprietary right, unless the possession is obtained by succession or transfer.

Hence the real purchasers who allow the name of the *benamidar* to be maintained in the annual registers for a long time without any objection, cannot on the latter's death claim mutation under section 34 of the U. P. Land Revenue Act on the ground that the entry of the *benamidar* is fictitious and that they have actually been in proprietary possession.

The case of the real purchasers is not covered even by section 33 of the U. P. Land Revenue Act, as no error is made in the entry.

Where a mutation is applied for under the terms of one section (*i. e.*, section 34), it is illegal to grant it under the terms of another section (*e. g.*, section 33) not concerned with mutation.

The heirs of a deceased proprietor, although not in possession, are entitled to mutation as against those persons who have no lawful possession under section 34 of the U. P. Land Revenue Act and who possibly may be found to have no legal possession at all.

Appeal against the order of the Commissioner, Benares, dated 21st April, 1904.

JUDGMENT.

HARDY, S. M.—(*December 6th*, 1904.)—This is a third appeal in a mutation case and it involves a question of importance in the interpretation of the Revenue Act.

One Mirza Tasadduq Husain recently died. His name had been recorded in the *khewat* for a great number of years, 40 or 50 it is stated. On his death the present respondents claimed mutation under section 34, Act III of 1901, on the ground that they were in proprietary possession, making rental collections and paying Government Revenue. They allege that the entry of the deceased proprietor who was a relative—he is spoken of as their "ancestor"—was fictitious, that as long as he was alive, they did not wish the papers corrected, but that, as he is dead, they desire entry of their names.

The appellants, the son and daughters of the deceased, claimed entry as heirs of their father and as being in possession. Both parties adduced oral and documentary evidence in support of their respective claims. It appears that a claim of the respondents to succeed as heirs to the deceased has been set aside.

The Tahsildar considered that the respondents were in possession as proprietors, and had been so for a long time; and that the appellants, though the lawful heirs, were not in possession.

The Assistant Collector held that there was some proof, though it was weak, of the appellants' possession; but that it was sufficient to render possession doubtful; and that as the appellants were the legal heirs, their names should be recorded. The Assistant Collector pointed out that the respondents claimed under section 34, Act III of 1901, entry of their names; and that as they had failed to prove possession by succession or transfer, their claim failed. If, as they alleged, they were in previous proprietary possession, it was their business to have applied for correction of the record under section 33 (2) of the Act.

The Collector on appeal reversed the Assistant Collector's order. His opinion was that the present respondents were clearly in possession and added, "mutation could take place in favour of a trespasser if the interested parties acquiesced." The accuracy or relevancy of this *dictum* is not apparent.

The Commissioner to whom the case went in second appeal held that the respondents were in possession. His view was that the contention that the respondents could not claim record of their names under section 34, there having been neither transfer nor succession, was not fatal to their case, inasmuch as under section 33 the Revenue Courts have a wider discretion than is given by section 34 and that as the heirs of Tasadduq Husain are not in possession their names cannot be entered. The plea that the respondents set up was apparently that the real purchaser of the estate was one Ghulam Ali Khan whose heirs they were; that he inserted the name of the deceased Tasadduq Husain fictitiously; and that on the latter's death, the respondents were entitled to the entry of their names.

After full consideration, I do not think that the Commissioner's decision can be sustained. It has been found as a fact that the respondents are and have been in possession, and this finding must be accepted. But they claim mutation under section 34 of the Revenue Act and this claim is untenable, inasmuch as that section does not provide for the record of possession of a proprietary right, unless the possession has been obtained by succession or transfer, conditions which are wanting in the present case. Indeed the Commissioner's judgment appears to admit this, as he refers to section 33 as the section whose provisions "primarily guide Revenue Officers in making entries in the records." He adds that this section gives much wider powers than section 34. Now it seems to me that when a mutation is applied for under the terms of one section, it is illegal to grant it under the terms of another section not concerned with mutation; and further I do not think that section 33 covers the present case. That section enables the Collector to correct errors proved to be made in the annual registers. I do not know what error has been made. The name of the deceased was recorded in the revenue papers apparently as a purchaser, and has been so entered for a long period of years without any objection. It is, of course, possible that the purchase by the deceased was fictitious and that he was not the true purchaser. If the purchase was made at a public sale in execution of a civil or revenue decree, a suit against him for possession by the real purchaser would be barred. If the sale was a private sale, the real purchaser could recover the property in a suit for possession, except where the object of the real purchaser, the beneficial owner, was to effect a fraud. But it is not the business of the Revenue Courts to assist the maintainers of an entry which they admit to be a fictitious entry, and save them from the consequences of their own action. It is the business of the purchaser of an estate to record his own name as proprietor; if he chooses to make a fictitious entry and to maintain it, he must take the consequences and be left to sue in the Civil Courts. The further argument of the Commissioner is that as the appellants have no possession they cannot, therefore, claim entry under section 34. But the appellants have the legal right to succeed to their father, and they are, in my opinion, entitled to mutation against a person who has no lawful possession under section 34 and who possibly may be found to have no legal possession at all. I would reverse the decision of the Collector and Commissioner and restore the decision of the Assistant Collector with costs in all Courts.

THOMSON, J. M.—The respondents cannot under section 34 maintain this claim for they do not claim either by succession or transfer. I agree in the proposed order; the respondents must be left to seek their remedy elsewhere, if so advised.

Appeal allowed.

BATA MANDAL *v.* MANINDRA CHANDRA NANDI.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 478 OF 1910.

January 12, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beacheroft.

BATA MANDAL AND ANOTHER—DEFENDANTS —APPELLANTS

versus

Maharaja MANINDRA CHANDRA NANDI BAHADUR—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 29, 109B—Applicability of kabuliat—Agreement for enhancement, when not in violation of s. 29.

An agreement embodied in a *kabuliat* to pay a certain amount of rent agreed upon by the parties in settlement of a *bona fide* dispute regarding the rate of rent and to avoid further litigation is not an agreement in violation of the terms of section 29 of the Bengal Tenancy Act

Sheo Sahoy v. *Ram Rachia Roy*, 18 C. 333 and *Nath Singh* v. *Damri Singh*, 28 C. 90, commented upon and followed.

Section 29 of the Bengal Tenancy Act is limited to cases where there is real contract for enhancement, which cannot ordinarily take place where there is a *bona fide* dispute about the rent payable before, either for area or for rate.

Section 109B of the Bengal Tenancy Act, which was inserted into the Act in 1907, contemplates an inquiry into agreements adjusting disputes about enhancement, but it does not apply to a case where the agreement was made 15 years before the Settlement proceedings.

Appeal against the decrees of the Special Judge of Zillah Murshidabad, dated the 30th September 1909 and 2nd of October 1909, reversing those of the Settlement Officer at Beldanga.

Babus *Provash Chandra Mitra* and *Kumar Sanka Roy*, for the Appellants.

Dr. *Rash Behary Ghosh* and Babus *Ram Chandra Mitra*, *Hemendra Nath Sen*, *Sarat Kumar Mitra* and *Jotindra Nath Lahiri*, for the Respondent.

JUDGMENT.—This is an appeal by the defendants in a suit under section 106 of the Bengal Tenancy Act. In the course of proceedings for the preparation of a Record of Rights under Chapter X of the Bengal Tenancy Act, a dispute arose between the landlord and the tenants as to the amount of rent annually payable by the latter. The landlord relied upon a *kabulyat* executed by the tenants on the 17th April 1893. The *kabulyat* on the face of it states that the tenants held a definite quantity of land and that they agreed to pay a specified rent in respect of the land. The tenants contended that the *kabulyat* had been executed in contravention of the provisions of section 29 of the Bengal Tenancy Act. To meet this objection, the landlord relied upon an *amanat roka*, in which it was stated by the tenants that there was no certainty of the actual quantity of land and the amount of rent payable in respect thereof at the time when they executed the *kabulyat*. The Settlement Officer held that the *kabulyat* was not binding upon the tenants and made an entry in the Record of Rights in their favour, holding that the rent payable by them was the rent they had paid before the *kabulyat* was executed. The landlord thereupon instituted the present suit for declaration that the tenants were liable to pay rent on the basis of the *kabulyat* and for amendment of the Record of Rights. The Settlement Officer dismissed the suit; but upon appeal that decision has been reversed by the Special Judge. In this Court on behalf of the tenants it has been argued that the *kabulyat* is not binding upon them, and an endeavour has been made to distinguish the decision in *Sheo Sahoy* v. *Ram Rachia Roy* (1) and *Nath Singh* v. *Damri Singh* (2). The Special Judge has found that at the time when the *kabulyat* was executed, there was a *bona fide* dispute between the landlord and the tenants as to the quantity of land and the rent payable in respect thereof. On the basis of this finding, he has held that the *kabulyat* is not affected by the provisions of section 29 of the Bengal Tenancy Act. In our opinion, the view taken by the second Judge is supported by the decisions mentioned and must be upheld.

There is no room for controversy that the case of *Nath Singh* v. *Damri Singh* (2) is an authority for the proposition that an agreement embodied in a *kabulyat* to pay a certain amount of rent agreed upon by the parties in settlement of a *bona fide* dispute regarding the rate of rent and to avoid further litigation, is not an agreement in violation of the terms of section 29 of the Bengal Tenancy Act. A careful examination of the judgments of the learned Judges who decided that case, has convinced us that this was the proposition they intended to lay down on the authority of the decision in *Sheo Sahoy*

(1) 18 C. 333.
(2) 28 C. 90.

v. *Ram Rachya Roy* (1). With regard to this earlier case, there may be some room for argument that the judgments are possibly ambiguous; there may be a question whether the learned Judges intended to lay down that section 29 applied only when the intention of both parties was to effect an enhancement. But it is worthy of note that one of the learned Judges who decided the later case was a party to the earlier decision and we must accept his view of what he had intended to decide in concurrence with his colleague in the earlier case. We must take it then that the two decisions mentioned are against the contention of the appellant. There is the further fact that in the case of *Kedar Nath Hazra* v. *Maharaja Manindra Chandra Nandi*(3) to which one member of this Bench was a party, an unsuccessful attempt was made to challenge these two decisions, and although some doubt was expressed whether they gave effect to the true intent of the Legislature in framing section 29, they were followed, possibly not altogether without hesitation and reluctance. After a careful consideration of the elaborate arguments which have been addressed to us on the present occasion, we see no adequate reason to dissent from these decisions which have been accepted as good law for a quarter of a century: as will presently be seen, they can be defended upon an intelligible construction of section 29 of the Bengal Tenancy Act.

ection 29 finds a place in the fifth Chapter of the Bengal Tenancy Act among a group of sections which deal with the question of enhancement of rent of an occupancy *raiyat*. Of these the first, namely section 27, lays down the principle that the rent for the time being payable by an occupancy *raiyat* shall be presumed to be fair and equitable until the contrary is proved. Section 28 then follows with the principle that where an occupancy *raiyat* pays his rent in money, his rent shall not be enhanced except as provided by the Act. This clearly contemplates an enhancement where there is an intention to effect an enhancement. Section 30 deals with the case of enhancement of rent by suit. It is obvious that an enhancement under this section can be effected only when there is an intention to effect an enhancement. Section 29 which is wedged in between section 28 and section 30 relates to enhancement of rent by contract, and lays down that the money-rent of an occupancy *raiyat* may be enhanced by contract, subject to the condition that the rent must not be enhanced so as to exceed by more than two annas in the rupee the rent previously payable by the *raiyat*. The section consequently deals with the validity of a contract for enhancement of rent. It may be legitimately held that there can be no contract for enhancement of rent unless both the parties to the contract are agreed upon one point, namely that there is to be an enhancement of the rent. This does not necessarily imply that the parties are agreed as to what is the amount of rent actually payable before the enhancement. To take a concrete illustration the landlord may assert that the rent payable is Rs. 10; the tenant may assert that the rent payable is Rs. 9. If there is an agreement that the rent in future will be Rs. 11 there is an agreement for enhancement, because both the parties are agreed that the rent payable in future shall be higher than the rent payable in the past, whether we accept the figure for the antecedent rent as asserted by the landlord or as alleged by the tenant. It is thus clear that the operation of section 29 may fairly be limited to a case where there is a real contract for enhancement, which cannot ordinarily take place where there is a *bona fide* dispute, that is, a serious claim, honestly made on the one hand and honestly repudiated on the other, as to the rent payable. Such a dispute may be the result of a controversy as to the area of the land, or the rate at which it is held or both these elements. This, we think, is a reasonable construction of section 29 of the Bengal Tenancy Act, and as it has been uniformly adopted ever since 1891 we are not prepared at this distance of time to take a different view. We cannot also overlook the significant fact that although since 1891 the Bengal Tenancy Act has been repeatedly amended, section 29 has not been so altered as to negative the decisions mentioned. We must accordingly uphold the decision of the Special Judge that the *kabulyat* in this case is not invalidated by section 29 of the Bengal Tenancy Act.

One further question must be examined,

(3) 5 Ind. Cas. 309; 11 C. L. J. 106.

namely, what is the effect of section 109B, which was inserted in the Bengal Tenancy Act by Act I of 1907 B. C. and did not consequently require consideration in the decisions mentioned? Section 109B deals with the question of the authority of the Revenue Officer to give effect to agreements or compromises. Sub-section (1) provides that in framing a Record of Rights and in deciding disputes under Chapter X, the Revenue Officer shall give effect to any lawful agreement or compromise made or entered into by any landlord and his tenant, but he shall not give effect to any agreement or compromise the terms of which, if they were embodied in a contract, could not be enforced under the Act. This sub-section clearly contemplates in the first place a dispute, and in the second place a lawful agreement or compromise in settlement of such dispute. When an agreement or compromise has been reached under these circumstances, the Settlement Officer may give effect to it, but he is debarred from giving effect to it if it is of a certain description. Sub-section (2) then provides that where any agreement or compromise has been made for the purpose of settling a dispute as to the rent payable, the Revenue Officer shall in order to ascertain whether the effect of such agreement or compromise would be to enhance the rent in a manner or to an extent not allowed by section 29 in the case of a contract, record evidence as to the rent which was legally payable immediately before the period in respect of which the dispute arose. This inquiry is obviously contemplated in a case where the agreement or compromise has been made for the purpose of settling a dispute, namely, a dispute which the Revenue Officer would be called upon to decide on the merits but for the agreement or compromise. Section 109B clearly does not apply to a case of the description now before us, where the contract between the parties was made in 1893, that is, 15 years before the Settlement proceedings. Consequently section 109B is of no avail to the defendants.

The result is that the decree of the Special Judge is affirmed and this appeal dismissed with costs. We assess the hearing fee at one gold *mohar*.

It is conceded that this judgment will govern the other appeals, namely, Nos. 370, 559, 565, 581, 590, 597, 602, 603 and 657 of 1910. These appeals, also, are dismissed with costs, one gold *mohur* in each case

Appeals dismissed.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REVISION No. 121 OF 1913-14.

May 5, 1914.

Present:—Mr. Maynard, F. C.

HIRA AND OTHERS—PLAINTIFFS—JUDGMENT-DEBTORS - APPLICANTS

versus

NIHAL SINGH AND OTHERS—DEFENDANTS—DECREE-HOLDERS—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), s. 84 (5)—Revision — Powers of Financial Commissioner—Substantial justice—Material irregularity—Technical irregularity no ground for revision.

A technical irregularity is not a good ground for interference on the revision side.

The Financial Commissioner will exercise his powers under section 84 (5) of the Punjab Tenancy Act (within the limits set by the Civil Procedure Code to the revisional jurisdiction of the Chief Court) only when interference is necessary in order that substantial justice may be done.

The fact that ejectment proceedings were twice in succession decided otherwise than upon the merits, does not justify interference upon the revision side in the absence of any indication of material irregularity.

The inclusion in the notice of ejectment, and in the subsequent delivery of possession, of a particular field held in previous judicial proceedings to be a part of the land from which the tenants were not liable to ejectment, was a material irregularity. The omission of the direction for ejectment from the order of dismissal of the suit to contest liability to ejectment, is only a technical irregularity.

Case forwarded by the Commissioner of Jullundur, on 16th March 1914.

ORDER.—The applicants did not wish to be represented before me in this case. I have heard Counsel for the respondents.

The facts, in so far as they affect the present proceedings, are these. The respondents (landlords) caused a notice of ejectment under section 45 (1) of the Punjab Tenancy Act to be served upon the applicants in respect to certain land,

One of the fields (No. 743) which was included in this notice, had been held in previous judicial proceedings to be a part of the land from which the applicants (tenants) are not liable to ejectment. This important fact appears to have been overlooked in dealing with the notice of ejectment.

The tenants sued to contest their liability to ejectment and obtained an *ex parte* decree in their favour; but the *ex parte* decree was set aside on 20th March 1911. When the case came up, it was on this occasion the tenants who absented themselves from the Court, and on this occasion their suit was dismissed in default.

In passing orders, the Court did not direct the ejectment of the tenants in accordance with section 45 (6) of the Punjab Tenancy Act and the Commissioner is of the opinion that this omission was a technical irregularity. Notwithstanding the absence of any specific direction of ejectment, possession was given to the landlords (respondents) by proceedings in execution of decree.

In referring the case for action on the revision side the Commissioner is, if I understand him correctly, influenced by two considerations over and above that of the irregularity in the form of the decree, which he describes as technical only. One of these considerations is that the case has never been tried on the merits; and the other is that the ejectment proceedings included field No. 743 which, as already noted, had been held to be land from which the tenants (applicants) were not liable to ejectment. In regard to the omission of the direction for ejectment from the order of dismissal, I may say that the definition of decree in section 2 of the Civil Procedure Code (from which an order of dismissal for default is expressly excluded) makes it somewhat doubtful whether there is any technical irregularity at all.

It is, however, not necessary to determine this point, because a technical irregularity is certainly not a good ground for interference on the revision side. It has been laid down more than once, and I take this opportunity of re-stating the doctrine, that the Financial Commissioner will exercise his powers under section 8[illegible] (5) of the Punjab Tenancy Act (within the limits set by the Civil Procedure Code to the revisional jurisdiction of the Chief Court) only when interference is necessary in order that substantial justice may be done.

What happened in this case was that the tenants contested their liability to ejectment, but failed to establish their contention. If we leave out of account, for a moment, the other aspects of this case, it seems clear that broad considerations of justice call for the decision either (1) that the original notice of ejectment which the tenants contested, holds good in consequence of their failure in the proceedings or (2) that the order of the Court carried with it a direction of ejectment, and that the successful litigant should not suffer from a technical irregularity (if there was a technical irregularity) for which the Court and not he was to blame.

The fact that the ejectment proceedings were twice in succession decided otherwise than upon the merits, does not justify interference upon the revision side, in the absence of any indication of material irregularity. Against the decision dismissing their claim in default the tenants applied unsuccessfully for a review; and their subsequent appeal was also rejected. There is no reason why the Financial Commissioner should upset the decision now.

The one material irregularity in the proceedings was the careless inclusion in the notice of ejectment, and in the subsequent delivery of possession, of field No. 743. I set aside so much of the proceedings as dealt with field No. 743, and order the restoration of the possession of that field to the tenants (applicants). In all other particulars, the application is rejected. I pass no order as to costs.

Application rejected.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 263 OF 1914.

July 20, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C., and Mr. Kendall, A. J. C.

KANDHAI AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 164—Confession—Care necessary in recording confessions—Questions as to ill-treatment—Magistrate's satisfaction as to voluntariness of confession—Statements in confession inconsistent with medical evidence.

Great care and circumspection are necessary in recording a confession under section 164, Criminal Procedure Code. It is necessary to record the questions put to the accused to ascertain whether the confession was voluntary, to tell him that after his confession he will not have to go back to Police custody, to warn him of the consequence which will ensue if he falsely implicates himself in the hope of release and to ask him whether the Police or any other person has subjected him to any ill-treatment.

No hard and fast rule can or should be laid down as to the procedure which should be adopted when an accused person is placed before a Magistrate for the recording of a confession under section 164, Criminal Procedure Code, but it is not sufficient to put one comprehensive question as to the nature of the confession or to make a note at the commencement of the record of the confession that the accused has been warned not to confess through any fear or inducement and that the Police of the *thana* have been removed from the Court room.

A Magistrate ought, by putting questions which occur to him, to make himself conscientiously satisfied that the man is a free agent and the confession is voluntary and has not been procured by threats or inducements.

Where in a murder case this was not done by the Magistrate recording confessions and they were retracted on trial and the statements in the confessions as to the manner in which the murder was committed were inconsistent with medical evidence, the accused were acquitted.

Appeal against the order of the Sessions Judge, Rae Bareli, dated 9th June 1914.

Mr. *St. G. Jackson* and Pandit *Uma Shankar*, for the Appellants.

The *Government Pleader*, for the Crown.

JUDGMENT.—Chhedi, a goldsmith of Bainti, was murdered on the night of the 21st April 1914. Kandhai Bari, Kandhai Sonar, Khannu Ahir, Govind Brahman and Parbhu Kurmi were charged by the Police with having committed the murder. Kandhai Bari was granted a conditional pardon under section 337 of the Code of Criminal Procedure and was examined as a witness for the prosecution. The other persons were tried and convicted by the learned Sessions Judge of Rai Bareli. Two of them, Kandhai Sonar and Khannu Ahir, were sentenced to death subject to confirmation by this Court for taking part in the murder and the remaining two, Govind and Parbhu, were sentenced to transportation for life for abetment of the same. Kandhai Sonar and Parbhu were also convicted under sections 404 and 404/114 of the Indian Penal Code respectively, but no sentences were passed on those charges in view of the sentences previously referred to. All the convicts appeal and the reference for confirmation of the sentences of death passed on Kandhai Sonar and Khannu Ahir is also before us.

It appears that Chhedi was carrying on an improper intimacy with a Brahman widow living in the village, named *Musammat* Kaunsilla, from five or six years past. His wife died last year and he had no issue. His brother Sital was living in another village about two miles off from Bainti Bazar. *Musammat* Kaunsilla states that she sometimes stayed in the house of Chhedi and sometimes in her own house at night. On the evening of Tuesday, the 21st April last, she took Rs. 7 from Chhedi and went home. Chhedi is stated to have left his house soon after her; and he was not seen alive thereafter. His servant, Parbhu appellant, who used to work at his shop, went to Raghuraj Singh, the *mukhia* of the village, at 11 P.M. and informed him that since a *ghari* of the night Chhedi was missing and said that he was afraid to stay at his house alone all night. On the morning of Wednesday *Musammat* Kaunsilla went to the house of Sital and informed him that Chhedi was missing and could not be found. Sital went with the *mukhia* of Bainti to the house of Chhedi and found it locked from outside. Parbhu unlocked the door. But Chhedi was not found inside. The lock of the ironsafe kept in the house was found intact. Chhedi was an ex-convict under Police surveillance. On the 22nd April, at about 7 P.M., Ishri, the village *chaukidar*, made a report to the Police that Chhedi was away from his house from the previous

evening and that his whereabouts were not known. A report was similarly made by Sital two hours later, stating that he had learnt from Parbhu, the servant of Chhedi, that there had been a quarrel between *Musammat* Kaunsilla and Chhedi two days earlier, that *Musammat* Kaunsilla was demanding her ornaments and Chhedi was saying that he had none and that Chhedi had paid her Rs. 7 on Tuesday evening and had followed her, but had not been seen or found anywhere since. The Sub-Inspector reached the village on the morning of the 23rd April 1914. On the 24th April he got the iron safe opened by a blacksmith and found in it some silver ornaments and Murshidabadi rupees. Sital stated that there should have been other gold and silver ornaments in the ironsafe and gave a list of the said ornaments on the 25th April. On the morning of the 26th April Parbhu gave information in regard to some property being in the well of Govind accused. The well was searched and found to contain a bag in which some silver ornaments were tied. The Sub-Inspector states that Parbhu referred him to Kandhai Bari and Khannu for further information. Kandhai Bari was sent for and confronted with Parbhu, and the information elicited from Kandhai Bari led to the discovery of the dead body of Chhedi buried in a grove, where the body of a woman who had died of plague had recently been interred, on the bank of Kesho-ka-tal at some distance from the village. There was an empty sack lying on the side of the corpse and another empty sack and a little box lying on its top. The corpse was tied up into a bundle with a rope round the forehead, throat, ankles and wrists. It was identified to be that of Chhedi. A *post mortem* examination of the dead body, conducted by Major Illius, showed that there were marks of ligatures round the neck, wrists and ankles and around the head across the eyes, and that death was due to strangulation by a tight ligature round the neck which caused a fracture of the hyoid bone and a dislocation of the left half of the thyroid cartilage of the larynx. The Sub-Assistant Surgeon who assisted in making the *post mortem* examination deposes that when the corpse arrived, he removed the rope tied round the neck and ankles before the Civil Surgeon came to lay out the body for *post mortem* examination. He also states that he noticed a coagulation of the blood on the neck and legs of the deceased. The Civil Surgeon found depressions at those places, but makes no reference to any coagulation or congestion of the blood in his evidence. No question was put to him on that point. The matter is, however, unimportant, for according to medical authorities coagulation can be produced by a ligature applied very shortly after death. At any rate there is nothing improbable in the feet having been tied, while the strangulation was going on, to prevent struggle and resistance. On the 26th April Kandhai Bari gave five Murshidabadi rupees to the Police describing them as a part of the booty. On the same day at about three *gharis* before sunset Mahabir gave a tin gun, tin sword, an English hat and 16 Murshidabadi rupees to the Police, saying that Kandhai Sonar had just thrown them into his house. On the 29th April Nanidh Rai gave a gold *dholna* to the Police, stating that it was given to him on the morning of the 26th April by Kandhai Sonar for sale. On the 28th April 1914 Kandhai Bari, Govind and Parbhu were produced before Chaudhry Nathu Ram, a Magistrate of the first Class, to have their confessions recorded. Kandhai Bari and Govind made statements admitting their participation in the murder and Parbhu admitted having joined in the consultation to commit it. The Magistrate granted pardon to Kandhai Bari on the 2nd May 1914 and released him from custody on the same day on the security of Raghuraj Singh, the *mukhia* of the village, in spite of the written objections of the other accused who had made no confessions.

Govind and Parbhu retracted their confessions in the Court of the Committing Magistrate and stated that they were obtained by ill-treatment. *Musammat* Ladui, a concubine in the keeping of Khannu accused, was also sent up for examination under section 164 of the Code of Criminal Procedure as a witness on the 28th April 1914. She described Kandhai Bari and the appellants other than Parbhu as having taken part in the murder, but retracted her statement before the Sessions

Judge and pointed out a small discoloration at the wrist on her right side in proof of her ill-treatment.

The evidence adduced in the case consisted mainly of the statement of the approver and the retracted confessions of Govind and Parbhu accused and the statements of some witnesses, who profess to have derived possession of some of the articles recovered by them from Kandhai Sonar or to have seen some of the accused going together shortly before or after the murder. The evidence of the approver is not, however, consistent in many respects with the retracted confessions of Govind and Parbhu accused. The approver states that the consultation took place at the Bainti Bazar, a day before the murder, in which the appellants and Mangal Shukul took part. The statement of Govind in his retracted confession, however, was that the consultation took place in the house of Khannu accused. The approver states that on the day of the murder the deceased came to the house of Khannu at 3 *gharis* after nightfall to divide the *bhusa* which was joint property. The statement of Govind, however, was that he had come to make a settlement in respect of *bhusa* and to have the same winnowed. Persons do not ordinarily go to divide *bhusa* at night and the statement of the approver that the deceased had gone for that purpose to the house of Khannu is, therefore, on the face of it highly improbable. Raj Bahadur and Radhe Lal, moreover, state that on the evening of Tuesday there was a talk between Khannu and the deceased in the threshing floor relating to the disposal or sale of *bhusa* belonging to the share of the latter. There was little or no occasion consequently for the deceased to have gone again to the house of Khannu at three *gharis* after nightfall to divide the *bhusa* or to settle about its winnowing or disposal. The approver speaks of a rope having been tied by Kandhai Sonar and Khannu round the neck of the deceased to strangle him, but the confession said to have been made by Govind makes no reference to the tightening of a rope and merely states that Kandhai and Khannu accused held the mouth of the deceased and twisted his neck. Neither in this so-called confession nor in the confession or evidence of the approver is there any reference to the tightening of a rope round other parts of the body. The story, as originally given by the approver, was that some gold and silver ornaments and *hamel* rupees were taken out of the ironsafe, and with the exception of Rs. 5 made over to the approver they were tied in a bag and dropped into a well in front of the house of Govind accused. The alleged confession of Govind, however, recorded the existence of two bags and a small box, and that of Parbhu, the tying of the property in a *dupatta* or sheet which was made over to Kandhai accused. The approver has tried to reconcile the above statements by asserting before the Sessions Judge that the best things were put in a cloth and the rest in a bag, and the latter was let down into a well and the former taken by Kandhai accused. But it is unlikely that the other conspirators would have allowed Kandhai accused to have taken away the best things with him or that the approver would have contented himself with taking rupees five for the time being in the hope of getting more after the murder was hushed up.

The approver is a neighbour of *Musammat* Kaunsilla, who at the time of the first report was suspected by Sital, the brother of the deceased, to have been responsible for the commission of the murder. The story of the part taken by the approver in committing the murder is possibly true, but, when he goes on to describe the place where the murder was committed and the men who had joined in it, his evidence cannot be implicitly trusted without material corroboration of an independent character. The Sub-Inspector states that he found in the house of *Musammat* Kaunsilla a red mark on the top of her roof, another on the upper part of her wall and a third outside her house lower down her wall. The houses all round that place were admittedly empty on account of plague.

He also found some marks in her courtyard, which, he says, might have been made by mangoes. But no mangoes of the kind generally taken by people of the class to which *Musammat* Kaunsilla belongs, are available in April. The Police took no steps to inquire whether *Musammat* Kaunsilla had taken any part in the murder, or had pressed the deceased to return her ornaments or had filed any suit or complaint against him for the recovery of the same. The

approver must naturally have been anxious to obtain his release, which he succeeded in getting within four days of his making a confession and Mahabir and Naunidh Rai who ascribe the possession of the property recovered from their possession to Kandhai Sonar accused, must equally have been anxious to save their skins.

It appears that the deceased executed a Will, by which he gave the whole of his property to a relation of his named Bandi Din. His property appears to have been largely moveable, comprising ornaments or cash. The Will was attested by Kandhai Sonar accused, whose statement is that Sital coerced and threatened Bandi Din and made him run away. Naunidh Rai, who professes to have received a gold *dholna* on Sunday morning from Kandhai Sonar, is a debtor of Sital, who holds a mortgage of his land. He is himself under arrest on a charge of possessing stolen property, and his explanation that Kandhai Sonar gave him the property for sale is consistent with his anxiety to save himself. His father Radhey Lal is a witness for the prosecution, and it is possible that Radhe Lal may have put his son at the disposal of those responsible for the prosecution to save him and to provide corroborative evidence against Kandhai Sonar accused. Mahabir states that Kandhai Sonar threw a tin gun, a tin *talwar*, an English hat and a cloth containing Murshidabadi rupees in his house on Sunday evening at three *gharis* before sunset, and alleges that Debau Kalwar saw the accused throwing the things. But Debau states that Kandhai Sonar had put them in Mahabir's house just when the Sub-Inspector was coming saying that he would take these things away shortly afterwards, to which Mahabir made no objection. The approver, on the other hand, states that he told the Police to search the house of Mahabir for the cloth containing the stolen articles. If Kandhai Sonar had placed the ornaments in the house of Mahabir just when the Sub-Inspector was coming, it was hardly possible for the approver to have known that the property was placed in the house of Mahabir or for Kandhai Sonar to have told him that he was putting the property with him so that it might not be traced. The evidence of the witnesses who saw some of the appellants going together towards the house of Khannu or returning at midnight from the direction of Kesho-ka-tal, cannot be trusted, because they do not appear to have been examined till after the body was discovered.

The appellants have made aspersions against the Police and have suggested that the real murderers have been let off. Kandhai Sonar states that he has been implicated because he has enmity with Raghuraj Singh, the *mukhia* of the village, about whom he gave information to the Police in his presence that he was harbouring thieves and allowing them to assemble at his house. His story, which he has given in great detail, is that Raghuraj Singh got annoyed with him in consequence and beat him with shoes, that he filed a complaint about it in the Criminal Court, which was transferred for disposal to the Court of Raja Rampal Singh, and that he subsequently withdrew his complaint owing to pressure having been brought to bear upon him by the people of the village. No attempt appears to have been made by the Court below to ascertain whether those facts were true. The confessions do not appear to have been recorded with sufficient care and circumspection. The questions to be put to persons to ascertain whether the confessions were of a voluntary nature were not recorded. None of them appear to have been told that they will not have to go back to the Police custody after their statements were recorded, nor warned as to the consequences which would ensue, if they falsely or in the hope of release implicated themselves. They were not asked whether the Police or any other person had subjected them to any ill-treatment. No hard and fast rule can or should be laid down as to the procedure which should be adopted when an accused person is placed before a Magistrate for the recording of a confession under section 164. It is not sufficient to put one comprehensive question as to the nature of the confession, which is very much what the Magistrate did in this case to Kandhai Bari. In the case of the other two he simply noted at the commencement of the record of confession that the man had been warned not to confess through any fear or inducement and that the Police of the *thana* had been removed from the Court room. He put no question at all. A Magistrate ought, by putting questions which occur to him, to make himself conscientiously satisfied that the man is a

free agent, and that the confessson he makes is a voluntary confession and that he has not been forced or deceived into making it. This, we regret to notice, the Magistrate made no attempt to do in the case of either Govind or Parbhu. The statement of Govind as to the manner in which the murder was committed is further inconsistent with the medical evidence.

It is clear, however, from the evidence adduced that Parbhu accused used to sleep at night in the house of the deceased and that he had the key of the house with him on the night in question; and his conduct in going to the house of the *mukhia* at 11 P.M. and pretending that he was afraid to stay alone at the house of the deceased is extremely suspicious. Parbhu is proved to have pointed out some of the stolen property removed from the ironsafe which stood in the house of the deceased in the well of Govind, and though there is nothing to show that he himself removed the same from the house of the deceased and placed it in the well, there can be no doubt that he assisted in the removal of that property. It is proved that the deceased carried the key of that iron safe about him, and of this fact Parbbu who was his servant must have been cognizant. We consider it proved, therefore, that he is guilty of an offence under section 414 of the Indian Penal Code.

The charge of murder or abetment of murder or of criminal misappropriation cannot be sustained against any of the appellants.

We allow the appeals accordingly and set aside the conviction and sentences passed upon Kandhai Sonar, Khannu, Govind and Parbhu under sections 302, 302/109 and 302/114 of the Indian Penal Code and those of Kandhai Sonar under section 404 of the Code. We alter the conviction of Parbhu Kurmi from one under section 404/114 to one under section 414 of the Indian Penal Code and sentence him to rigorous imprisonment for three years. The other appellants should be released from custody unless required on some other charges.

Appeal allowed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 76 OF 1914.
CRIMINAL REVISION PETITION No. 65 OF 1914.

October 1, 1914.

Present:—Mr. Justice Sadasiva Aiyar.

E. C. CHINNASWAMI PILLAI—ACCUSED—PETITIONER

versus

CHAIRMAN OF THE ARKONAM UNION—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 353, 358—Madras Local Boards Act (V of 1884), s. 82, cl. (2)—Illegal distraint of doors of house—Assault while distraining—Offence.

The act of a bill collector in distraining the doors of a house under section 82, clause (2), of the Madras Local Boards Act (V of 1884) is illegal, and if while so distraining, he is assaulted, an offence under section 358, and not under section 353, of the Indian Penal Code is committed

Purushottama v. *Municipal Council of Bellary*, 14 M. 467, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Deputy Magistrate of Ranipet Division, in Criminal Appeal No. 35 of 1913, preferred against that of the Stationary Sub-Magistrate of Walajah, in Calendar Case No. 128 of 1913.

Mr. *T. Ananda Rao*, for the Petitioner.

Mr. *P. R. Grant*, for the Government.

ORDER.—It is clear to me that the doors ought not to have been distrained under section 82, clause (2) (*i*), of the Local Boards Act, as they are not moveables [see the definition of immoveable in General Clauses Act and also *Purushottama* v. *Municipal Council of Bellary* (1) on the interpretation of the analogous section in the District Municipalities Act]. The bill collector was, therefore, not acting in the lawful discharge of any duty imposed on him as a public servant when he proceeded to distrain the doors. The conviction under section 353 cannot, therefore, stand.

It is unnecessary to consider the rather difficult question whether the Appellate Magistrate was precluded by section 556 of the Criminal Procedure Code from hearing the appeal, as I think that the Magistrate who tried the case in the first instance was justified on the evidence in his finding that the petitioner did assault the bill collector,

(1) 14 M. 467.

though the assault might have been committed on sudden and grave provocation.

I alter the conviction to one under section 358, Indian Penal Code, and reduce the sentence to a nominal fine of three rupees.

The balance of fine will be refunded.

Conviction altered.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION NO. 37 OF 1914.

April 14, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C.

ALAUDDIN KHAN—ACCUSED

versus

EMPEROR—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), ss. 403, 437 —Inquiry—Discharge without making any judicial investigation into merits of complaint—Inquiry into same charge on second complaint.

Where a Magistrate discharged an accused person without making any judicial investigation into the merits of the complaint:

Held, that he was competent to again inquire into the same charge on a second complaint.

Appeal against the order of the Sessions Judge of Hardoi, dated 4th August 1913, upholding that of the Joint Magistrate, Hardoi, dated 13th June 1913.

Mr. *P. N. Bozdon*, for the Applicant.

The *Government Pleader*, for the Crown.

JUDGMENT.—The applicant, Alauddin Khan, has been convicted on a charge of selling *charas* without a license, punishable under section 60 of United Provinces Act IV of 1910.

It appears that the accused was arrested and sent up for trial by the Sub-Inspector of Police, but the Magistrate refused to take cognizance and discharged the accused from custody on the ground that no cognizance could be taken of the offence except on the report or complaint of an Excise Officer. It was subsequently brought to the notice of the Magistrate that the Sub-Inspector of Police was an Excise Officer within the meaning of section 70 of the said Act. He, therefore, started fresh proceedings under section 60 of Act IV of 1910 of his own motion and summoned the applicant to stand his trial on the said charge.

The evidence adduced by the prosecution was accepted by the trying Magistrate, who sentenced the applicant to a fine of Rs. 50 or in default to simple imprisonment for a period of six months. It is urged in revision that the trying Magistrate was not competent to go behind his previous order of discharge and that the Sub-Inspector of Police was not an Excise officer within the meaning of section 70 of the Excise Act.

Under section 10, clause (2) (*c*), of the Excise Act the Local Government has invested all Police Officers with the powers specified in section 50 of the Act. Those powers authorize the Police Officers to arrest a person and to search and detain him for any offence under the Excise Act and the Sub-Inspector is, therefore, an Excise officer as defined in section 3, clause (*b*), of the Act.

The refusal of the Magistrate to take cognizance of the complaint does not bar a subsequent revival of the proceedings, because the complaint was dismissed on a preliminary ground. Under section 63 of the Code of Criminal Procedure a person who has been arrested by a Police Officer can be discharged under the special order of a Magistrate. Section 253 of the Code applies to cases where a discharge is made after recording evidence or examining the complainant on a finding that the charge is groundless. The explanation to section 403 provides that the dismissal of a complaint, the stopping of proceedings, under section 249, the discharge of the accused or an entry made upon a charge under section 273 is not an acquittal so as to operate as a bar to fresh proceedings. The explanation appended to section 215 of Act X of 1872 provided that an order of discharge would not bar the revival of a prosecution for the same offence, but those words were omitted from the subsequent Codes. In *Mir Ahwad Hossein* v. *Mahomed Askari* (1) it was held by a Full Bench, Ghose, J., dissenting, that a Magistrate in a warrant case having passed an order of discharge was competent to take fresh proceedings and issue process against the accused in respect of the same offence, without an order for further inquiry being passed under section 437 of the Criminal Procedure Code having

(1) 29 C. 726; 6 C. W. N. 633 (F. B.).

the effect of setting aside such order of discharge. In *Emperor* v. *Chinna Kaliappa Gounden* (2) a Full Bench of the Madras High Court held, Subramani Ayyar and Davies, JJ., dissenting, that a dismissal of a complaint under section 203 did not bar a fresh prosecution. In *William Cecil Keymer* v. *Emperor* (3) Banerji and Ryves, JJ., held that the Magistrate who tried and discharged an accused person on a particular charge was competent to again inquire into the same charge on a second complaint. Whether he can do so on the discovery of new evidence or otherwise where an order of discharge is passed on the merits, he can at all events do so where there has been no judicial investigation by the Magistrate on the merits of the complaint, for in the latter event there is no judgment or adjudication after trial within the meaning of sections 366 and 369 of the Code.

The application is, therefore, rejected.

Application rejected.

(2) 29 M. 126; 16 M. L. J. 79, 1 M. L. T. 31, 3 Cr. L. J. 274 (F. B.).

(3) 22 Ind. Cas. 145; 12 A. L. J. 1; 15 Cr. L. J. 1; 36 A. 53.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1088 OF 1913.

January 9, 1914.

Present:—Mr. Justice Kensington.

BALLIA AND ANOTHER—CONVICTS—PETITIONERS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (*Act XLV of* 1860), *s.* 363—*Father, when not liable for kidnapping his own child*—Kumhar, *whether bound by strict Hindu Law.*

M, a *Kumhar*, betrothed his minor daughter to a minor son of *B*. Later on *B* objected to the marriage when arranged and in consequence *M* married the girl to *C*, a minor. The girl returned almost immediately to the house of her father and was made over to *B*.

On this *B* was convicted under section 363, Indian Penal Code, and *M* under section 363/109, Indian Penal Code:

Held, that strict Hindu Law on the subject could not be applied to the parties and that neither *B* nor *M* had committed any offence.

In such a case even if it be supposed that a technical offence has been committed, only a nominal sentence is appropriate.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Sessions Judge, Ferozepore Division, dated the 7th April 1913, affirming that of the Magistrate, first Class, Ferozepore, dated the 5th March 1913, convicting the petitioners.

Mr. *Nand Lal*, for the Petitioners.

Mr. *Badar-ud-Din Kureshi*, for the Respondent.

JUDGMENT.—This is a confusing case, but the essential facts are simple enough.

The parties are *Kumhars*. Mamraj, aged 50 originally betrothed his minor daughter to the minor son of Ballia. Later on Ballia objected to the marriage when arranged, and in consequence Mamraj is said to have married the girl to the complainant (a minor) on the 15th March 1911. There is some doubt whether this was a valid marriage or a mere form intended to bring pressure on Ballia, but for present purposes I will take it that the marriage ceremony was gone through.

The girl returned almost immediately to the house of her father Mamraj, and nine months later was by him made over to Ballia on the ground that the marriage had really been with Ballia's son.

On this Ballia has been convicted under section 363 and Mamraj under section 363/109, and both have been heavily sentenced.

The offence supposed to have been committed was a matter which concerned the Civil Courts rather than the Criminal, and even if it be assumed that the convicts technically committed a criminal offence much more nominal sentences would have been appropriate.

But I cannot agree with the lower Courts, who seem also to have had considerable doubt on the point, that either Ballia or Mamraj can be rightly convicted of kidnapping. The complainant can hardly under the peculiar circumstances of the case be treated as the girl's guardian, and whatever impropriety the girl's father may have committed it is absurd to treat either him or Ballia as guilty of having been engaged in kidnapping. Rightly or wrongly the girl's father himself chose to treat her as married into Ballia's family, and he did not remove her from guardianship, legal or constructive, of any one but himself. Considering the status of the parties concerned it is not possible to apply the elaborate theories of strict Hindu Law.

I do not myself think that either Ballia or Mamraj have committed any criminal

offence, but if they did they have been more than sufficiently punished by the imprisonment already undergone. They have certainly not kidnapped the girl.

The revision is, therefore, allowed. The convictions of Ballia and Mamraj are set aside. They are acquitted and will be released. Ballia's fine of Rs. 100 will also be refunded, if paid.

Revision allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 145 OF 1914.

August 26, 1914.

Present:—Mr. Stuart, J. C.

BAIJ NATH AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 361 - Lawful guardian—Hindu girl, custody of—Paternal uncles, setting up adverse title, kidnapping by—Guardians and Wards Act (VIII of 1890)—Order by Deputy Magistrate making over minor to lawful guardian, ultra vires.

Where an orphan minor Hindu girl, who was entrusted to the care of her maternal uncles and had obtained mutation in her favour of certain property which was claimed by her paternal uncles, after having lived for 18 months with the maternal uncles, was forcibly carried away by her paternal uncles and was caused to be married:

Held, that the paternal uncles were rightly convicted under section 361 of the Penal Code.

Held, also, that though under the Hindu Law, paternal uncles are preferential guardians to maternal uncles, where paternal uncles claim an interest in the minor's property adverse to her, they are not entitled to the custody of the minor's person under the provisions of Act VIII of 1890.

Held, further, that the order of the Deputy Magistrate making over the girl to the maternal uncles on certain conditions and entrusting the girl to a trustee until those conditions were fulfilled, was *ultra vires*, and it was open to them to take such legal steps for the minor's custody as they thought fit.

Appeal against the order of the Sessions Judge, Lucknow, dated 6th July 1914, upholding that of the Deputy Magistrate of Unao, dated 25th May 1914.

Mr. *St. G. H. S. Jackson*, for the Appellants.

The *Government Pleader*, for the Respondent.

JUDGMENT.—The facts, as found by the learned Deputy Magistrate and the learned Sessions Judge, are that the girl Sahodra was the daughter of Gaya Prasad. Her mother predeceased her father. Her father married Sukhdei as his second wife. Gaya Prasad predeceased Sukhdei. Sahodra remained in the charge of Sukhdei, and on the latter's death the girl was made over to the custody of her maternal uncles. On the death of Sukhdei Sahodra's paternal uncles endeavoured to obtain possession of certain property which was claimed on behalf of the girl. The girl has succeeded in obtaining mutation in respect of this property. After she had obtained mutation and while she was in the custody of her maternal uncles, being then a minor, the applicants who represent the paternal uncles forcibly carried her off from the custody of the maternal uncles, and it is alleged that she has since been married. The Courts found that the girl did not consent to her removal, in spite of the fact that she subsequently deposed to having been taken away at her own request. I see no reason to differ in any way from the finding of the Courts below as to the facts. In the grounds of revision it is urged that the paternal uncles were entitled to the guardianship of the girl under the provisions of the Hindu Law, and that in view of this circumstance no offence was committed in removing her from the custody of her maternal uncles. According to the provisions of the Hindu Law the paternal uncles would ordinarily have been entitled to the guardianship of the girl. But in the peculiar circumstances of this case and in view of the fact that they were endeavouring to obtain the property left by her deceased father against her, it is more than doubtful whether they would have been permitted to retain custody of her person or her property, had their claims to such custody been contested under the provisions of Act VIII of 1890, and it is satisfactorily established that the girl had been permitted for 18 months or more to remain in the custody of her maternal uncles without objection on the part of anybody. Such being the case I find that her maternal uncles were lawfully entrusted with her care and custody under the provisions of section 361 of the Indian Penal Code, and that the offence of kidnapping was committed. Admitting that the man to whom she is alleged to have been married was considered a suitable

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husband by her step-mother, the convictions remain perfectly good. The applicants had no justification for their action, and I find it impossible to believe that they were actuated in what they did by any desire to benefit the minor girl. I find that the convictions both with regard to the offence of kidnapping and the offence of rioting are supported by the evidence upon the record, and are good and legal convictions. I do not consider the sentences excessive. The action of the applicants was most reprehensible, and their motives were of the most sordid nature. I, therefore, refuse to interfere with either the convictions or the sentences. But I do not find that the order from the words "*Musammat* Sahodra shall be made over to the care of Baij Nath" down to "under the care of the trustee on his existing bond"* can be upheld.

I, therefore, set aside that portion of the Deputy Magistrate's order. It will be open to the maternal uncles to take such legal action as they may think fit with regard to the custody of the person of the minor.

Appeal dismissed.

* The order referred to is as follows: "*Musammat* Sahodra shall be made over to the care of Baij Nath, her maternl uncle, on his furnishing a security of Rs. 5,000 within a month of this date, with the conditions that he will safely keep the girl, and shall not marry her to anybody, except with the permission of the District Judge and after obtaining from him a certificate of guardianship against Jhandeshar, Jasodanandan, Baij Nath the accused, Suraj Bali and Thakur Prasad. If the security be not furnished within this date, the girl shall be made over to the care of Jhandeshar and his family. This order shall not be carried out until the period for appeal is over or if the appeal is filed, it is upheld in appeal. In the meantime the girl shall remain under the care of the trustee on his existing bond."

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 49 OF 1914.
CRIMINAL REVISION PETITION NO. 42 OF 1914.
September 21, 1914.

Present:—Mr. Justice Sadasiva Aiyar.

ANANTHARAMA VADHIAR—COMPLAINANT—PETITIONER

versus

MUTHIA TEVAN AND OTHERS—ACCUSED—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 495—Circle Inspector permitted to conduct prosecution, whether can withdraw.

A Police Circle Inspector who is permitted to conduct a prosecution can withdraw it as well with the permission of the trying Magistrate under section 495 of the Code of Criminal Procedure.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Sessions Court of Tinnevelly, in Criminal Revision Case No. 25 of 1913, dated 27th October 1913, preferred against the order of discharge made by the Joint First Class Magistrate of Shermadevi, in Calendar Case No. 67 of 1912.

Mr. *L. S. Veeraraghava Aiyar*, for the Petitioner.

The *Public Prosecutor*, for the Government.

Mr. *T. Rangachariar* (with him Messrs. *A. Swaminatha Aiyar* and *K. Parthasaradhy Aiyangar*), for the Accused.

ORDER.—In this case the Police of Shermadevi on the information of the petitioner, Anantharama Vadhiar, submitted a charge-sheet to the Joint First Class Magistrate of Shermadevi charging four persons, three of them with robbery under section 394, Indian Penal Code, and the fourth with the abetment of that offence. After four witnesses had been examined for the prosecution by the Police Circle Inspector and after certain other proceedings and after an infructuous petition for the transfer of the case made to the District Magistrate, the said Police Inspector of Ambasamudram Circle put in a petition on the 10th April 1913 to the Joint First Class Magistrate for permission to withdraw the charge against the accused. The Joint Magistrate on the 12th April 1913 accepted the petition as one filed under section 494 of the Criminal Procedure Code read with section 495, clause 2, and granted the permission sought for and discharged the accused under section 494, clause (*a*). It is against this order of discharge that the present revision petition has been filed by Anantharama Vadhiar.

I admitted the revision petition because the 2nd ground mentioned in the revision memorandum, namely, that the Police had no power to withdraw from the prosecution and that the lower Court had no power to sanction such withdrawal, appeared to raise an arguable point of law. Notice was accordingly given to the Public Prosecutor and to the accused,

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I have now heard again the learned Vakil who appeared for Anantharama Vadhiar and have also heard the learned Public Prosecutor and the learned Vakil for the accused and I have further considered the matter. Section 494 of the Criminal Procedure Code says that any Public Prosecutor appointed by the Government may, with the consent of the Court, withdraw from the prosecution before the case reaches what may be called the final stage. Section 495 is divided into two clauses, 1 and 2. The first clause says that any Magistrate may permit the prosecution to be conducted by any person other than an officer of Police below a rank to be prescribed by the Local Government etc., but that no person other than the Advocate-General, Standing Counsel, a Government Solicitor, Public Prosecutor or other officer generally or specially empowered by the Local Government in this behalf shall be entitled to conduct the prosecution without such permission. Clause 2 of section 495 says that "any such officer" shall have the like power of withdrawing from the prosecution as is provided by section 494.

I take it that the first sentence in the first clause of section 495, which sentence (I agree with the learned Public Prosecutor in thinking) is worded awkwardly, means (*a*) that a Magistrate may permit the prosecution to be conducted by any person other than a Police Officer, (*b*) that the Magistrate might permit the prosecution to be conducted even by a Police Officer if he is not below a rank prescribed by the Local Government with the previous sanction of the Governor-General in Council.

On the 30th June 1887, the Government of India gave sanction to the Local Government empowering Police Officers in the Madras Presidency not below the rank of a first class Head Constable in charge of a Police Station to conduct the prosecution of cases. The Local Government on the 19th July 1887 accordingly empowered all officers of Police of and above the rank of a first class Police Head Constable in charge of a Poliee Station to conduct prosecutions. I take it that by this notification all such superior Police Officers were generally empowered by the Local Government to conduct prosecution without even the permission of the Magistrate under the 2nd sentence of clause 1 of section 495.

When I admitted this petition, I was not aware of this notification of 1887. If this notification is still in force, the Circle Inspector who withdrew the prosecution in the present case is an officer generally empowered within the meaning of the second sentence, clause 1, of section 495 and he is, therefore, entitled under clause 2 of that same section to withdraw from the prosecution with the permission of the Court as mentioned in section 494. It was, however, suggested by the petitioner's Vakil that the Local Government's order of 19th July 1887 was cancelled by subsequent proceedings passed at or about the time when special Prosecuting Inspectors were appointed. He was, however, unable to refer me to say such repealing order or notification and I find on a perusal of Rule 38 of the Criminal Rules of Practice and also Appendex III, page 299, in the authorised edition of 1910, that Government order of 19th July 1887 seems to be still in force. I am, therefore, of opinion that the Circle Inspector of Police who conducted the prosecution in this case had the power, with the consent of the trying Magistrate, to withdraw the case.

Then it was argued by Mr. L. S. Veeraraghava Aiyar who appeared for Anantharama Vadhiar that the Magistrate was wrong in the circumstances of this case in having given his consent to the withdrawal of the prosecution and that I ought to revise the action of the Magistrate in giving such consent. Mr. T. Rangachariar who appeared for the accused contended on the other side that the High Court had no power to interfere in revision with the discretion of the Magistrate in giving his consent to the withdrawal. In a similar case [*In re Sadayan* (1)] a Division Bench of this Court held that "as the Judge is not called on to give any reasons for his action, the High Court had no means of ascertaining what the reasons were and the High Court has no power to interfere with the order of acquittal", which had been passed in that case. I find, however, that the learned Judges who constituted the Division Bench did not sanction the

(4) 4 Ind. Cas. 1126; 5 M. L. T. 216.

decision in that case being reported in the authorized reports. In their judgment they referred to an earlier decision in Criminal Revision Case No. 274 of 1907 in which this Court did interfere in revision with the consent granted by the lower Court to the withdrawal of a prosecution, but the learned Judges dissented from that earlier ruling. In these circumstances, I do not wish to express any final opinion on the question whether this Court has got the power to interfere in revision with the discretion of the Magistrate in giving the consent to the withdrawal.

Assuming, then, without deciding that this Court has got such power, I am not satisfied that this is a fit case in which that power should be exercised for the purpose of re-starting the withdrawn prosecution. I, therefore, reject this petition.

Petition rejected.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEALS NOS. 109 AND 112 OF 1914.

April 28, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C.

ABBAS QULI KHAN—ACCUSED

versus

EMPEROR—PROSECUTOR.

Evidence—Handwriting, similarity of, how far evidence of forgery—Several offences, whether forming same transaction, substantial test to determine—Conviction whether can be based on suspicion.

Similarity of handwriting affords some assistance in determining whether the evidence adduced to connect a certain person with the forgery can be believed but the test is by no means safe or certain, the prosecution should show that the accused was the only person who could have written the forged document.

Srikant v. *Emperor*, 2 A. L. J. 444; 2 Cr. L. J. 353; *Lalta Prasad* v. *Emperor*, 5 Ind. Cas. 355; 13 O. C. 1; 1 Cr. L. J. 114; *Kali Charan Mukerji* v. *Emperor*, 2 Ind. Cas. 154; 6 A. L. J. 184; 9 Cr. L. J. 498, followed

The real and substantial test by which to determine whether several offences are so connected as to form the same transaction, depends on whether they are so related to one another in point of purpose, as cause and effect or as principal and subsidiary acts as to constitute one continuous action, irrespective of the persons by whom the same may have been committed.

No conviction can be based on mere suspicion, and the indication afforded by the interest of the party concerned may in cases, where a trap is laid by the other, lead to misleading results.

Appeal against the order of the Sessions Judge, Lucknow, dated 18th February 1914.

Messrs. *Mumtaz Husain* and *Ali Ausat*, for the Appellant.

Babu *Nagendro Nath Ghoshal* and Pandit *Jagat Narain*, for the Crown.

JUDGMENT.—Ahmad Husain was a Vaccination Clerk in the Municipal Office of Lucknow. He is charged with the forgery of an entry in the *chaukidar's* register of births and deaths for 1904 and of a document purporting to be a copy of the same, with intent that it might be used to support a claim then pending before the Wasika Officer. Abbas Quli Khan is charged with the abetment of the forgery of the entry in the register of births and deaths abovementioned and with using the copy of an extract from the said register as genuine knowing it to be forged. The learned Sessions Judge has convicted both the accused and sentenced them to rigorous imprisonment for three years on each of the charges, the sentences to run concurrently.

The prosecution arose out of certain proceedings pending before the Wasika Officer in connection with the claims made by *Musammat* Sikandar Ara Amina Begam, widow of Jamshed Mirza, on behalf of herself and her minor son, Dilawar Husain, *alias* Laddan Saheb, and her two daughters, and by *Musammat* Qureshia Begam, the alleged *mutai* wife of Jamshed Mirza, on behalf of her minor son, Dulare Mirza, *alias* Babba Saheb, to a Wasika allowance of Rs. 140-2-3 standing in the name of Jamshed Mirza deceased. The title of *Musammat* Sikandar Ara Amina Begam and her son and daughters by inheritance from Jamshed Mirza was not disputed. The status of *Musammat* Qureshia Begam, as the *mutai* wife of Jamshed Mirza, and of Dulare Mirza, who claimed to be the son of Jamshed Mirza by her, was denied. The question at issue before the Wasika Officer was, whether *Musammat* Qureshia Begam was the *mutai* wife of Jamshed Mirza and whether Dulare Mirza *alias* Babba Saheb was born of her by Jamshed Mirza or by a Darogha named Mir Bahadur Husain in the service of Jamshed Mirza. The case of *Musammat* Sikandar Ara Amina Begam was prosecuted by her

agents, Raza Husain and Baqar Mirza, while that of *Musammat* Qureshia Begam by Abbas Quli Khan and Mahesh Prasad.

On the 26th February 1913 Baqar Mirza applied for the inspection of the registers of births and deaths relating to *Mohallas* Beruni Khandak and Talab Gangni Shukul for 1902 to 1904, and according to the evidence made an inspection of those registers on two successive dates. Abdul Aziz, the Statistical Clerk of the Municipal Office, states that the *chaukidar's* registers of births and deaths for the *mohallas* in question were not then found, but there is no note of that fact on the application for inspection which bears an endorsement that the inspection was granted and a charge of Re. 1 was levied for the same (Exhibit 12). Baqar Mirza subsequently applied for a copy of an extract from the *chaukidar's* register of births and deaths, dated the 22nd November 1903, and obtained it on the 5th March 1913 (Exhibit 10). Armed with that copy he applied to the Wasika Officer for the production of the *chaukidar's* register of births and deaths for *Mohalla* Talab Gangni Shukul, appertaining to the year 1903, to establish that a son was born to Darogha Mir Bahadur Husain on the 22nd November 1903.

Meanwhile Abbas Quli Khan applied to the Municipal Office for the inspection of the register of births and deaths of the *mohalla* in question for the year 1904. The application for inspection is not forthcoming, but it appears from the evidence of Abdul Aziz that the *chaukidar's* register of births and deaths for 1904 could not be traced in the office. A requisition was thereupon sent to the Police Office at Hazrat Ganj on the 18th March 1913, asking that the remaining registers of births and deaths of the Qandhari Bazar outpost, to which *Mohalla* Talab Gangni Shukul appertained, for 1901 to 1911 might be sent to the Municipal Office (Exhibit 23). The reply of the Police Office to this requisition was that there were no such registers left in the office. It appears that in February 1912 the work of recording births and deaths was transferred from the Police to the Municipal Department, and such registers as the Police then had at the Police Station were sent on to the Municipal Office for custody. Abbas Quli Khan was, therefore, unable to obtain an inspection. On the 17th April 1913 he made a formal application for a copy of the entries from the 18th to the 4th October 1904 in the register of births relating to *Mohalla* Talab Gangni Shukul, which then appertained to *Thana* Ganesh Ganj (Exhibit 14). A copy of (Exhibit 11) was prepared by Ahmad Husain, one of the accused in this case, and made over to Abbas Quli Khan some time in April 1913. Ahmad Husain took care not to sign his name in the copy as its copyist. The copy was signed by Dr. Aurora, the Municipal Health Officer, and was attested as a true copy by Mr. Botting, the Secretary of the Municipal Board. There is nothing in the copy to show by whom it was compared. The original register from which this copy is alleged to have been made, is not now forthcoming. The Wasika Officer before whom the above copy was produced by Abbas Quli Khan summoned the original for his inspection. A register purporting to be the register of births (Exhibit 16) was then produced before him by Abdul Aziz, the Statistical Clerk, but the entry dated the 2nd October 1904 in that register did not agree with the entry made in the copy granted to Abbas Quli Khan (Exhibit 11) above referred to.

The register for 1904 produced by Abdul Aziz before the Wasika Officer (Exhibit 15) is in a printed form marked "Sanitary Form No. 9 of 1904" and bearing on each page 5 columns, desgined to contain the following particulars:—

1. Number.
2. Year and date of birth.
3. Name of the father or head of the family and caste.
4. Son or daughter.
5. Signature of the clerk with date.

The procedure in vogue at the time when the above entry purports to have been made, was that the *chaukidar* was to enter the births in his own register, which was kept in Sanitary Form No. 9, and to communicate the same to the clerk-in-charge of the Police outpost, who used to acknowledge receipt of the report in the last column of the *chaukidar's* register and keep a separate and bigger register himself for all the *mohallas* appertaining to his *chauki*. The copy granted to Abbas

Quli Khan contains the same number of columns, but with entirely different headings. It does not for instance contain any column, showing the number of the house where the birth took place, but provides a column for remarks. The order in which the headings figure in the copy are :—

1. Date of birth.
2. Name of the person in whose family birth took place.
3. Son or daughter.
4. Residence.
5. Remarks.

Abdul Aziz states that when the Wasika Officer summoned the original register from which the above copy purported to have been made, a search was directed and the *chaukidar's* pocket register (Exhibit 16) was then made over to him by Ahmad Husain accused as a register from which the said copy had been made. There is so much variation, however, between the said register, which is in a printed form, and the copy that it is difficult to believe that the copy was made from that register. The entries and the words used in the two do not tally, and there are obvious alterations of the year of birth throughout several pages, on one of which the disputed entry occurs, from 1902 or 1907 into 1904. On comparing this *chaukidar's* pocket book (Exhibit 16) with the register of births maintained by the Police in the year 1907, the entries on pages 5 and 6 seem to tally exactly with the entries in the Police register, showing thereby that these two pages have been taken from the *chaukidar's* pocket book for another year and inserted in the book (Exhibit 16) to make it appear that the said birth took place in 1904. At page 5 of this pocket book, there are some marks of rubbing or erasure, where the disputed entry, showing the birth of Banne Saheb to Nawab Shahanshah Dulha, is entered. The entry is, undoubtedly, a forgery, but it is not possible to say that the copy (Exhibit 11) was made from that book, for no one would forge an original which would falsify his copy. If the pocket book was intended to be forged, it would have been forged so as to tally with the copy, or a copy would have been granted so as to tally with the forged original. The conclusion to which one is forced, therefore, is that the copy itself was granted from a supposed original which had no existence and that the copy was a fictitious document forged for the purpose of providing evidence in support of the claim of Nawab Banne Saheb, the alleged son of *Musammat* Qureshia Begam by Jamshed Mirza. In the copy (Exhibit 11) as well as in the pocket book (Exhibit 16), Nawab Banne Saheb son of Nawab Shahanshah Dulha is entered in the column where the name of the father or head of the family in which the birth took place should have been entered. A child is not usually named immediately at the time of his birth, and it is surprising that instead of the name of the father the name of the child newly born should have been entered in the said column. There is nothing to account for the difference between the headings and columns borne by the copy and the headings and columns which were admittedly in use in 1903 and 1904 according to Exhibits 15 and 16 filed. There is, moreover, internal evidence afforded by the copy itself that it was fictitiously prepared and had no genuine original, for in the year 1904 *Mohalla* Talab Gangni Shukul appertained to *Thana* Ganesh Ganj and formed no part of Police Circle Hazrat Ganj to which it has since been transferred, while column 4 of the copy describes that *mohalla* as appertaining to the latter. The copy was prepared by Ahmad Husain and was intentionally forged to help the claim of Banne Saheb, son of *Musammat* Qureshia Begam, and he is, therefore, guilty of an offence under section 468 of the Indian Penal Code.

There is no reliable evidence, however, to show by whom the forged entry in Exhibit 16 was written. The alleged similarity of handwriting is not very marked and cannot be absolutely trusted. Similarity of handwriting affords some assistance in determining whether the evidence adduced to connect a certain person with the forgery can be believed, but the test is by no means safe or certain.

In *Srikant* v. *Emperor* (1) where it was sought to convict a clerk employed in an office of forgery upon the supposed

(1) 2 A. L. J. 444; 2 Cr. L. J. 353.

similarity between his handwriting and that of some fragmentary pieces of writing upon which the charge was based, it was held that the prosecution should make an attempt to show that the accused was the only man in the office who could have written the forged document. The decisions in *Lalta Prasad* v. *Emperor* (2) and *Kali Charan Mukerji* v. *Emperor* (3) emphasise the same rule. There is no evidence in this case to show by whom the disputed entry or alterations in Exhibit 16 were made and the charge of forgery against Ahmad Husain in regard to that register cannot be sustained.

There is similarly no evidence to prove that Abbas Quli Khan abetted the forgery of that entry. It was probably to the interest of his employer to get the forgery made if she was anxious to concoct evidence in support of her son's title. But if she had more than one agent, the conviction of Abbas Quli Khan on a charge of abetment of forgery, in the absence of specific evidence to show that he got the forgery made, cannot be upheld. Abbas Quli Khan was, moreover, not likely to forge an original which would destory or nullify the copy granted to him. There is no evidence to show that Abbas Quli Khan was aware that the certified copy was made from a forged register or from a register which had no real existence. The signatures of Dr. Aurora, the Health Officer, and of Mr. Botting, the Municipal Secretary, were sufficient to justify him in believing that the copy was one that could be safely used. No conviction can be based on mere suspicion, and the indication afforded by the interest of the party concerned may in cases, where a trap is laid by the other, lead to misleading results. The charges against Abbas Quli Khan under sections 466/109 and 471 of the Indian Penal Code, therefore, fail.

The question of misjoinder raised under the circumstances on behalf of the appellants ceases to be of any importance. The forgery of the *chaukidar's* pocket register and the use of the certified copy formed a series of transactions in which the persons forging and those abetting them could be jointly tried. The times may have been different, but as observed in *Emperor* v. *Shrufalli* (4) there may be a continuity and a community of purpose. The real and substantial test by which to determine whether several offences are so connected as to form the same transaction, depends on whether they are so related to one another in point of purpose, or as cause and effect or as principal and subsidiary acts, as to constitute one continuous action. The circumstances of the present case suggest a community or continuity of purpose in different acts constituting the forgery irrespective of the persons by whom the same may have been committed.

I accordingly uphold the conviction and sentence passed on Ahmad Husain under section 468 of the Indian Penal Code in regard to Exhibit 11 and set aside his conviction under section 466 of the Code. The conviction and sentence passed on Abbas Quli Khan is set aside and he will be set at liberty.

Conviction upheld.

(2) 5 Ind. Cas. 355; 13 O. C. 1; 11 Cr. L. J. 114.
(3) 2 Ind. Cas 154; 6 A. L. J. 184; 9 Cr. L. J. 498.
(4) 27 B. 135; 4 Bom. L. R. 390.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 25 OF 1914.

June 15, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C., and Mr. Kendall, A. J. C.

EMPEROR THROUGH DAULAT—APPLICANT

versus

Musammat JADI—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 488—Maintenance allowance paid by Muhammadan—Subsequent divorce, effect of.

Where a Magistrate made an order under section 488, Criminal Procedure Code, directing a Muhammadan to pay a certain monthly allowance towards the maintenance of his wife:

Held, that on a subsequent divorce of his wife by the husband that order became *functus officio*.

Criminal reference by the Sessions Judge of Gonda, on revision against the order of the Joint Magistrate, Gonda, dated 11th September 1913.

The *Government Pleader*, for the Crown.

Mr. *Abdul Raoof*, for Daulat, Applicant.

EMPEROR *v.* JADI.

Mr. *Shaukat Ali*, for Jadi, Opposite Party.

JUDGMENT.—On the 12th August 1910 one Daulat was ordered by the Joint Magistrate of Gonda to pay a certain monthly allowance towards the maintenance of his wife. Proceedings had been instituted on her application and Daulat at that time pleaded that he had divorced her. This plea he was unable to prove. On the 5th of August 1913 *Musammat* Jadi applied to the Joint Magistrate for recovery of eight months' arrears of maintenance. On this Daulat filed an objection to the effect that eight months ago he had divorced his wife in the presence of witnesses, and that a deed of divorce had been duly executed and registered; and he asked that the order for maintenance should be set aside. The Magistrate declined to consider his application, on the ground that it came under no stated exception to section 488, and a warrant for realization of arrears of maintenance was ordered to be issued.

The learned Sessions Judge of Gonda has submitted the order of the Magistrate to this Court, recording his own opinion that the order is wrong and should be set aside.

It is argued on behalf of Daulat that if he succeeds in proving that the woman has ceased to be his wife, then the Magistrate should no longer enforce the maintenance order. For *Musammat* Jadi it is argued that an order of maintenance having been passed in her favour, it cannot be cancelled, except on proof that she is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, under section 488 (5) of the Code of Criminal Procedure. In *Mahbuban* v. *Fakir Bakhsh* (1) Knox, J., held that an order for maintenance under section 488 could only be concluded under the provisions of that section itself and not by invocation of the Muhammadan Law; and in the case reported as *Shah Abu Ilyas* v. *Ulfat Bibi* (2) he held that when an order for maintenance has been passed it is not for a Court enforcing that order to consider any point other than the identity of the parties, and the non-payment of the allowance due. This case was decided by a Bench of three Judges and the opinion of the other two, who did not agree with Knox, J., prevailed. The learned Judicial Commissioner, taking the same view as that taken by Mr. Justice Knox, which is opposed to the view taken by this Court in *Amir Mirza* v. *Musammat Imaman* (3), has referred the question to a Bench.

The matter does not appear to us to present any difficulty. The Code of Criminal Procedure, Chapter XXXVI, provides for the case of a person who, having sufficient means, neglects or refuses to maintain *his wife*; and under section 488 certain Magistrates, on proof of such neglect or refusal, may order such person to make a monthly allowance for the maintenance of *his wife*. We do not see how this order can be equitably enforced when there is no wife remaining to be maintained. The fact that the powers of divorce given by the Muhammadan Law may so be exercised as to sometimes defeat the intention of the Legislature, cannot affect the law as it stands. We find that, with the one exception of the opinion of Mr. Justice Knox quoted above, the view which we are here expressing is the view which every High Court in India as also the Chief Courts of the Punjab and of Burma have expressed. The dissolution of the bond of marriage when once validly effected, must have the result of stopping the operation of a Magistrate's order made in favour of a wife. With the cessation of the conjugal relation, the responsibilities attached thereto cease. It is only on proof of the existence of this relation that a Magistrate can make any order at all, and any order made is to be for a monthly allowance for the maintenance of a wife, and it is as wife that the woman is to continue to receive an allowance. We, therefore, find that it is the Magistrate's duty, on such an objection being raised, to inquire whether there has been, or has not been, a legal and valid divorce; and if he finds that there has been a valid dissolution of the marriage, he ought not to issue an attachment warrant or otherwise to execute the order, it having become in fact *functus officio*.

The Magistrate's order is, therefore, set aside and he is directed to dispose of the applications of *Musammat* Jadi and Daulat in the light of the above finding.

Order set aside

(1) 15 A. 143.
(2) 19 A. 50; A. W.N. (1896) 173.
(3) Select Case No 239.

GURUSWAMI NAIKEN *v.* TIRUMURTHI CHETTI.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 456 OF 1914.
CASE REFERRED No. 52 OF 1914.
October 30, 1914.

Present:—Mr. Justice Ayling and
Mr. Justice Hannay.

GURUSWAMI NAIKEN AND OTHERS —ACCUSED

versus

TIRUMURTHI CHETTI—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), ss. 250, 422—Criminal Rules of Practice, r. 60—Order setting aside grant of compensation—Omission of notice to District Magistrate, whether ground for interference by High Court.

In an appeal against an order granting compensation under section 250, Criminal Procedure Code, the District Magistrate ought to be served with a notice, but an omission to send him a notice and his consequent non-appearance would not justify the High Court's interference in revision with the Appellate Court's order.

Emperor v. *Palaniappa Velan*, 29 M. 187; 3 Cr. L. J. 452; *Ambakkagari Naji Reddi* v. *Basappa of Medimakkulappalli*, 1 Ind. Cas. 79; 5 M. L. T. 262; 9 Cr. L. J. 150; 19 M. L. J. 130; 33 M. 89, distinguished.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the Sessions Judge of Coimbatore, in his letter dated 11th July 1914.

Mr. *G. Krishnaswami Aiyar*, for the Accused.

Mr. *C. S. Venkatachariar*, for the Complainant.

Mr. *P. R. Grant*, for the Government.

JUDGMENT.—The order which we are asked to revise was passed by the Joint Magistrate of Pollachi Division setting aside on appeal an order of the Stationary Sub-Magistrate of Udamalpet for payment of compensation under section 250, Criminal Procedure Code.

The Sessions Judge of Coimbatore has referred it as illegal, on the ground that no notice of the appeal was given to the Public Prosecutor as required by section 422, Criminal Procedure Code.

Section 422 of the Code of Criminal Procedure directs that notice of appeal should be given "to such officer as the Local Government may appoint in this behalf" and a reference to Rule 60 of the Criminal Rules of Practice shows that the only officer who can be held to be appointed to receive notice of an appeal of this kind is, not the Public Prosecutor, but the District Magistrate who is nominated in clause (1) "for appeals other than appeals to Courts of Session."

We may remark that, as far as our experience goes, this clause is very generally disregarded throughout the Presidency, and it may be doubted whether it was really intended to apply to compensation cases. But, as it stands, it is certainly applicable and we have merely to decide whether the disregard of it is a sufficient ground for interference with the Joint Magistrate's order. On the whole we think it is not. In *Emperor* v. *Palaniappa Velan* (1) the Officiating Chief Justice, Sir S. Subramania Aiyar sitting alone set aside the order in a case indistinguishable from the present one, but expressed himself in very guarded language. He remarked that there seemed little reason for notice to the officer appointed by Government in a matter in which the accused only are really interested, and appears to have been mainly influenced by the failure to give notice to the accused, so that the latter might have an opportunity of supporting the order passed in their favour. In a later case *Ambakkagari Nagi Reddi* v. *Basappa of Medimakkulappalli* (2) a Bench of this Court declined to interfere on the ground of failure to give notice to accused, seeing that this was not required by law, but remarked that notice to the Public Prosecutor (*sic*) was clearly necessary. Whether they would have deemed its omission sufficient ground for interference is not clear.

Notice to the District Magistrate is practically a formality in an appeal of this description; for there can be very few cases in which that Officer would deem it necessary to oppose the appeal. It cannot be said that either of the parties really concerned was prejudiced by its omission. The accused has no right of audience in such an appeal and cannot count on the support of the District Magistrate. The Joint Magistrate's order is in favour of the complainant. The District Magistrate himself has not moved in the matter, and the Public Prosecutor does not support the reference.

We decline to interfere.

(1) 29 M. 187; 3 Cr. L. J. 452.
(2) 1 Ind. Cas. 79; 5 M. L. T. 262; 9 Cr. L. J. 150; 19 M. L. J. 130; 33 M. 89.

SHEO DULARE MISRA *v.* BRIJ BHUKHAN LAL.

*OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 10 OF 1913.

August 28, 1914.

Present:—Mr. Stuart, J. C., and Mr. Kendall, A. J. C.

Pandit SHEO DULARE MISRA AND OTHERS —DEFENDANTS—APPELLANTS

versus

Pandit BRIJ BHUKHAN LAL—PLAINTIFF —RESPONDENT.

Hindu Law—Joint family—Managing member can sue or be sued on behalf of family—Decree binding on other family members—Compromise in interest of family, manager competent to enter into—Fraud or undue influence as ground of avoiding compromise— Karta *plaintiff or defendant not to be distinctly stated as such—Residence of joint family members at different places—Business on behalf of family carried on in local manager's name alone—Local manager, decree against, binding on whole family—Alienation—Pre-emption suit decreed—Property pre-empted lost by operation of law.*

A managing member of a joint Hindu family can sue and be sued on behalf of the family, and a decree in such a suit binds the other members of the family of which he is the manager.

Sheo Shankar Ram v *Musammat Jaddo Kunwar*, 24 Ind. Cas. 504; 18 C. W. N. 968; 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 645; 20 C. L. J. 282; 36 A. 383; 12 A. L. J. 1173 (P. C.); *Jogendro Deb Roy Kut* v. *Funindro Deb Roy Kut*, 14 M. I. A. 367; 11 B. L. R. 244; 17 W. R. 104; 2 Suth. P. C. J. 517; 3 Sar. P. C. J. 32; 20 Eng. Rep. 824 and *Kishen Parshad* v. *Har Narain Singh*, 9 Ind. Cas. 739; 33 A. 272; 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 21 M. L. J. 378; 13 C. L. J. 345; 13 Bom. L. R. 359; 38 I. A. 45; (1911) 2 M. W. N. 395 (P. C.), referred to.

When a defendant is competent to defend a suit relating to a joint family transaction carried out by him as manager, he is entitled as such to enter into a compromise in the course of that suit if he considers it in the interest of the family to do so, although other members of the family may be entitled in certain circumstances to avoid the decree on the ground of fraud or undue influence.

Apart from special circumstances, it is not essential in suits by or against the manager of a joint Hindu family that a plaintiff should state in distinct terms that he is suing as manager or that the defendant is being sued as manager.

Hori Lal v. *Nimman Kunwar*, 15 Ind. Cas. 126; 34 A. 549 (F. B.); 9 A. L. J. 819 and *H. H. M. Jijamba Bai Sahib* v. *Sagniram Jathai Row Sahib*, 14 Ind. Cas. 374; 22 M. L. J. 45, referred to.

Where the members of a joint Hindu family reside at different places, but certain business transactions are carried on at the principal place of residence in the name of one member alone acting as local manager on behalf of the family, and upon a purchase having been made by the local manager in his name but on behalf of the family and out of joint family funds, a suit for pre-emption is brought and decreed against him alone, the suit is rightly brought against him alone and the decree is in ordinary circumstances binding on the other members of the family, although the pre-emptor knows that the purchase is made out of joint family funds and on behalf of the family and does not sue the local manager as *karta* of the family.

Where a pre-emption suit is decreed on a reasonable compromise being filed in the suit, the vendee cannot be said to have alienated the property in suit, but to have lost it by operation of law.

Appeal from the decree of the Subordinate Judge, Rae Bareli, dated 14th January 1913.

Pandit *Gokaran Nath Misra*, for the Appellants.

Mirza *Sami-ullah Beg*, for the Respondent.

JUDGMENT.—The facts out of which this appeal has arisen are briefly as follows. On the 23rd of May 1909 Sada Sukh, defendant No. 6, purchased a one-anna share in village Ramuapur, in a hamlet of which, Dalva Khera, he resides and owns a house and some cultivatory holding, from Gajadhar Prasad for Rs. 5,648-2. Defendant No. 6 is one of six brothers, the other five, defendants Nos. 1 to 5, who are appellants in this Court reside in Calcutta. Sada Sukh is the eldest brother. Sheo Dulare, defendant No. 1 is the eldest of the remaining five. He earns Rs. 250 a month in the service of a firm in Calcutta, while Sheo Narain, the second Calcutta brother, earns Rs. 150 a month in the service of some other firm. It is proved that the money with which the above purchase was made was remitted, mainly in currency notes the numbers of which have been proved, by Sheo Dulare from Calcutta and that the purchase was made out of joint family funds. It is further proved and admitted that the administration of what property there is and of what business is transacted in Dalva Khera, is in the hands of Sada Sukh who is, as noted above, the eldest brother. A certain amount of money-lending is carried on by him in the Rae Bareli and Unao Districts of this Province; and all the documents in connection therewith are executed in the name of Sada Sukh alone, though admittedly the transactions are conducted on behalf of the joint family. The present plaintiff brought a suit against defendant No. 6 to enforce his right of pre-emption in respect of the one-anna share purchased as above. It is proved and admitted that the funds for the defence of that suit were remitted from Calcutta by Sheo

Dulare, who deputed his brother Sheo Narain to assist in instructing the Pleader and in the conduct of the suit. Defendant No. 6 apparently had taken the precaution of issuing a notice as prescribed by section 10 of the Oudh Laws Act before he concluded his purchase from Gajadhar Prasad; and the pre-emptor's suit was dismissed in the first Court for this reason. The case was carried on to the Court of the District Judge on appeal, where, as is proved by evidence in this case, doubts arose as to whether the price stated in the notice and subsequent sale-deed was fixed in good faith or not. If the Judge were to have found that the price was not fixed in good faith, it would follow that the pre-emptor would have been entitled under section 13 of the Oudh Laws Act to bring the suit, despite the fact that due notice had been given. Recognising this position the parties came to terms; and a compromise was effected by which the defendant No. 6 accepted a decree for pre-emption against him on deposit of the full purchase-money as set out in the sale-deed. The decree is dated 29th March 1911. Money was deposited accordingly, and the pre-emptor proceeded to take possession of the share so acquired. He met, however, with opposition from defendants Nos. 1 to 5, who alleged that his decree was against Sada Sukh alone, whereas they were members of a joint family with him, and that Sada Sukh had no power to bind them or to alienate their property. The plaintiff, therefore, brought this present suit for possession and mesne profits. It was contested by defendant No. 6, Sada Sukh, on the grounds that they six were all members of the joint family and that the property was purchased on behalf of them all, but in his name alone as he alone was present; that the pre-emption suit was filed against him alone, although the plaintiff pre-emptor knew that defendants were brothers and members of the joint family and that they as such had really purchased the property; and that he (Sada Sukh) was compelled to file the compromise against his will in the Appellate Court. The reply of the other defendants, Nos. 1 to 5, followed this lead. They pleaded that the purchase was made out of joint family funds and that they all obtained joint possession over the property in dispute, and that defendant No. 6 had no authority on their behalf to enter into any compromise which had the effect of alienating their joint property. The lower Court decreed the claim.

Appeal has been laid in this Court on the grounds that the defendants-appellants Nos. 1 to 5 are not bound by the compromise and decree of the 29th March 1911; that the defendant No. 6 not having been sued as manager of the joint family, no decree against him can bind the family; that the compromise was not made with the consent or authority of the co-parceners; that even if he were defending that suit as the representative of the family, his authority did not extend to entering into a compromise and thereby alienating the property; and that the compromise was not beneficial or advantageous to the interests of the defendants Nos. 1 to 5. Two other grounds of appeal which have reference to the jurisdiction of the Appellate Court in the pre-emption suit, and to a decree for Rs. 114 mesne profits, have not been argued. It is admitted in this Court that the purchase was made out of joint family funds, and that Sada Sukh was the local manager on behalf of the joint family. It is pleaded for the plaintiff-respondent that, as the transaction of sale was entered into with Sada Sukh alone, it was Sada Sukh alone whom it was necessary to implead as defendant in the pre-emption suit, even though in the sale transaction he was acting on behalf of the other members of the joint family.

It has been repeatedly laid down that a managing member of the joint Hindu family can sue and be sued on behalf of the family and that a decree in such a suit will bind the other members of the family of which he is a manager. In a recent decision of the Privy Council passed in this year 1914, *Sheo Shankar Ram* v. *Musammat Jaddo Kunwar* (1), this principle has been again recognised and their Lordships say:—"There are occasions, including

(1) 24 Ind. Cas. 504; 18 C. W. N. 968; 16 M. L. T. 475; (1914) M. W. N. 593; 1 L. W. 645; 20 C. L. J. 282; 36 A. 383; 12 A. L. J. 1173 (P. C.).

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foreclosure actions, when the managers of a joint Hindu family so effectively represent all other members of the family that the family as a whole is bound;" and on the facts of that case which were not so strong as the facts of the present case, they applied that principle. There was no suggestion, they said, that the managers did not act in the interest of the family. Such a principle was recognised by their Lordships of the Privy Council in 1871 when in the case of *Jogendro Deb Roy Kut* v. *Funindro Deb Roy Kut* (2) they remark at page 376: "They think that this case cannot in any degree be likened to those which sometimes occur in India, wherein the interest of a joint and undivided family being in issue, one member of that family has prosecuted a suit or has defended a suit, and a decree has been made in that suit which may afterwards be considered as binding upon all the members of the family, their interest being taken to have been sufficiently represented by the party in the original suit." In *Kishen Parshad* v. *Har Narain Singh* (3) Lord Robson at page 276 says: "Is there any principle of law or any custom applicable to a case like this, according to which the managing members of a Hindu joint family entrusted with the management of a business, must be held incompetent to enforce at law the ordinary business contracts they are entitled to make or discharge in their own names?" In this present case, as we have noted, it is proved by the evidence of Sada Sukh himself that all the money transactions conducted on behalf of the joint family in the Unao and Rae Bareli Districts are conducted by him alone on behalf of the family; and the remarks of his Lordship quoted have equal force whether the manager be a plaintiff enforcing, or a defendant supporting, a transaction entered into by him on behalf of the family. In the course of his judgment in *Kishen Parshad's* case (3) his Lordship also remarked that the defendant was, of course, entitled to insist on all the persons with whom he expressly contracted being made parties to the suit. We are, therefore, of opinion that the pre-emption suit was rightly brought against Sada Sukh alone by the pre-emptor and that the other members of the family must, in ordinary circumstances, be held to be bound by the decree obtained in that suit.

Defendants Nos. 1 to 5, however, plead that even if it be admitted that they would all be ordinarily bound by this decree, they are not so in this case because neither did Sada Sukh enter into the compromise willingly, nor was he authorised to make such a compromise, nor was that compromise advantageous in the interests of the family.

It is untrue to say that Sada Sukh was compelled to enter into the compromise. It is of course possible that the plaintiff's suit having been dismissed in the first Court, he would have been *prima facie* unwilling to accept a decree for pre-emption against him in the Appellate Court. But we have described above the position of affairs which led to the compromise. Sada Sukh acted on the advice of his Pleader, and that Pleader has been examined in the present case, and we have no doubt that recognising the circumstances Sada Sukh entered into that compromise willingly. And the defendants have not in the least satisfied us that the compromise was not in the interest of the family, even if we allow that such an argument can be brought forward as raising a presumption of undue influence or fraud. The litigation was thereby concluded, and the joint family received back the whole of the nominal purchase-money, the validity of a portion of which was under challenge at the time. Where the defendant was competent to defend a suit relating to a joint family transaction carried out by him as manager, we hold that he was entitled as such to enter into a compromise in the course of that suit if he considered it in the interest of the family to do so. There is no doubt that other members of the family might be entitled in certain circumstances to avoid the decree on the ground of fraud or undue influence. But no fraud or undue influence has been proved by the defendants in the present case.

The result of the compromise was that the property purchased from Gajadhar Prasad was lost to the joint family at its original price; but it is not right to say that by

(2) 14 M I. A. 367; 11 B. L. R. 244; 17 W. R. 104; 2 Suth. P. C. J. 517, 3 Sar. P. C. J. 32; 20 E. R. 824.

(3 9 Ind. Cas. 739 (740); 33 A. 272; 15 C.W.N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 21 M. L. J. 378; 13 C. L. J. 345; 13 Bom. L. R. 359; 38 I. A. 45;(1911) 2 M. W. N. 395 (P. C.).

entering into that compromise Sada Sukh made any alienation of joint family property such as the other members of the family would be entitled to challenge. There being a law of pre-emption applicable to Oudh under the Oudh Laws Act, the original purchase, and the purchaser's position thereunder, was, until the period of limitation had expired, liable to be disturbed if a pre-emptor were to appear and to substantiate his right. The purchaser, therefore, had not obtained an unassailable title; and the result of the suit was that the transaction came to be cancelled by operation of law, and not by any voluntary act of Sada Sukh.

It is admitted that when the pre-emption suit was brought Sada Sukh was not therein described as *karta* of the joint family, nor was there any reference made directly or indirectly to the purchase having been made on behalf of the joint family. It is pleaded for the defendants Nos. 1 to 5 that they could in any case be held bound by the decree such as the one in question only if it was obtained in a suit brought against Sada Sukh *as karta of the family*. It is of the essence of the case set up by these defendants that the plaintiff pre-emptor, who was *lambardar* of Ramuapur, did know perfectly well that Sada Sukh was a member of the joint family and that the purchase was being made by him, not in his own capacity, but as manager of that family; and it is further proved by the evidence of Sheo Dulare and Sheo Narain themselves that they did take an active part in the defence of that suit. Whatever, in fact, was the array of parties, the effect of the positions they have adopted is that both parties to the pre-emption suits were tacitly recognising that the claim for pre-emption was directed against a joint family purchase. Their argument is, therefore, particularly unfair; and they are attempting merely to take advantage of a technical question of procedure. As was said by Lord Penzance in the well-known case reported in *Henry J. B. Kendall* v. *Peter Hamiltan* (4): "Procedure is but the machinery of the law after all—the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct, and even extinguish, legal rights, and is thus made to govern where it ought to subserve." But, apart from the special circumstances, we hold that it is not essential that a plaintiff should state in distinct terms that he is suing as manager, or that the defendant is being sued as manager; and we are supported in this by authority, *viz.*, the reported decisions in *Hori Lal* v. *Nimman Kunwar* (5) and in *H. H. M. Jijamba Bai Sahib* v. *Sagniram Jathai Row Sahib* (6).

We, therefore, dismiss this appeal with costs.

Appeal dismissed.

(4) 4 A. C. 504; 48 L. J. C. P. 705; 31 L. T. 418; 28 W. R. 97.

(5) 15 Ind. Cas. 126; 34 A. 549 (F. B.); 9 A. L. J. 819.

(6) 14 Ind. Cas. 374; 22 M. L. J. 45.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL No. 17 OF 1909.

April 2, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

BASIR-UD-DIN AHMAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HIMMAT ALI MONDAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence—Gift—Secondary evidence—Agent, authority of—Presumption—Declaratory suit—Title, proof of—Onus.

Petitions presented to the Collector by a donor, admitting and recognizing a gift of his property in favour of his wife, are secondary evidence of the strongest character of the gift.

Where a petition purporting to have been signed by the agent of a party on whose behalf the same was filed, comes out of a public office like the Collectorate, the presumption is that, before the signature of the agent was accepted, the Executive Officer was satisfied that the agent had the authority of his principal to sign his name.

In a suit for declaration of right to immoveable property it is not for the defendant to show that he has got a title to the property, but the plaintiff has to make out his title to the property.

Appeal against the decree of the Sub Judge, Second Court of 24-Parganahs, dated the 30th of November 1908.

Moulvi *Khorshed Hosain* and Babu *Ramani Mohan Chatterjee*, for the Appellants.

Babus *Dwarka Nath Chakravarty*, *Biraj Mohan Majumdar* and *Shashi Shekhar Bose*, for the Respondents.

BASIR-UD-DIN AHMAD *v.* HIMMAT ALI MONDAL.

JUDGMENT.

FLETCHER, J.—This is an appeal from a judgment of the learned Subordinate Judge, second Court, of the 24-Parganahs dismissing the plaintiffs' suit. The suit was brought by the plaintiffs for a declaration that they are entitled to a certain share in a certain immoveable property and the ground on which their claim was put forward was that the property in question belonged to one Mitoo Sircar and that the plaintiffs were along with the defendants the heirs of the said Mitoo Sircar. The second claim that was put forward was that it might be declared that neither the defendants nor the deceased Sarafat Mondal had any right to the said 11-annas odd share of the property mentioned in the schedule. I do not know what we have got to do in this case with the title of the defendants or the deceased Sarafat Mondal. The point we have got to deal with in this case is whether the plaintiffs have established their title to a portion of the property as alleged by them in the plaint. The learned Judge of the Court below came to the conclusion that the plaintiffs had failed to establish their case, and, after hearing the evidence, I agree with the learned Subordinate Judge. I think that anybody paying any attention to the documents adduced in evidence in this case cannot arrive at any other conclusion.

The case turns on a very simple point. Admittedly the property originally belonged to Mittoo Sircar and Mitoo Sircar, it is said in the year 1854, executed a *heba*, that is, a deed of gift in favour of Anar Bibi of the property in question. The *heba* is not forthcoming. It is now objected that secondary evidence ought not to have been admitted of the *heba*, because it is not shown that the document on a diligent search could not be found in the lower Court, and although the deed was not forthcoming, it does not appear to have been criticized and the point that strict proof had not been given before secondary evidence was adduced does not seem to have been raised there. The secondary evidence given in this case is of the strongest character possible. First of all there is the admission of Mitoo himself that he had, in fact, executed the *heba* in favour of his wife, Anar Bibi. It is said that the petition presented to the Collectorate by Mitoo was signed only by a *Mukhtear*. But in a public office like the Collectorate, before the signature of an agent is accepted, the Executive Officer would require proof that the agent has the authority of his principal to sign his name, and, therefore, it must be that a power-of-attorney or *mukhtearnamah*, as it is called in this country, was produced in this case in the Collectorate to satisfy the Executive Officer that the *Mukhtear* had the authority to sign the name of Mitoo Sircar. Moreover a petition was put in by Anar Bibi herself in the Collectorate during Mitoo's life-time and the documentary evidence establishes that money was paid into the Collectorate by Anar Bibi through the hands of Mitoo Sircar. There cannot be the slightest doubt in this case that Mitoo did by these documents recognize and admit that he had granted a *heba* of this property in favour of his wife. From the year 1854, down to the year 1902, when Anar Bibi died, that is, for a period of 48 years, the documents that are produced conclusively show that the title was in Anar Bibi and that she was also in possession of the property. On Anar Bibi's death, the property would go to her heirs and not to the heir of Mitoo Sircar. It is essential in this case for the plaintiffs to prove that the property was the property of Mitoo Sircar and that on the death of Anar Bibi or rather on Mitoo Sircar's death, it passed to the heirs of Mitoo Sircar and not to the heirs of Anar Bibi. In my opinion the documents conclusively prove that the property was the property of Anar Bibi and not the property of Mitoo Sircar.

Another point which has been raised in this case on behalf of the appellants is that the defendants are not the sole heirs of Anar Bibi, but that there are two sisters of Anar Bibi, namely, Abeedunessa Bibi and Amoran Nessaa Bibi, who both acquired on the death of Anar Bibi a share in the property and that the document relinquishing their claim to the defendants was not a registered document and was, therefore, void. It does not

matter for the purposes of this case whether the document was void or not. If the sisters of Anar Bibi were necessary parties to the suit, the plaintiffs ought to have joined them as defendants. This is not a case in which the defendants have got to show that they have a title to the property, but it is a case in which the plaintiffs have got to make out their title to the property. It seems to me that on every possible grounds the learned Sub-Judge came a correct conclusion in this case wh n he held that the plaintiffs had failed to make out their title to any portion of the property. The present appeal, therefore, fails and must be dismissed and dismissed with costs.

RICHARDSON, J.,—I agree.

Appeal dismissed.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REVISION No. 176 OF 1913-14.

May 6, 1914.

Present:—Mr. Maynard, F. C.

RUGHA—APPLICANT

versus

MUGHLI AND OTHERS—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), ss. 38, 59 (1) (b)—Abandonment by widow—'Tenant having the right of occupancy'—Requirements of s. 38—Actual possession of tenancy.

Abandonment, like ejectment, terminates the rights of the widow, and the right of occupancy at once devolves upon the next claimant.

At the very moment that the widow completes the period required to bring section 38 of the Punjab Tenancy Act into operation, she ceases to be the 'tenant having the right of occupancy' by the operation of section 59 (1) (*b*).

In order to establish the conditions contemplated by section 38 the tenant, whose abandondment of his tenancy is alleged, must have been at some time in possession of the tenancy in question.

Case forwarded by the Commissioner of Ambala on 5th March 1914.

Mr. *Dwarka Parshad*, for the Appellant.

Mr. *Fazal Ilahi*, for the Respondents.

ORDER.—The parties are represented before me by Counsel. A widow who had succeeded to occupancy rights held by her deceased husband left the village in which the land was situated. The precise nature of the arrangements which she made for the cultivation of the land, and the manner in which effect was given to them, are not entirely clear from the file. Apparently the person whom she employed to cultivate for her continued to cultivate on behalf of the landlords. At any rate the owners (who are the co-sharers in the village) say that they regularly receive rent from the tenant, Shahzada, though the language employed appears to amount to a contention that he is cultivating on their behalf and not on behalf of any occupancy tenant.

The landlords claimed in mutation proceedings that the name of the widow should be removed from the column of occupancy, and this claim was upheld as far as the Collector's Court. The Commissioner has referred the case for revision on the ground that the act of the widow did not affect the rights of the collaterals, who are admittedly descended from the ancestor who originally held the tenancy.

The widow having left the village some years ago, a fresh entry of some sort is necessary and the question is what it should be.

The rights of a widow in an occupancy tenancy are very strictly limited by law. She cannot transfer the right by sale, gift or mortgage, or even by sub-lease for a term exceeding one year. It would be somewhat surprising if, in these circumstances, a mere act of neglect on her part could suffice to destroy the rights of persons who are protected by law against her wilful disposal of the property.

Clause (*b*) of section 59 (1) makes the legal position clear. Abandonment, like ejectment, terminates the rights of the widow, and the right of occupancy at once devolves upon the next claimant. At the very moment that the widow completed the period required to bring section 38 of the Punjab Tenancy Act into operation, she ceased to be "the tenant having the right of occupancy" by the operation of section 59 (1) (*b*).

An attempt has been made before me to show that the collaterals were themselves guilty of abandonment, because they did not at once enter upon and manage the tenancy. It appears that they misunderstood their legal position and thought that they must wait till the widow's absence had lasted a stated number of years. Be this as it may, it is clear that a person who has never been in

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actual possession of a tenancy, has not had the opportunity of cultivating and arranging for the cultivation of the land of which it consists; and I hold that in order to establish the conditions contemplated by section 38 the tenant, whose abandonment of his tenancy is alleged, must have been at some time in possession of the tenancy in question.

I accept the application and order mutation of the occupancy tenancy in the names of the collaterals of the deceased tenant, Niadar, with costs in favour of the applicant.

Application accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 337 OF 1912.

August 10, 1914.

Present:—Mr. Stuart, Offg. J. C., and Mr. Kanhaiya Lal, A. J. C.

DATA RAM TEWARI—PLAINTIFF—APPELLANT

versus

DEOKALI TEWARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Oudh Laws Act (XVIII of 1876), s. 9—Pattas or leases of birt sankalap *granting heritable and transferable rights*—Nazrana *or premium taken in advance—Rent reserved*—Birt, bai birt *and* birt sankalap, *meanings of—Proprietary or under-proprietary rights, sale of.*

A grant of under-proprietary rights by means of *pattas* or leases of *birt sankalap* giving heritable and transferable rights, in lieu of a *nazrana* or premium taken in advance and an annual rent reserved thereby, cannot be treated as a sale of either a proprietary or an under-proprietary tenure.

The right of pre-emption arises only in case of transfers by sale or foreclosure and not in case of transfers by lease, although perpetual, mortgage or gift.

Dewanutulla v. *Kazem Molla*, 15 C. 184 and *Babu Baldeo Prasad* v. *Shaikh Ali Husain*, 10 O. C. 348, referred to.

Ram Faqir v. *Sheo Ratan*, 8 O. C. 121 and *Ram Autar* v. *Drigpal*, 8 Ind. Cas. 725; 14 O. C. 41, distinguished from.

Appeal from the decree of the Subordinate Judge, Sultanpur, dated 7th May 1912, upholding that of the Munsif, Musafirkhana, dated 28th February 1912.

Pandit *Gokaran Nath Misra*, for the Appellant.

Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.—These appeals arise out of suits for pre-emption brought by the plaintiff-appellant in respect of certain plots of land transferred by the superior proprietors of the village to certain *Brahmans* residing there. The deeds evidencing the transfers are styled *pattas* or leases of *birt sankalap* and purport to grant heritable and transferable rights in the said plots, in lieu of a *nazrana* or premium taken in advance and an annual rent reserved thereby. The plaintiff-appellant is one of the superior proprietors of the village. His contention is that the leases aforesaid amount to sales of under-proprietary tenures and that he is entitled to pre-empt the same under section 9 of the Oudh Laws Act (XVIII of 1876). The suits were decreed by the Court of first instance but dismissed by the lower Appellate Court on the ground that the transfers in question were perpetual leases and did not give rise to a right of pre-emption.

The transfers are unquestionably in the nature of grants of under-proprietary rights. Under the Oudh Laws Act a cause of action for the enforcement of a right of pre-emption arises when a proprietary or under-proprietary tenure is transferred by sale or foreclosure. The main question, therefore, is whether the documents in question really evidence sales of proprietary or under-proprietary rights. A sale is defined by section 54 of the Transfer of Property Act as a transfer of ownership in exchange for a price paid or promised or part paid and part promised. There was no transfer of ownership in this case, but only a transfer of a limited right, subject to an annual payment of rent. A *nazrana* or premium, taken preliminary to the transfer, is not necessarily the price of the property conveyed, for a premium may be taken as much in the case of a lease as in the case of any other grant. The reservation of an annual rent payable by the transferee to the transferor is inconsistent with a sale, and a grant of under-proprietary rights in lieu of a premium taken in advance and an annual rent reserved cannot be treated as a sale of either a proprietary or under-proprietary tenure. It cannot be a sale of proprietary tenure because there cannot be two proprietors of the same property at the same time, holding it exclusive of one another. It cannot also be regarded as a sale of under-proprietary

tenure, because the tenure was not granted in lieu of a price paid or promised, but was granted by way of a *birt* in lieu of a premium paid and an annual rent reserved ostensibly to provide the holder with a means of subsistence. A *birt*, as explained by Sykes, is usually an under-proprietary right ceded to provide means of livelihood, and there are some classes of *birts* known as *bai birts* granted by the proprietor for money paid, in which a fixed rent is generally payable for the land, though it is a low rent (Chhail Behari Lal's Taluqdari Law, pp. 187 and 188). Grants made by way of *birt sankalap* often partake of the character of both *bai birts* and true *sankalap*, the consideration for the grant being compounded of a money payment and the blessings of the *Brahmans* or their performance of the services of family *gurus* or priests (*ibid.* p. 196). The deeds of *birt sankalap* granted in these cases cannot, therefore, be treated as sales of proprietary or under-proprietary rights so as to give rise to a right of pre-emption. The learned Judicial Commissioner, who referred these cases to a Bench, rightly observed that property may be liable to pre-emption but only in a case where a transfer is made in one of two ways, namely, by sale or foreclosure. There is no right of pre-emption against transfers by lease, mortgage or gift. In *Dewanutulla* v. *Kazem Molla* (1), it has been held that where a co-proprietor does not part with his entire interest in land by an absolute sale but merely grants a lease of it, even though it be a lease in perpetuity, the doctrine of pre-emption does not apply. In *Babu Baldeo Prasad* v. *Shaikh Ali Husain* (2) it was similarly held that a perpetual lease was not a sale within the meaning of the Oudh Laws Act, though no right of re-entry was reserved.

The learned Counsel for the appellant relies on the decision in *Ram Faqir* v. *Sheo Ratan*, (3) which was followed in *Ram Autar* v. *Drigpal* (4) and in an unreported case of this Court, *Amres Singh* v. *Sheo Balak*(5). But in the first of these cases the *birt* granted by the superior proprietor was substantially a sale of under-proprietary rights carved out of the entire property for a money payment and the finding of this Court was that the transaction was no other than what it purported to be, namely, a sale. In the other two cases, the annual payment of what was called the *lagan sarkari* was merely a condition under which the grantee was to pay the share of the Government revenue charged on the land like any other proprietor, and no payment of any rent was reserved to the grantor.

A right of pre-emption is virtually a right to compel a co-sharer to sell property to another co-sharer in preference to a stranger, but no person has a right to compel his co-sharer to make a gift in his favour or to grant to him rights at a favourable rate of rent. There is nothing to show the amount of revenue payable in respect of the plots in dispute, and the terms on which the grantor gave the same to the contesting defendants may not have been those on which he would have granted them to another person. We find, therefore, that the deeds of *birt sankalap* in question are merely leases conferring heritable and transferable rights on the lessees, subject to the payment of a fixed annual rent, and are not sales so as to give rise to a right of pre-emption.

The appeals fail and are dismissed with costs.

Appeals dismissed.

(1) 15 C. 184.
(2) 10 O. C. 348.
(3) 8 O. C. 121.
(4) 8 Ind. Cas. 725; 14 O. C. 41.
(5) Second Civil Appeal No. 256 of 1908.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 496 OF 1911.

June 8, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Rattigan.

THE ALLIANCE BANK OF SIMLA, LTD., OF LAHORE—PLAINTIFF—APPELLANT

versus

Bhai KAHAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage – Alienation by mortgagor – Condition empowering mortgagor to sell and pay ¾ths of sale money to mortgagee – Mortgagee, rights of – Registration – Notice – Mortgagee not bound to sue at once.

A condition in a mortgage-deed that if the mortgagor sold a part of the mortgaged property, 12 annas

per rupee shall be paid to the mortgagee to be credited towards the mortgage-money, does not destroy the mortgagee's lien on the mortgaged property and in case of a sale, the mortgagee can follow the mortgaged property if he is not paid the ¼ths of the sale-money.

Narsingh Das v. *Thakur Das*, 23 P.R 1891, referred to.

Renga Srinivasa Chari v *Gnanaprakasa Mudaliar*, 30 M. 67; 2 M. L. T. 36, distinguished.

Registration of a mortgage-deed itself is sufficient notice to the persons dealing subsequently with the mortgaged property, particularly where the debtor is a notorious man and his dealings with the mortgagee are very well known in that locality. The contention that the deed was registered in Lahore while the property in dispute is in Sialkot, has no force inasmuch as when a deed affecting properties in more than one District is registered in one of them, a copy is sent for record to each District in which any part of the property is situate.

Dina v. *Nathu*, 26 B. 538; 4 Bom. L.R. 253, referred to.

Shan Mann Mall v. *Madras Building Co.*, 15 M. 268; 2 M. L. J. 95, dissented from.

The mortgagee's laches in suing does not bar him from asserting his right.

A prayer for an alternative relief does not mean that the right to the original relief has been waived.

First appeal from the decree of the Additional District Judge, Gujranwala, dated the 13th January 1911, decreeing plaintiff's claim.

Messrs. *Pestonji Dadabhai* and *H. A. Herbert*, for the Appellant.

Mr. *Gokal Chand Narang*, for Defendants Nos. 37 to 39.

Mr. *Muhammad Din*, for Defendant No. 30.

Mr. *Mohammad Sharif*, for Respondents Nos. 7, 8 and 9.

JUDGMENT.—This is an appeal on behalf of the plaintiff Bank, which is principal respondent in a connected Appeal No. 269 of 1911 [*Shib Nath* v. *Alliance Bank of Simla Ld., Lahore* (1)] disposed of by us to-day. The questions to be decided in this appeal are quite distinct from those dealt with in the connected appeal, and we have, therefore, determined to make it the subject of a separate judgment. To understand these questions it is necessary to read paragraphs Nos. 8 and 9 of the amended plaint, part II, page 16, paper-book; the pleas of defendants Nos. 37 to 39 at pages 42-45 of defendants Nos. 30 and 31 at page 40, of defendant No. 28 at page 37 and of defendants Nos. 7 to 9 at pages 28, 29.

The total value involved is Rs. 27,700, but in the first instance appellant affixed to his appeal only Court-fee to the value of Rs. 10. Objection was taken and Mr. Pestonji conceded that an *ad valorem* fee was necessary and undertook to pay it and has paid it.

The learned District Judge has dealt with the pleas of these and other defendants in disposing of issues Nos. 20, 21 and 22, the question being whether the mortgagee (now the plaintiff-appellant) holding the mortgage of 31st May 1899 could follow the properties sold and mortgaged to these defendants and included in the said mortgage, or whether under the terms of that mortgage the said alienations all made after 31st May 1899 removed the said properties from the grasp of the mortgagee. The District Judge's finding based on the terms of the deed of the 31st May 1899 was that properties sold by the mortgagor after that date do escape from the mortgage lien, but not properties merely mortgaged. We have now to deal with the sales to the four batches of defendants detailed above.

Defendants-respondents and the learned District Judge rely upon condition 15 of the mortgage-deed—Part I, page 45—which runs thus:—

"If I desire to sell a part of the immoveable property mortgaged, then 12 annas per rupee shall be paid to the mortgagee out of the sale money for the property thus sold, and such payment shall be credited towards the principal mortgage-money and interst."

It is contended that this gives the mortgagor full power to sell at will and that when a sale has taken place the mortgagee is only entitled to recover ¾ths of the sale-money from the mortgagor and can no longer follow the property sold. On the side of the plaintiff-appellant the contention is that a reasonable construction should be put on such a condition as No. 15; that the District Judge's interpretation would involve this that Diwan Lachhman Das, if he had so pleased, might have sold the whole of the mortgaged property at once and thus have destroyed the whole of defendant No. 1's security, leaving defendant No. 1 with his personal action against Diwan Lachhman Das; and that this is not a condition to which any sane man could possibly agree. The reasonable construction, Mr. Pestonji urges, is that, unless and until the mortgagor actually paid the aforesaid ¾ths of a sale-money to mortgagee, the latters' lien on the property sold in each instance remained intact, and that it was

(1) 25 Ind. Cas. 480; 110 P. W. R. 1914; 215 P. L. R. 1914.

the duty of purchasers to have examined the mortgagor's title and position, to have ascertained the state of affairs and to have seen to it that ¾ths of the sale-money should reach the mortgagee: and he distinguishes the case of sale to defendant No. 5 of some of the mortgaged property, which has been found to be and admittedy is no longer subject to the mortgage in suit, by pointing out that defendant No. 1 expressly assented to that sale and to the escape of that property from his grasp. These contentions Mr. Pestonji fortifies by reference to part I, page 65, lines 37, 38, in the sale-deed to the father of defendants Nos. 7 to 9, as showing that the vendee knew there was a risk.

Defendant No. 28 has not appeared and this appeal is heard *ex parte* against him. For defendants Nos. 37 to 39 Mr. Gokal Chand Narang appears and puts forward arguments, which may be summarised thus :—

(*a*) Defendant No. 1 and the plaintiff Bank are estopped by conduct from following the property in our hands.

(*b*) The way in which the jewels pledged to the Tirath Ram firm and sold to defendant No. 5 were dealt with misled the vendees, and further shows that there must have been an oral variation of the contract as regards condition 15 aforesaid, and probably this variation extended also to the immoveabe property sold.

(*c*) At most plaintiff is entitled to recover from each lot of property sold only ¾ths of the purchase-money of that lot and even that should not be recovered from the said property until the whole of the rest of Lachhman Das's estate is exhausted.

(*d*) The decree should only be for 1½ lakhs with interest and not for a sum calculated on the basis of the mortgage-deed.

This last contention we have fully considered and rejected in our judgment on the connected appeal and we need not refer to it again. Taking the other points *seriatim*, we are referred by Mr. Narang as regards (*a*) to the fact that for four years persons whose interests were hostile to those of defendant No. 1 and of the Bank, dealt with this land without objection, though defendant No. 1's mortgage was "with possession"; to the circumstance that the mortgage-deed was registered in Lahore, while the property is in Sialkot ; to sections 38 and 40 of the Transfer of Property Act ; to defendant No. 1's attitude as regards the land sold to defendant No. 5 —see Part II, page 205, line 24, and page 110, last paragraph. As to the registration of the deed being effected in Lahore, the force of the argument is weakened when it is remembered that when a deed affecting properties in more than one district is registered in Lahore, a copy is sent for record to each district in which any part of the property is. We take the view that in the circumstances of this case* registration was sufficient notice, and to this we add the remark that Diwan Lachhman Das was a notorious man and that most probably the fact of his dealings with defendant No. 1 was well-known to all and sundry in Sialkot. There was sufficient here to put the various vendees on their guard and to set them on inquiry. Indeed the contention that Lachhman Das's dealings with defendant No. 5 and the jewel transaction misled the vendees, seems to us to contradict the other contention that the vendees had no notice. As to defendant No. 1's alleged standing by, our view is that it was the vendee's duty to see that he got his money and there was no duty placed by law on him to rush in and sue for it at that stage. This disposes of all the points taken under (*a*); and our views are amply warranted by those taken in *Narsingh Das* v. *Thakur Das* (2), a case which is not at all unlike the present one and in which, if anything, there was more in favour of the subseqnent alienees than we find here.

Point (*b*) is too conjectural to have any value. Point (*c*), which is supported by a reference to *Renga Sirinivasa Chari* v. *Gnanaprakasa Mudaliar* (3) (last paragraph of judgment), does not impress us. The arrangement arrived at there was by consent of Counsel; and the proposition laid down by Mr. Narang appears to us

(2) 23 P. R. 1891.
(3) 30 M. 67; 2 M. L. T. 36.

*Dina v. Nathu, 26 B. 538; 4 Bom. L. R. 253.

to be opposed to law and common sense.

Mr. Mohammad Din, speaking for defendants Nos. 30 and 31, adds that Mr. Grey's admission, page 298, Part II, lines 29-32, binds the plaintiff; but this is a mistake. Clearly Mr. Grey could not have intended to throw up the sponge in the way suggested; he really only intended to say that *in default of anything better* the Court might give a decree against the other property, but he never waived the something better.

Speaking for defendants Nos. 7 to 9 Mr. Mohammad Sharif argues that conditions 6 and 15 of the mortgage-deed show that the transaction was not a mortgage at all, relies on *Shan Maun Mull* v. *Madras Building Co.* (4), as showing that registration was not sufficient notice, and points out that the property sold to his clients was not included in lists attached to the trust-deed of 20th April 1903, showing that it was no longer considered part of mortgagor's estate. The Madras ruling was considered in the Bombay case noted in the foot-note* and we prefer the view taken by the Bombay High Court. Then we do not agree that the deed of 31st May 1899 was no mortgage. In our opinion it was a mortgage combined with an unusual incidental arrangement under which mortgagor, in selling off any parcel of the mortgaged property, should be entitled to retain $\frac{1}{4}$th of the purchase-money for his own purposes. And the exclusion of the property from the trust is nothing. It had ceased to be the mortgagor's property, but this in itself does not debar the mortgagee from following it up in the hands of its new owner.

We are constrained, therefore, to accept this appeal and to modify the decree of the lower Court by laying it down that the properties in the possession of defendants Nos. 7 to 9, 28, 30 and 31 and 37 to 39, which are included in the mortgage of 31st May 1899, shall be liable under the decree. At the same time we think there was perhaps some excuse for these defendants in their opposition to the claim and we, therefore, direct that in this appeal the parties shall bear their own costs.

Appeal accepted.

(4) 15 M. 268; 2 M. L. J. 95.

*See last page.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER No. 402 OF 1910.

February 16, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

UPENDRA NATH ROY CHOWDHURY—JUDGMENT-DEBTOR—PETITIONER—APPELLANT

versus

BHUDEB CHANDRA ROY CHOWDHURY AND ANOTHER—DECREE-HOLDERS—OPPOSITE PARTY—RESPONDENTS.

Sale, auction—Deposit of purchase-money—Decree-holder, whether bound to withdraw before confirmation of sale—Interest, up to what date allowable.

As a decree-holder is not bound to withdraw the money deposited by an auction-purchaser before the sale is confirmed, he is entitled to interest on the decretal amount up to the date of confirmation.

Benode Lal Bandhopadhya v. *Srikristo Chuckerbutty*, 8 Ind Cas. 4; 15 C. W. N. 783 and *Nafar Chandra Pal Chowdhury* v. *Gopal Chandra Mukerjee*, 22 Ind. Cas. 946; 19 C. L. J. 358, followed.

Appeal against the order of the Subordinate Judge, second Court, 24-Parganahs, dated 26th February 1910.

Babus *Jogendra Chandra Ghosh* and *Prakash Chandra Mazumdar*, for the Appellant.

Babus *Bepin Behary Ghosh* (Junior), *Upendra Lal Roy* and *Bankim Chandra Mukherjee*, for the Respondents.

JUDGMENT.—The only question in controversy in this appeal between the judgment-debtor-appellant and the decree-holders-respondents, relates to the period for which the appellant is liable to pay interest under the mortgage decree obtained on the 29th May 1907 by the respondents. The decree states that after the lapse of the date fixed for the payment of the judgment-debt, the decretal amount will bear interest at the rate of six per cent. per annum till the date of realisation. In execution of this decree the mortgaged properties were sold on the 14th July 1909. The earnest money was deposited by the purchaser on that date and the balance was brought into Court on the 3rd August 1909. On the 13th August the judgment-debtor applied to have the sale set aside on the grounds mentioned in rule 90 of Order XXI of the Code of 1908. Four months later, on the 13th December, the judgment-debtor withdrew

his application for reversal of the sale. The result was that the sale was confirmed.

The decree-holders contend that they are entitled to interest up to the 13th December 1909 when they were placed in a position to appropriate the sale-proceeds in satisfaction of their decree. This argument has found favour with the Court below. On behalf of the judgment-debtor it has been argued in this Court that this view is erroneous and that, as under section 65 of the Code of Civil Procedure the title vests in the purchaser from the date of sale, the decree-holders are entitled to interest only up to that date. This view, however, cannot be seriously maintained, for the entire purchase-money was not brought into Court till the 3rd August 1909, that is, nearly three weeks after the date of sale. It has next been contended that the interest should be allowed to run at most up to the date when the entire purchase-money was realised, because, it is said, it became then open to the decree-holders to withdraw the money in satisfaction of their decree. In support of this proposition reliance has been placed upon the cases of *Jogendra Nath Sircar* v. *Gobind Chunder Addi* (1) and *Vishvanath* v. *Virchand* (2) and reference has also been made to the cases of *Ramanathan Chettiar* v. *Subramania Sastrial*(3) and *Manilal* v. *Nanabhai* (4). The three cases last mentioned have no bearing upon the question for decision, and the case upon which special stress has been laid, namely, *Jogendra Nath Sircar* v. *Gobind Chunder Addi* (1), does not formulate an inflexible rule of law that the decree-holder is bound to withdraw the sale-proceeds from the Court as soon as the entire purchase-money has been deposited. The decisions on this subject were reviewed in this Court in the case of *Benode Lal Bandopadhya* v. *Srikristo Chuckerbutty* (5), where it was pointed out that although it may be open to the Court to distribute the sale-proceeds amongst the claimants before the sale has been confirmed, it is not obligatory upon the Court to distribute it then nor is the sum distributable then as a matter of course. It was added that an order for distribution should not ordinarily be made before the confirmation of the sale. In the case before us, what is the position of the parties? At the instance of the decree-holders, the mortgaged properties were sold and were converted into money for the purpose of satisfaction of the judgment-debt. The entire money was brought into Court by the purchaser on the 3rd August 1909. In one sense the money, at that time, became, in theory, available for the satisfaction of the debt, but the judgment-debtor on the 13th August 1909 raised the question of the validity of the sale. It was undoubtedly not obligatory upon the decree-holders to withdraw the sum in satisfaction of their decree with the possible contingency that if the application of the judgment-debtors succeeded, they would be compelled to bring back the money into Court with interest. No decree-holder is bound to withdraw the money under such circumstances in satisfaction of the decree, a satisfaction which may subsequently be nullified at the instance of the judgment-debtor. Indeed if the decree-holders had applied to withdraw the money before the disposal of the objections to the sale, the Court would doubtless have properly refused the application. As was pointed out in the case of *Benode Lall Bandopadhya* v. *Srikristo Chuckerbutty* (5), when the mortgagor applied for reversal of the sale on the ground of irregularity and fraud, he challenged the validity of the sale, and this made it practically impossible for the decree-holders to ask for distribution of the sale-proceeds till those proceedings had terminated. If the sum realised by the sale be treated as the property of the judgment-debtor which he tendered to the decree-holder in satisfaction of his debt, the tender here was conditional and consequently of an illusory character. The decree-holders could not be expected to take the money on condition that they would refund the same to the purchaser if the sale was reversed at the instance of the judgment-debtor. This view is also supported by the decision in

(1) 12 C. 252.
(2) 6 B. 16.
(3) 26 M. 179.
(4) 28 B. 264; 6 Bom. L. R. 11.
(5) 8 Ind. Cas. 4; 15 C. W. N. 783.

Nafar Chandra Pal Chowdhury v. *Gopal Chandra Mukerjee* (6). In fact the case before us is of a much stronger description. In that case, the confirmation of sale was delayed by reason of a dispute between two rival bidders as to who was entitled to have the sale confirmed in his favour. The judgment-debtor was in no way responsible for the delay caused, and yet it was held that the decree-holders were entitled to interest up to the date of confirmation of sale when the money became really available for the satisfaction of the debt. In the case before us, the confirmation of the sale was delayed by reason of the application of the judgment-debtor which remained pending for four months and was then withdrawn by him. If the decree-holders were deprived of interest under the decree by reason of such action on the part of the judgment-debtor, they would be subjected to great hardship for no fault attributable to them.

We are clearly of opinion that the order made by the Subordinate Judge must be confirmed and this appeal dismissed with costs. We assess the hearing fee at three gold *mohurs*.

Appeal dismissed.

(6) 22 Ind. Cas. 946; 19 C. L. J. 358.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 163 OF 1912.

August 3, 1914.

Present:—Mr. Stuart, J. C., and Mr. Kanhaiya Lal, A. J. C.

Musammat MIRO—DEFENDANT—APPELLANT

versus

LACHHMAN PRASAD—PLAINTIFF AND ANOTHER—DEFENDANT--RESPONDENTS.

Pardanashin *ladies, transactions by, law as to—Burden of proof—Validity of deed to be established by person relying upon it.*

The strongest and most satisfactory proof ought to be given by the person claiming under or relying upon a deed of power or sale or gift executed by a *pardanashin* lady that the transaction was real and *bona fide* and fully explained to and understood by her, so as to establish the validity of the deed.

Mirza Sajjad Husain v. *Nawab Wazir Ali Khan* 16 Ind. Cas. 197; 15 O. C. 271; 10 A. L. J. 364; 16 C. L. J. 613; 14 Bom. L. R. 1055; 16 C. W. N. 859; 23 M. L. J. 210; 34 A. 455; 12 M. L. T. 361; (1912) M. W. N. 976; 39 I. A. 156 (P. C.); *Kali Bakhsh Singh* v. *Ram Gopal Singh*, 21 Ind. Cas. 985; 16 O. C. 378; 18 C. W. N. 282; (1914) M. W. N. 112; 36 A. 81; 12 A. L. J. 115; 15 M. L. T. 130; 19 C. L. J. 172; 1 O. L. J. 67; 26 M. L. J. 121; 16 Bom. L. R. 147 (P. C.); *Thakoor Deen Tewary* v. *Nawab Syed Ali Hoosein Khan*, 1 I. A. 192 at p. 206; 21 W. R. 340; 13 B. L. R. 427 (P. C.) and *Shambati Koeri* v. *Jago Bibi*, 29 I. A. 127 at p. 131; 29 C. 749 (P. C.); 6 C. W. N. 682, referred to.

Appeal from the decree of the Subordinate Judge, Tahsil Biswan, dated 2nd September 1912.

Babus *Salig Ram* and *Hargovind Das*, for the Appellant.

Babu *Basudeo Lal* and Pandit *Gokaran Nath Misra*, for Respondent No. 1.

JUDGMENT.—In this case the appellant, *Musammat* Miro, sold by a registered deed of sale, dated 7th February 1912, all the rights which she had inherited from her deceased mother to Lala Lachhman Prasad, plaintiff-respondent, a certain Manman Lal being in possession of the landed property which had been enjoyed by the mother of *Musammat* Miro up to the time of her death. Lala Lachhman Prasad instituted a suit against Manman Lal for possession of the property joining *Musammat* Miro, his vendor, and her sister, *Musammat* Chamela as defendants. The learned Subordinate Judge found that the property in question had been inherited after the death of *Musammat* Sarsuta, mother of *Musammat* Miro and *Musammat* Chamela, by her daughters Miro, Chamela and Hiro, the last named of whom had died before the institution of the suit, and that the deed of sale executed by *Musammat* Miro in favour of Lala Lachhman Prasad effected a valid transfer, and decreed Lala Lachhman Prasad's claim against Manman Lal in respect of one half of the property. Against this decree *Musammat* Miro has filed an appeal asserting that she alone had inherited the whole of her mother's property, and that the sale-deed was not binding upon her because she was a *pardanashin* woman. *Musammat* Chamela has filed a cross-objection to the effect that she had inherited the whole of the property of her mother.

The law with regard to transfers by *pardanashin* ladies has been laid down in many rulings of their Lordships of the Privy Council and has been a subject of discussion in two recent rulings, *Mirza Sajjad Husain*

v. *Nawab Wazir Ali Khan* (1) and *Kali Bakhsh Singh* v. *Ram Gopal Singh* (2). The law was stated in *Thakoor Deen Tewary* v. *Nawab Sayed Ali Hossein Khan* (3) by Sir Montague Smith in the following words:— "According to the principles which have always guided the Courts in dealing with sales or gifts made by ladies in such a position the strongest and most satisfactory proof ought to be given by the person who claims under a sale or gift from them that the transaction was a real and *bona fide* one, and fully understood by the lady whose property is dealt with." Sir Andrew Scoble further stated in *Shambati Koeri* v. *Jago Bibi* (4): "It is a well-known rule of this Committee that 'in the case of deeds and powers executed by *pardanashin* ladies, it is requisite that those who rely upon them should satisfy the Court that they had been explained to and understood by those, who executed them.'"

Applying these principles and laying the burden of proof upon the plaintiff-respondent to establish the validity of the deed, we are satisfied that the contents of the deed were fully understood by *Musammat* Miro before she affixed her signature to the document. There is evidence, which we believe, to the effect that the transaction was fully discussed between the plaintiff-respondent and *Musammat* Miro's father-in-law, and that *Musammat* Miro was informed of all considerations which affected the subsequent transactions. There is evidence which shows that she had a fairly accurate conception both as to what she was selling and as to what it was worth, and that after consultation with her father-in-law and her husband she agreed to sell her rights for a sum which all three of them considered sufficient. *Musammat* Miro is not altogether an uneducated woman. She was for a period, though it is to be noted for a very short period, a pupil at a Girls' School and has received sufficient education to be able to sign her name. She is a *Khattri* by caste. Her husband is a young man of moderate education who has been employed in the Railway, and her father-in-law has been for many years an orderly in a Civil Court. The transaction had been explained to *Musammat* Miro by the members of her own family, and there is evidence that at the time that the deed was registered it was fully explained to her again by the Registering Officer. It has been argued before us that she sold the property in question for much less than its value. We are not of opinion that she obtained an inadequate price for what she sold. A portion of the property is landed property. The profits of *Musammat* Miro in the same amount to less than Rs. 50 a year. The greater part of the remaining interests is of a speculative nature, and it is impossible to say what the value of it will be to the purchaser. At the very outside he will be fortunate if he obtains Rs. 1,500 for these remaining interests. But in view of the fact that Manman Lal had asserted a title which if accepted would have extinguished all interests of *Musammat* Miro in the property, the plaintiff-respondent at the time of its purchase had no certainty that he would obtain anything. If Manman Lal's title were established, he would have lost all that he paid. Therefore, we are of opinion that Rs. 1,000 was not an inadequate price for what he purchased at the time that he purchased it. The evidence brought forward by *Musammat* Miro to the effect that the transaction was entered into without her knowledge is contradictory and valueless. We have not the slightest hesitation in finding that she was sufficiently intelligent to understand the terms of the transaction, that she thoroughly understood the terms of the transaction, and that the transaction was not of a disadvantageous nature to her.

There is only one point remaining for consideration and that is whether the right of *Musammat* Miro's mother should have been inherited by *Musammat* Miro alone, or by *Musammat* Chamela alone, or by both of them in equal shares. We are asked to apply the doctrine of *nirdhan* (poverty), and applying that doctrine we find on the fact that the learned Subordinate Judge has rightl decided that the two sisters inherited th property in equal shares. Both sisters ar

(1) 16 Ind. Cas. 197; 15 O. C. 271; 10 A. L. J. 364; 16 C. L. J. 613; 14 Bom. L. R. 1055; 16 C. W. N. 889; 23 M. L. J. 210; 34 A. 455; 12 M. L. T. 361; (1912) M. W. N. 976; 39 I. A. 156 (P. C.).

(2) 21 Ind. Cas 985; 16 O. C. 378; 18 C. W. N. 282; (1914) M. W. N. 112; 36 A. 81; 12 A. L. J. 115; 15 M. L. T. 130; 19 C. L. J. 172; 1 O. L. J. 67; 26 M. L. J. 121; 16 Bom. L. R. 147 (P. C.).

(3) 1 I. A. 192 at p. 206; 21 W. R. 340; 13 B. L. R. 427 (P. C.).

(4) 29 I. A. 127 at p. 131; 29 C. 749 (P. C.); 6 C. W. N. 682.

in comfortable circumstances, each is well off, and neither is much better off than the other.

We, therefore, dismiss the appeal and dismiss the cross-objection of *Musammat* Chamela. *Musammat* Miro will pay her own costs and those of Lala Lachhman Prasad. *Musammat* Chamela will pay her own costs.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 34 OF 1913.

March 9, 1914.

Present:—Mr. Crouch, A. J. C., and Mr. Boyd, A. J. C.

Syed TURABALISHAH AND ANOTHER—PLAINTIFFS—APPLICANTS

versus

BIBI NAJU AND ANOTHER—DEFENDANTS—OPPONENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint after passing of preliminary decree—Partition suit—Equitable jurisdiction of Court.

The rule allowing amendment of plaint is a rule of conduct rather than a rule of rigid law and must be read as subject to the inherent powers of the Court to prevent abuse of its powers. The Court has to see that material justice is done.

In a suit for partition, a Court of Equity does not act ministerially and in obedience to the call of those parties who have a right to partition, but adjusts the equities of all parties interested.

Mr. *Wadhumal Oodharam*, for the Applicants.

Mr. *E. Raymond*, for the Opponents.

JUDGMENT.

BOYD, A. J. C.—In 1907 plaintiffs prayed for partition of a large tract of land, which they called estate No. 252 and which they said consisted of many survey numbers which they mentioned. They got a preliminary decree from Leggett, A. J. C., giving them the land claimed in the plaint and directing partition.

In October 1910 plaintiffs applied for actual demarcation accordingly; and by consent of defendants the same Judge appointed a Commissioner to effect the partition. In February 1912, however, it became known that plaintiffs had given wrong survey numbers to nearly all the fields which compose estate No. 252. In fact the estate consists of 113 survey numbers and in the plaint schedule only 14 of them are mentioned, the other survey numbers mentioned not being then part of that estate, having been forfeited to Government before the suit. The plaint being wrong, the preliminary decree based on it was also wrong. Some time after the mistake had come to light, plaintiffs asked the Court to amend the plaint by putting correct survey numbers: that meant adding 99 new survey numbers to the schedule and striking off 141.

The Court refused to allow amendment. The learned Judge realized that plaintiffs' mistake was merely due to misapprehension of the facts. But he considered that the indulgence of an amendment should not be granted to plaintiffs owing to their negligence and delay.

From the correspondence between the Court and the Commissioner it appears that in March 1912 plaintiffs first became fully aware of the mistake they had made, but they did not apply to the Court for an amendment till January 1913. The delay was really more than that; for in May 1911 they received a communication from the Commissioner from which they could easily infer that there had been a serious mistake in their plaint. So it may be granted that they have been negligent and dilatory.

But that alone does not seem to be sufficient cause for refusing amendment. Order VI, rule 17, Civil Procedure Code, says that the Court may allow amendment at any stage and adds: "All such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." I take it that "questions in controversy" means questions in dispute at the date of suit. The rule appears to be mandatory, while the corresponding section 53 of the old Code was not. Now amendments may be divided into two classes, (1) cases in which the plaintiff wishes to correct a clerical mistake or a *bona fide* wrong description due to some ignorance or carelessness and (2) cases in which he tries to add, by proving some new cause of action, to the dispute which already

exists. Cases of the latter class would not fall within rule 17 of Order VI; for the determination of the new questions so raised would not be necessary to the settlement of the controversy which existed when the suit was brought. The present case admittedly comes under the former class; for the learned Judge realised that plaintiffs did not mean to ask more than they meant to ask in the plaint. Amendments have been refused in India since the Code of 1908; but it has always been in cases of the latter class.

However, the said rule is an exact copy of rule 1 of Order XXVIII of the English Rules of the Supreme Court, 1883; and it has been often held that we should be guided by the best English decisions on the question. Here are a few of the best known *dicta*. In *Tildesley* v. *Harper* (1) Bramwell, L. J., said: "My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise." In *Weldon* v. *Neal* (2) it is said: "However negligent or careless the first omission and however late the proposed amendment, the amendment should be allowed if it can be allowed without injustice to the other side." Again in *Cropper* v. *Smith* (3) Bowen, L. J., says that the Court should correct any kind of mistake if it can do so without injustice; and in other cases it is pointed out that the party desiring amendment at a late stage can be mulcted in costs.

On the other hand, an amendment which was necessary to the settlement of the real controversy, which existed between parties at date of suit, was refused in *Steward* v. *North Metropolitan Tramways Co.* (4). Defendants sought to amend their pleadings at a late stage by pointing out that plaintiffs ought to have sued some one else to whom they (defendants) had delegated their responsibility. The amendment was refused mainly because, at the time when it was asked, a suit by plaintiffs against the right party would have been barred by limitation. The circumstances were such that the plaintiffs could not be reasonably expected to know at time of suit who the right party was. At page 558 of the report Lord Esher said, referring to English rule 1 of Order XXVIII: "A rule has been enunciated by the Court which is rather a rule of conduct than a rule of rigid law such as can never be departed from; because I take it that the Court might depart from it if there were very exceptional circumstances in any particular case leading the Court to think that it would not be right to apply it. It is nevertheless a rule of conduct which must be generally followed."

It would seem from the above that the English authorities have interpreted the rule rather freely; for if it were absolutely mandatory, there would be no question of justice, and amendments necessary to the settlement of the dispute would have to be allowed, whether they caused wrongful loss or not. I infer that the learned Judges read the rule as subject to the inherent power of the Court to prevent abuse of its powers. Following this doctrine I am of opinion that, as the proposed amendment is necessary to a settlement of real dispute, the only remaining question is whether it causes injustice which cannot be compensated for in costs: if it does not, it must be permitted.

It is unnecessary for me to try to define the word "injustice;" for in the present case clearly the amendment will cause nothing that could fall within any imaginable definition of that term. It has caused some delay for which the defendants can be compensated in costs, if necessary; and anyhow defendant No. 2 can recover from plaintiffs the cost of management of the estate, which I see he did partly in his account of May 1911. On the other hand if the amendment be refused, plaintiffs might lose the right to partition of the greater part of a large estate owing to their mistake in pleading, and that would be an unduly severe punishment. Thus all that defendants stand to lose is an unjust advantage.

(1) (1878) 10 Ch. D. 393 at pp. 396, 397; 48 L. J. Ch. 495; 39 L. T. 552; 27 W. R. 249.
(2) (1887) 19 Q. B. D. 394 at p. 396; 56 L. J. Q. B. 621; 35 W. R. 820.
(3) (1884) 26 Ch. D. 700 at 710; 53 L. J. Ch. 891; 51 L. T. 733; 33 W. R. 60.
(4) (1886) 16 Q. B. D. 556; 55 L. J. Q. B. 157; 54 L. T. 35; 34 W. R. 316; 50 J. P. 324.

It follows that they will not suffer injustice owing to the amendment.

I would, therefore, allow the application reversing the order and permit the amendment prayed for, putting the costs on the estate for the reason given by my learned colleague.

CROUCH, A. J. C.—This is an application under section 115, Civil Procedure Code, to set aside an order of this Court on the original side rejecting an application for amendment of the plaint.

Plaintiff, as grandson of Ali Razashah, is suing for partition of an estate which formerly belonged to Bahaduralishah and the said Ali Razashah as tenants-in-common. The whole estate was, at date of filing the plaint, in the hands of the Manager of Incumbered Estates and was known as estate No. 252, and the plaint made it perfectly clear that it was of the estate known as No. 252 that plaintiff sought partition. In a schedule to the plaint were given all the survey numbers of the estate as it was constituted when entrusted to the Manager. Defendants, in their written statement, disputed plaintiff's right to a share of the estate on various grounds, but the correctness of the schedule was not challenged. Issues were framed, the parties went to trial, and a preliminary decree was passed without any question as to the schedule being raised. Plaintiff was held to be entitled to partition and to possession of one-half share of the estate in suit and the suit stood adjourned for determination of mesne profits. The preliminary judgment bears date the 7th April 1909. With a view to ascertain the mesne profits interrogatories were administered to the Manager, the interrogatories referring throughout to estate No. 252, without any mention of particular survey numbers. In his replies, the Manager gave an account of the profits of the whole estate No. 252, showing the total profits to be Rs. 4,110-3-8, and in a note added the information that some new land had been acquired while the estate was under management. Plaintiff then applied that the Collector of Karachi should be appointed Commissioner to partition the properties and, on the 8th September 1910, a consent order was passed appointing the Collector "to partition the land in suit of the estate No. 252 as shown in the schedule annexed to the plaint" and on payment of the balance of Court-fee by plaintiff, to deliver half to the plaintiff and also half the mesne profits up to 1909-10 as shown in the Manager's statement. The plaintiff had paid Court-fee as on Rs. 4,000 only, hence a small extra sum was due from him. On the 24th January 1911, the Manager was instructed to pay to plaintiff half the amount collected by him and half the remainder when recovered. To this order the Manager replied by letter of the 8th May 1911 showing that the account formerly rendered related to the entire estate under management, but that as plaintiff was to get half of the realizations only from the property described in the plaint, a statement had been prepared showing the profits from such of the survey numbers mentioned in the schedule to the plaint as still formed part of the estate. Now the estate had been under management since 1897 and during the fourteen years it had undergone much change, 141 numbers out of 155 having been forfeited to Government and 99 new numbers having been taken up. The account submitted showed only Rs. 458 as due to plaintiff. On the 27th February 1912 the Collector wrote to the Court stating that out of the numbers described in the commission order only 14 remained. This letter appears to have been received on the 4th March. From that date up to the 18th January 1913 nothing whatever was done by anybody concerned in the case but, on that date, plaintiff's legal representatives (plaintiff had in the meantime died) applied under Order VI, rule 7, for permission to amend the plaint by adding to the schedule the 99 survey numbers that had been added to the estate since management. This application was rejected on the ground of the negligence and delay displayed by plaintiff.

Now, what is the result of refusing the amendment? By the consent order of the 21st October 1910 the Manager is bound to pay over to plaintiff half the amount collected by him and plaintiff is entitled to such half whether or not the whole estate be partitioned, for his failure to include all survey numbers cannot have the effect of transferring his share in the omitted numbers to defendant No. 1; the only possible result of such omission would be to leave the parties tenants-in-common of such numbers. The effect of refusing an amendment (assuming that the instructions to the Commissioner

remain as before) is to deny to the defendant, as well as to plaintiff, complete partition and to leave the Manager as before in possession of the undivided numbers as trustee for both parties.

But, in a suit for partition, a Court of Equity does not act ministerially and in obedience to the call of those parties who have a right to partition, but adjusts the equities of all parties interested (see *Story* v. *Johnson* (5) cited in Mews' Digest). The negligence and delay of the plaintiff in applying for amendment of the plaint formed no ground for refusing that complete partition which was undoubtedly asked for in the plaint and which the other beneficiary apparently desired.

Nor could the plaintiff be justly barred from any relief to which he was entitled in the suit merely because in the order issued to the Commissioner the words as shown in the schedule annexed to the plaint were inserted. For plaintiff was entitled to a partition according to the rights as declared in the judgment and the judgment declares plaintiff's right in the "lands in suit;" and a reference to the record makes it clear that up to the date of judgment "the lands in suit" were assumed to be all the lands which constituted estate No. 252. Had there been any dispute or any doubt as to what lands were subject to partition, it would have been the duty of the Court to order an inquiry as to the then constitution of the estate.

It is to be noted that, so far as the record goes, defendant No. 1, the other party beneficially interested, has never since the judgment disputed plaintiff's right to a partition of the whole estate No. 252. It is the Manager who has been endeavouring to take advantage of a technical blunder on the part of plaintiff to defeat his just rights, notwithstanding that he is trustee for the plaintiff as much as for the defendant and bound to protect his interests. No amendment of the plaint is necessary unless the parties beneficially interested are really in controversy as to the constitution of the estate to be partitioned; further, in a suit for partition it is unnecessary for plaintiff to ask that if there be any dispute or doubt as to the estate to be divided, an inquiry be made: for, as may be ascertained from Seton on Decrees, an order for such inquiry is ordinarily included in a properly drawn preliminary decree and, under Order VII, rule 6, Civil Procedure Code, it is unnecessary to ask for general or other relief which the Court can grant as a matter of course. Without any amendment of the plaint the Court could have issued instructions to the Commissioner under Order XXVI rules 13 and 14, to make such inquiry as to the constitution of estate No. 252 as was necessary.

If reference be made to Order X, rule 1, Order VI, rule 17, Order XIV, rule 1 (5) and rule 5, and section 153 it will be realised that the new Civil Procedure Code imposes on the Court a positive duty to do all things necessary for the purpose of ascertaining and determining the real questions in controversy between the parties. The distinction between what the Court may do and what the Court shall do is most carefully observed. The only limitation to the duty of making such amendments in the pleadings as are necessary for the purpose of determining, *i.e.*, finally deciding and settling, the real questions in controversy between the parties, appears to be that suggested by section 151: the legal rights of no party must be violated and the process of the Court must not be abused.

The application for amendment of the plaint was put in on the 16th January 1913; at that date, neither defendant No. 1 nor the Manager had positively stated that plaintiff's right to a partition of the whole estate No. 252, as given by the preliminary judgment, was being disputed; the Manager had done no more than to draw attention to the limitation in the instructions to the Commissioner and to literally comply with them. The Government Pleader applied for adjournments until the 4th April, in order to obtain instructions from the Legal Remembrancer who was advising the Manager as to the attitude to be adopted towards the application. It was not until the 4th April that the Court was definitely informed that the Manager desired to take advantage of the errors in the schedule to the plaint. As the Government Pleader had filed a *vakalatnama* for the 1st opponent, the Court had to take it that she too opposed the amendment on the same grounds, though it became clear

(5) (1837) 2 Y. & C. (Ex.) 586.

in argument that the application was opposed not to prevent the partition of all such estate as was held in common, but with a misty idea that applicant would be deprived altogether of the greater portion of his share. It was then evident, for the first time, that an amendment of the plaint was necessary, for, until then, there had been no declared controversy as to the constitution of the estate to be partitioned. The rejection of the application amounted to a refusal to determine the questions in controversy in the suit between the parties; the order is, therefore, one which we are competent to revise. The negligence of plaintiff in drafting his schedule and his delay in applying for an amendment constituted, in my opinion, no ground for refusing the amendment and it is to be noted that the Manager and defendant No. 1 permitted the plaintiff and the Court to be under the delusion that the schedule was correct for over four years after the plaint was filed, and did not, until six years after suit, definitely raise the dispute which made an amendment necessary. Defendants have certainly been at least as negligent and dilatory as plaintiff.

I would reverse the order sought to be revised and grant the application for an amendment; costs of the application in both Courts to be paid out of the estate.

Order reversed.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REVISION No. 122 OF 1913-14.

April 14, 1914.

Present:—Mr. Maynard, F. C.

MAHAN SINGH AND OTHERS—PLAINTIFFS—APPLICANTS

versus

NARAIN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), ss. 14, 84 (5)—Ejectment—Person in adverse possession of land made over to another in partition proceedings—Not party to proceedings—Cannot be ejected under ejectment proceedings—Revision—Grounds—Broad principle—Injustice or failure of justice—Perversity in findings—Serious misapplication of law of evidence.

A person found to be in adverse possession of land which was made over to another in partition proceedings to which the former was not a party, would not be liable to ejectment as a tenant under the Punjab Tenancy Act,

The Financial Commissioner, acting under section 84 (5) of the Punjab Tenancy Act, has, within the limits prescribed for the revisional jurisdiction of the Chief Court, an absolute discretion to determine whether his intervention is expedient. The broad principle to follow is to interfere only when a refusal to interfere would result in injustice or failure of justice.

The circumstances which would justify the Financial Commissioner on the revision side in holding that a subordinate Court has acted either without jurisdiction or illegally or with material irregularity, when on the facts found by that Court there is no such lack of jurisdiction and no illegality or material irregularity, would have to be of a very exceptional kind, though absolute perversity in the finding or a serious misapplication of the law of evidence in arriving at it might justify such interference.

Case forwarded by the Commissioner of Jullundur on 16th March 1914.

ORDER.—The land in respect to which the present suit has been brought is a portion of Nahri Nauranga which came by partition proceedings into the share of the defendants-respondents. Proprietary possession of the land was delivered to them in 1909 by the order of the Court but as the plaintiffs applicants are not owners of Nahri Nauranga, but only of the adjoining village of Nahri Khalsa it is understood that they were not parties to the partition proceedings. Owing to the intermixture of the lands of the two villages, they appear to have claimed rights in this area and they resisted the occupation of the defendants and interfered with the tenants put in by the latter. But the respondents are shown in the Revenue Records as having proprietary possession in accordance with the orders in the partition proceedings and they sued for the ejectment of the plaintiffs (applicants), which the Original and Appellate Courts have ordered.

The Original and Appellate Courts have found that the plaintiff-applicants have not succeeded in rebutting the presumption established by the Revenue Records that the defendants are owners and the plaintiffs tenants-at-will. That is to say, there is a finding of fact, supported by the Revenue Records, that the relations of landlord and tenants exist between the parties.

The learned Commissioner regards the decision as equitable. But having regard to the history of the case, and to the circumstances in which the plaintiffs took possession, he does not think that the facts justify the finding that the relations of he landlord and

tenant exist between the parties. That is to say, as I understand, he regards the possession of the plaintiffs as adverse, under the colour of proprietary right, and the ejectment proceedings in the Revenue Court as bad in law. He, therefore, refers the case for orders on the revision side.

His order of reference suggests the possibility that a person in the possession of land occupied without the consent of the landlord in the circumstances specified in section 14 of the Punjab Tenancy Act might be held to be a tenant and, therefore, liable to ejectment proceedings. I need only say here that it is most improbable that such an interpretation of section 14 would be upheld, as the reason for inserting that section is to provide for the case of a trespasser who is not a tenant. If the facts of the present case had been found to be what I understand the Commissioner to consider them to be, there could, I think, have been little doubt as to the law applicable to them. The plaintiffs-applicants, having been found to be in adverse possession of land which was made over to the defendants in partition proceedings to which the plaintiffs were not parties, would not have been liable to ejectment proceedings under the Punjab Tenancy Act.

The question before me, however, is whether, for the sake of a ruling on a point of law which is not seriously in question, I should, as a Court of revision, reverse the concurrent finding of two Courts on a point of fact, which has the support of the Revenue Records and whether I should do this notwithstanding that the decision based upon this finding is regarded by the Court which makes the reference as an equitable one.

Applications on the revision side from disappointed parties to revenue litigation are very numerous and in the majority of them the grounds put forward might serve as grounds of appeal, if appeal were permissible, but are not, and hardly ever affect to be, grounds for the exercise of so exceptional a jurisdiction as that of the Financial Commissioners on the revision side. The revisional jurisdiction of the High Court is limited by section 115 of the Civil Procedure Code to cases in which a subordinate Court appears to have exercised a jurisdiction not vested in it by law or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity. But it has always been recognised that the Financial Commissioner, acting under section 84 (5) of the Punjab Tenancy Act, has, within the limits prescribed for the revisional jurisdiction of the Chief Court, an absolute discretion to determine whether his intervention is expedient. There is a succession of rulings on this point and in *Imam Din* v. *Jiwan* (1) it was very clearly and in very general language ruled that the broad principle to follow is to interfere only when a refusal to interfere would result in injustice or failure of justice.

In the present case there are two distinct reasons for declining to exercise the revisional jurisdiction. In the first place, there is, on the part of the two Courts, a definite finding supported by the Revenue Records of facts which give jurisdiction to the Revenue Courts and render the plaintiffs-applicants liable to ejectment. The circumstances which would justify this Court, on its revision side, in holding that a subordinate Court had acted either without jurisdiction or illegally or with material irregularity, when on the facts found by that Court there is no such lack of jurisdiction and no illegality or material irregularity, would have to be of a very exceptional kind: though absolute perversity in the finding, or a serious misapplication of the law of evidence in arriving at it, might justify such interference. Apart from this point, there is no suggestion that the decision of the Subordinate Courts in the present case has resulted in injustice.

The application is rejected.

Application rejected.

(1) 6 Ind. Cas. 735; 2 P. R. 1910 Rev.; 101 P. L. R. 1910.

RAM DAT *v.* SUKHIA.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 317 OF 1912.

August 12, 1914.

Present:—Mr. Kendall, A. J. C.

RAM DAT, DECEASED, AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat SUKHIA AND OTHERS—DEFENDANTS—RESPONDENTS.

Second appeal – Credibility of evidence not to be considered – Adequacy of proof can be considered – Wajib-ul-arz, *interpretation of* "Malik," *meaning of—Presumption as to Hindu widow's power of alienation—Special custom, proof of—Hindu widow, transfer by, allowed to pass unchallenged, presumption in case of —Next reversioners, transfer in favour of, effect of—Transfer still open to challenge, effect of—Custom never proved by one instance.*

While the credibility of evidence which has been accepted by the Courts below cannot be considered, a Court on second appeal is entitled to consider whether that evidence amounts to an adequate proof of custom.

Where a *Wajib-ul-arz* stated that if there are no sons the widow, as long as she remains chaste in her husband's house, will be *malik*:

Held, that the word "*malik*" simply meant *malik* as a widow with restricted powers of alienation.

Dhondhe Singh v. *Sant Bakhsh Singh*, 3 O. C. 181 and *Bindraban Das* v. *Totri*, 3 O. C. 258, referred to.

The mere fact of alienation by a Hindu widow does not raise any presumption as to the existence of any special custom entitling her to do so. A slight presumption in favour of some such custom may be raised if an out and-out transfer is allowed to pass unchallenged by those having a right to challenge it; but no such presumption can at all be raised where the transfer is in favour of the next reversioners themselves or where it is still open to challenge.

One instance can never suffice to prove a custom.

Appeal from the decree of the District Judge, Rae Bareli, dated 30th April 1912, modifying that of the Subordinate Judge, Partabgarh, dated 6th March 1912.

Pandit *Gokaran Nath Misra*, for the Appellants.

Syed *Ali Muhammad*, holding brief of Syed *Wazir Hasan*, for the Respondents.

JUDGMENT.—Certain property belonged to Ramnidh, who died sixteen years ago. After his death his widow remained in possession until her death in July 1911. This suit was brought by the reversioners of Ramnidh for possession of his property. It was brought against his daughters and his daughters' sons, and also against mortgagees of the property from the widow, and against the vendee from the widow of plots Nos. 168 and 195 situate in village Mohwar. Plaintiffs Nos. 1 to 5 are the nearest reversioners. The remaining plaintiffs are the reversioners next to them, claiming title under an agreement with plaintiffs Nos. 1 to 5. Their suit was based on the allegation that daughters and daughters' sons are excluded from succession, and that the widow had no power to alienate the property.

In defence the custom as to exclusion of daughters was denied and it was alleged that by custom a widow had a full right to alienate, and further that there existed legal necessity which justified the alienation. An adoption with the permission of Ramnidh was also pleaded.

The first Court found that the custom as to the exclusion of daughters was proved. It found that legal necessity existed as regards part of the property which was transferred by mortgage; that the amount paid to meet that legal necessity must be paid by the plaintiffs before they could obtain possession of that propery; and that no legal necessity in connection with the sale of plots Nos. 168 and 195 existed. It found also that the widow had no right of transfer and that no adoption was proved. It, therefore, decreed the suit, subject to the payment of that sum to which I have alluded.

On appeal the lower Appellate Court, while upholding the finding as to the absence of legal necessity, held that it was proved that the widow had by custom a full right of transfer and it, therefore, varying the decree of the Court of first instance, dismissed the suit so far as plots Nos. 168 and 195 were concerned.

The plaintiffs, accepting the finding that the sum to which I have alluded must be paid, appeal to this Court on the grounds that the widow has not, by any custom, a power of transfer, that the *Wajib-ul-arz* has been misunderstood, and that there is no evidence on the record legally sufficient to prove the aforesaid custom.

The appeal must succeed. There is no doubt, as has been laid down both in other High Courts and also by this Court, that while the credibility of evidence which has been accepted by the Courts below cannot be considered, a Court on second appeal is entitled to consider whether that evidence

amounts to an adequate proof of custom. The lower Appellate Court relied on (*a*) the *Wajib-ul-arz*, (*b*) four transactions entered into by widows, (*c*) a statement of Ramnidh; and on the strength of these it came to the conclusion that a right of alienation in widows was proved. The oral evidence was to the contrary effect.

(*a*) *Wajib-ul-arz*—The *Wajib-ul-arz*, on which the defendants expressly stated they did not rely, is to the effect that if there are sons they will share in the estate equally on the death of their father; if there are no sons the widow, as long as she remains chaste in her husband's house, will be *malik*; and that in any case daughters have no share whatever, nor a widow, if there are any sons in existence. In a ruling of Chamier, J. C., a copy of which is Exhibit 16 upon this record, but which does not appear to have been published, he expressed his doubts as to whether even the words *malik kamil*, a much stronger expression than merely *malik*, meant more than *malik* as a widow. In *Dhondhe Singh* v. *Sant Bakhsh Singh* (1) it was laid down by a Bench of this Court that where a construction can be put upon a *Wajib-ul-arz* which is compatible with the rules of Hindu Law, that is the proper construction to be placed upon it. And in another case reported as *Bindraban Das* v. *Totri* (2), Deas, J. C., found that the provisions of a *Wajib-ul-arz* which set out that widows would remain in possession of their share *ba ikhtiar malikana* were inconsistent with the possession by a widow of an absolute estate. A widow in Hindu Law, coming into possession of her husband's estate on his death, undoubtedly becomes *malik* thereof for her life-time, and with restricted powers of alienation; and there is nothing in the *Wajib-ul-arz* before me which would justify the Court in putting any larger interpretation than this on the word *malik* therein contained.

(*b*). *Four transactions entered into by the widows*—

(1) The first of these is a deed of gift by *Musammat* Subhan in 1899. This gift was admittedly made to the next reversioner, and there was no one, therefore, to dispute it. It is common in my experience to find women, in temporary possession of property, trying to alienate it, more often perhaps in favour of daughters and daughters' sons; and the mere fact of alienation by a woman will not lead to any presumption that she is doing so by reason of any special custom, which she may believe entitles her to do so. What is to be seen rather is whether on an alienation by a widow taking place any objection has been made by reversioners or other people personally interested to object. If it is seen that an out-and-out transfer by a widow has been allowed to pass unchallenged by those who have a right to challenge it, that may raise a slight presumption in favour of some such custom. But along with this it must be remembered that, as has often been laid down, one instance can never suffice to prove a custom.

(2) This was a gift by one *Musammat* Phuljharia to her nephews made on 28th July 1882. A declaration that this deed of gift was inoperative after *Musammat* Phuljharia's death could have been prayed by reversioners within her life-time. But it is not obligatory on any person to come into Court to have such a deed of gift set aside, until after the death of *Musammat* Phuljharia. Now *Musammat* Phuljharia is admittedly still alive. But it is further seen that within a few months of the execution of this deed of gift, namely in October 1882, a reversioner, Datadin, did bring a suit on the ground that she had no right of transfer. But he brought his suit for possession, and not merely for a declaration; and his suit was dismissed on the ground that a suit for possession was premature. It is evident that neither of the above are instances which can support the alleged custom.

(3) This was a perpetual lease granted by *Musammat* Bundan in January 1909. *Musammat* Bundan died on the 26th July 1911, and the period within which the deed of gift can be challenged has not yet expired.

(4) This was a gift made by *Musammat* Dilraji on the 2nd July 1911, very shortly before this suit was filed, in favour of her daughter's husband. This transaction also is still open to challenge. And it may be further noted that she does not purport to make this gift owing to any inherent power in her to do so; but that she did so to carry out, as she said therein, the express wishes of her husband, the last male owner. None of these instances, therefore, in any way support the alleged custom.

(1) 3 O. C. 181. (2) 3 O. C. 258.

(c) *Ramnidh's statement*—It remains to consider the statement of Ramnidh. This statement was made by him in the course of Datadin's suit directed against Phuljharia's deed of gift. It is not relevant under section 33 of the Evidence Act nor is it relevant under section 32 (4), inasmuch as the controversy as to this custom had arisen at the time he made it.

It is perfectly evident then from the above review of the documentary evidence on which the lower Appellate Court has relied, that the alleged custom is entirely unproved.

The appeal is, therefore, allowed, the decree of the lower Court is set aside and the decree of the first Court is restored. The appellants may have their costs in this Court and the Court below.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 931 OF 1912.

May 21, 1914.

Present:—Mr. Justice Shah Din and Mr. Justice Scott-Smith.

BADHAWA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JALLU AND OTHERS—DEFENDANTS—RESPONDENTS.

Jurisdiction of Civil or Revenue Court—Claim by reversioners of sonless landowner for possession of land on ground that he had no right to create occupancy rights—Adverse possession—Limitation Act (IX of 1908), Sch. I, Art. 144.

A suit brought by the reversioners of a deceased sonless proprietor who had given occupancy rights in his plots of land to another, on the ground that he had no right to alienate the land in that way, is cognizable by a Civil Court.

Article 144 of the Limitation Act, IX of 1908, is applicable to such a case and a suit brought 30 years after the alienation is clearly barred.

Second appeal from the decree of the Divisional Judge, Hoshiarpur Division, dated 13th March 1912, varying that of the Subordinate Judge, second Class, Hoshiarpur, dated 4th December 1911, decreeing plaintiffs' claim in part.

FACTS appear from the following judgment of the Lower Court:—

Charta, in June 1872, mortgaged the whole of his holding, with *shamilat*, to Jallu, his nephew, for Rs. 600.

Prior to that, in 1864, he had given Jallu's father occupancy rights in 29 *kanals* 5 *marlas* and, after the mortgage in December 1872, he again gave him occupancy rights in a further area of 82 *kanals* 2 *marlas*. Charta died before 1879. In 1879 the mortgage of Rs. 600 is recorded as having been enhanced to Rs. 900, and Jallu alleges that the second mortgage was not reduced to writing.

However, plaintiffs, the immediate reversioners of Charta, have paid off the mortgage of Rs. 900, and now find themselves confronted, as regards 122 *kanals* 6 *marlas*, with the defendants' occupancy rights.

Plaintiffs' Pleader finds a difficulty in defining the nature of his clients' suit.

The lower Court has dismissed the suit in respect of the land covered by the occupancy rights, except in regard to 11 *kanals* 5 *marlas* which the lower Court found had been erroneously entered in the occupancy *khata*, and has given plaintiffs a decree for possession of the rest of the holding as proprietors.

The plaintiffs appeal, and there is a cross-objection by defendants in respect of the 11 *kanals* 5 *marlas*.

Haji Muhammad Bakhsh v. *Bhagwan Dass* (1) shows that the law is in a very parlous state, but the lower Court has held the case to be one triable by a Civil Court.

The position adopted by the plaintiffs appears to be, that the defendant is recorded as an occupancy tenant, that he has a tenant right, but that the alienation of that tenant right by Charta was invalid, and they ask for possession by cancellation of that right.

Regarded as a customary suit for cancellation of an alienation, this is triable by a Civil Court, and this is how it regards this case, and, as I take it, this is the manner in which plaintiff regards his case, if a *zemindar* can be said to advert at all to the precise nature of his case from a legal point of view.

Viewed so, the suit is time-barred, for the alienations took place in 1864 and 1872, Charta was dead in 1879, and the

(1) 3 Ind. Cas. 498; 76 P. R. 1909; 119 P. W. R. 1909; 66 P. L. R. 1909.

suit was not brought within 12 years of his death.

The Punjab Limitation Act does not apply, and it appears to me that limitation began to run, under Article 144, General Limitation Act, from the date of Charta's death.

But could the defendant, Jallu, be said to be in adverse possession *qua* tenant with occupancy, whilst the mortgage of the proprietary right subsisted in his favour ?

Adverse possession must be some overt act, which is obvious to the whole world and which gives notice to all concerned that the holder intends to hold in his own absolute right.

And in this case the occupancy title would have been obscured by the mortgage title, had Jallu been the tenant.

The plaintiffs could not have sued for possession of the occupancy land alone without redeeming the whole mortgage, and it is a generally accepted law that nobody is bound to bring a suit for declaratory relief.

Thus, had the occupancy been originally granted to Jallu, I should hold that the suit to contest the grant was not time-barred. But the grants of occupancy rights were made, not to Jallu, but to his father, Ghagga. Ghagga died some seven years ago, and mutation of the occupancy took place in favour of Jallu and his brothers in equal shares.

I must, therefore, hold that Ghagga's occupancy right was enjoyed adversely to plaintiff from the death of Charta, for plaintiff could have claimed that occupancy right without redeeming the mortgage.

I, therefore, find the suit time-barred and dismiss the appeal with costs. I have sent for the mutation on Chartu's death, but it is no longer extant.

If the suit be regarded as one by a landlord to prove that a tenant has no right of occupancy, then the suit is triable by a Revenue Court.

Now remains the cross-objection.

The lower Court has decreed 11 *kanals* 5 *marlas* to plaintiff, on the ground that 111 *kanals* 7 *marlas* only were granted to Ghagga, but, in the Settlement of 1879, he was erroneously shown as tenant with occupancy of 122 *kanals* 12 *marlas* instead of 111 *kanals* 7 *marlas* granted.

In respect to this area too I must hold that Ghagga has been in adverse possession as tenant with occupancy since at least 1879.

His possession was adverse to both mortgagee and mortgagor.

On these grounds, I accept the cross-objection, and, modifying the lower Court's decree, grant plaintiff a decree for all the land in suit as proprietor, subject to defendant's occupancy rights in 122-12/20 *kanals*, plainliff to pay costs throughout.

Bakshi *Tek Chand*, for the Appellants.

Mr. *Nand Lal*, for the Respondents.

JUDGMENT.—The facts of this case are fully given in the judgment of the Divisional Judge, and it is unnecessary to repeat them here. The plaintiffs-appellants brought the suit, out of which the present appeal has arisen, against the defendants-respondents for possession of 417 *kanals* 4 *marlas* of land upon certain allegations which are summarized in the judgment of the Subordinate Judge. There has been some doubt in this litigation as to what the exact nature of the plaintiffs' claim was, and we may say at once that upon careful consideration of the terms of the plaint and the pleadings of both the parties and the issues framed on those pleadings, we agree with the Divisional Judge that in respect of 122 *kanals* 6 *marlas* out of the land sued for, in which according to the entries in the revenue papers the defendants had occupancy rights at the date of suit, the plaintiffs' claim was to the effect that Charta, the original owner of the land, had no power to create occupancy rights in the said portion of the land in favour of Ghagga, father of defendants Nos. 1 to 4, and that as against the plaintiffs, who are the reversioners of Charta, the alienation of occupancy rights in favour of the said defendants was invalid and ineffectual. That this view of the nature of the claim is correct, is shown by the admission which was made by the plaintiffs' Pleader in the Divisional Court at a previous stage of the proceedings in this suit when the question for decision was as to whether the suit of the plaintiffs was or was not cognizable by a Civil Court. In his order of remand, dated the 17th February 1911, the Divisional Judge said:—

"But even as rgards the *maurusi* land the lower Court's order seems wrong, for the plaintiffs admitted that there is a *maurusi* entry, and their contention is that Charta was not competent to alienate these rights in his land. Their contention may or may not be time-barred, but it is one for disposal of a Civil and not by a Revenue Court."

It is clear from this passage that the nature of the plaintiffs' suit was as stated above, and at this stage of the case we are not prepared to accept the contention of the plaintiffs' Pleader that the plaintiffs sued the defendants as trespassers and not as persons in whose favour occupancy rights had been created by Charta. Upon this view of the case it is unnecessary to deal with the contention that the plaintiffs' suit for possession of the land must be decreed by the Civil Court and that the plea of the defendants that they were occupancy tenants, being one not cognizable by a Civil Court, should be ignored altogether [*Haji Muhammad Bakhsh* v. *Bhagwan Das* (1)].

Taking the suit then to be one in which the plaintiffs have contested the power of Charta to alienate rights of occupancy in 122 *kanals* 6 *marlas* of land in favour of the defendants, it seems to us that the Divisional Judge is right in holding that the suit is barred by limitation. As pointed out in this judgment, occupancy rights in 29 *kanals* 5 *marlas* and 82 *kanals* 2 *marlas* of land were created by Charta in the years 1864 and 1872, respectively, in favour of Ghagga, father of defendants Nos. 1 to 4; and it is clear that Ghagga enjoyed the occupancy rights in the said land adversely to the plaintiffs from the date of Charta's death. Charta is said to have died in or about 1879, and the present suit was not brought until the year 1909. The adverse possession of Ghagga and after his death of his sons, defendants Nos. 1 to 4, has thus lasted for about 30 years, and plaintiffs' suit as regards 111 *kanals* 7 *marlas* was, therefore, clearly out of time.

As regards the remaining 11 *kanals* 5 *marlas* in regard to which the Courts below have differed, we find that in the Settlement of 1879 this land is entered in the name of Ghagga as an occupancy tenant, but the Revenue Records do not show how this entry came to be made. This land was comprised in *Khasras* Nos. 1429, 1449 and 4660 of the 1879 Settlement, and Ghagga, occupancy tenant, was entered as in possession. Although no order relating to the mutation of this land in favour of Ghagga has been traced, there can be no doubt that mutation must have been made in pursuance of an order of a Revenue Officer. So far as the fact of Ghagga's possession is concerned, there is no distinction between the 11 *kanals* 5 *marlas* in question and the 111 *kanals* 7 *marlas* covered by the mutation orders of 1867 and 1872 and we hold, in agreement with the Divisional Judge, that as regards this 11 *kanals* 5 *marlas* also the possession of Ghagga and, after his death, that of his sons was adverse to the plaintiffs for more than 12 years before suit.

There remains the question whether the houses in dispute stand on the occupancy land or not. The first Court held that one of the *kothas* is situate in the *maurusi* land and that the remaining *kothas* claimed by the plaintiffs were not entered in the mortgage-deed of Jallu, defendant No. 1. The Divisional Judge has not dealt with this point, although it was raised in the 4th ground of appeal before him. The matter is involved in obscurity, and it is difficult to say definitely whether the *kothas* claimed by the plaintiffs stand on the occupancy land or not. The Counsel for the defendants admits the plaintiffs' right to the possession of the *kothas* which do not stand on the occupancy land, and this should be made clear in the decree which is drawn up in this Court. The execution Court will decide as to whether any of the *kothas* in suit do or do not stand on the occupancy land.

With this reservation the plaintiffs' appeal fails and is dismissed with costs.

Appeal dismissed

SIND JUDICIAL COMMISSIONER'S COURT.

TRANSFER APPLICATION No. 59 OF 1913.

April 3, 1914.

Present:—Mr. Hayward, J. C., and Mr. Crouch, A. J. C.

THE FIRM OF SHAMUSSUDDIN MAHIR BUX—DEFENDANTS—APPLICANTS

versus

THE FIRM OF ALI MAHOMED ALIDINA—PLAINTIFFS—OPPONENTS.

Civil Procedure Code (Act V of 1908), s. 22—Suit capable of institution in two Courts—Transfer from one Court to another—Evidence of defendant available outside jurisdiction, whether sufficient reason.

When a suit, which can be brought in either of two Courts, has been instituted in one of them, it cannot be transferred to the other merely on the ground that the defendant has all his evidence at the latter place.

Application under section 22, Civil Procedure Code, for transfer of the case from Karachi to Amritsar.

Mr. *Isardas Odharam*, for the Applicants.

Mr. *Rupchand Bilaram*, for the Opponents.

JUDGMENT.—Plaintiffs of Karachi sued defendants of Amritsar for an account of goods sent from Karachi for sale on certain terms in Amritsar.

Plaintiffs filed their suit in Karachi and allege they have their evidence in Karachi; but defendant states he has his evidence in Amritsar and has applied for transfer to Amritsar under sections 22 and 23, Civil Procedure Code. It must be presumed for the purposes of this application that jurisdiction lies both in the Karachi Court and the Amritsar Court. The mere fact that defendant has evidence in Amritsar is not, in our opinion, sufficient to justify transfer of the suit from Karachi to Amritsar. The evidence can be taken as usual on commission, even that of the defendant for good cause shown to the satisfaction of the Court.

We reject the application with costs.

Application rejected.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1178 OF 1912.

May 11, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Rattigan.

AMIR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

FAQIRA AND OTHERS—DEFENDANTS—RESPONDENTS.

Compromise—Party present but not signing it, whether bound—Minor, repudiation by—Civil Procedure Code (Act V of 1908), O. XXXII, r. 7.

A person who is a party to a suit and who is present in Court at the time of compromising it but does not object to its terms, is bound by the compromise although he has not actually signed it, and particularly where he also gets some benefit thereunder.

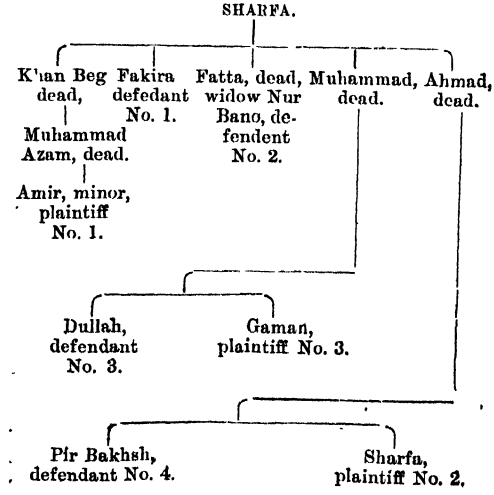
A minor on attaining majority is incompetent to repudiate a compromise made by his next friend or guardian in a suit, if it was made for his benefit and with the sanction of the Court.

First appeal from the decree of the District Judge, Attock District, at Campbellpur, dated the 20th April 1912, dismissing the plaintiffs' claim.

Dr. *Muhammad Iqbal*, for the Appellants.

Mr. *Nand Lal*, for the Respondents.

JUDGMENT.—A few words added to the following pedigree-table will suffice to explain this case:—



Sharfa's three sons by one wife were Fatta, Fakira and Khan Beg; his sons by other wife were Muhammad and Ahmad. The family separated, and after the death

of Sharfa and Khan Beg we find Fatta, Fakira and Muhammad Azam jointly owning in equal shares 3,049, *kanals* 14 *marlas* of land. Fatta died and his widow took his place, and then they partitioned their joint holding—Muhammad Azam taking 1,088 *kanals* 12 *marlas*, Fakira 1,226 *kanals* 4 *marals* and *Musammat* Nur Bano 1,095 *kanals* 1 *marla*. This was in 1903. In 1910 Dullah, Pir Bakhsh and Sharfa (son of Ahmad) and, by later impleading, Gaman sued for an avoidance of that partition on the ground of fraud and what not. This suit was compromised (page 16, paper-book) thus:—

(*i*) Fakira and *Musammat* Nur Bano at once surrendered 100 *kanals* to Dullah and Gaman, and 60 *kanals* to Pir Bakhsh and Sharfa.

(*ii*) After the death of *Musammat* Nur Bano, Fakira and Amir minor, shall take her remaining estate in equal half shares.

Amir and Sharfa being minors Pir Bakhsh and Fakira applied for sanction to compromise, see page 20 ; received sanction, page 21 ; put in the compromise and had it duly verified and passed, page 18.

The present suit is brought by Amir, minor, Sharfa, minor, and Gaman for a declaration that the property is still the joint property of plaintiff Amir and of defendants Nos. 1 and 2, Fakira and *Musammat* Nur Bano, the compromise being inoperative against the rights of the three plaintiffs. The Court below held that Amir, plaintiff, was bound by the compromise because it was in his favour, inasmuch as instead of taking (as he would do by ancestral shares) $\frac{1}{4}$th of Fatta's estate on the death of *Musammat* Nur Bano, he was to get $\frac{1}{2}$ of that estate diminished by the small areas given to Dullah, Gaman, Pir Bakhsh and Sharfa ; that Sharfa, minor, was bound "for the same reasons as have been given regarding Amir;" that Gaman was bound because he was present at the compromise and was duly represented, he being blind, by Dullah, his attorney. On these findings the suit was dismissed with costs.

All three plaintiffs have appealed against this decision, but Mr. Iqbal who represents them has wisely given up the claim *qua* Amir. He concedes that the compromise is clearly very beneficial to Amir and, therefore, finds himself unable to contend that the compromise should be upset at the instance of Amir. There remain the claims that it should be set aside on the suit of (*a*) Gaman, (*b*) Sharfa.

Now we are unable to find any force in either claim. Respondents assert that Gaman was present at the compromise, and the order of the District Judge dated 23rd November 1910 in the compromised case, see page 18, paper-book—though it does not specifically mention Gaman—goes to show that this assertion is in accordance with facts. Mr. Iqbal, when asked by us, is unable to assert that Gaman was not present ; and in these circumstances we must hold that he was present. This being so, and there being also the circumstantial evidence pointed out by the lower Court that Gaman had actually given a power-of-attorney to Dullah, it is idle for appellants to attempt to deny that the compromise was entered into with the full concurrence of Gaman. It is noteworthy also that it is more than doubtful whether Gaman, who under the compromise took at once along with Dullah 100 *kanals* of the land then in suit, was really entitled, by law or custom, to any share whatever in Fatta's estate. We have no hesitation, therefore, in holding that Gaman cannot now object to the compromise.

As regards Sharfa, he, no doubt, was a minor ; but the Court expressly sanctioned the compromise, as we have seen, and gave the opinion that the "compromise shall be beneficial" to him and the others. In his case also, as in the case of Gaman, it is doubtful whether he was by law or custom entitled to any thing out of Fatta's estate, and yet he along with Pir Bakhsh was to get and did get 60 *kanals* out of it.

These observations are sufficient to dispose of the case and we agree with the District Judge in his final conclusions against the plaintiffs, but we must point out two errors into which the learned District Judge has fallen. Clearly, though Sharfa's claim must fail, it does not fail on the same grounds as apply to the case of Amir ; and, again, at page 31, lines 28 *et seq.*, of the paper-book the Dis-

trict Judge is hardly right in quoting, in justification of the somewhat arbitrary shares allotted by the compromise of 1910, the reasons given by the Tahsildar in connection with the district earlier arrangement of 1903, for the differences of areas observable in that arrangement.

We dismiss the appeal with costs against Sharfa and Gaman.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 162 OF 1912.

April 6, 1914.

Present:—Mr. Crouch, A. J. C.

VALJI JASRAJ—PLAINTIFF

versus

TAYABJI MULLA MAHMED BHOY AND OTHERS—DEFENDANTS.

Guardians and Wards Act (VIII of 1890), s. 29 – Joint property – Alienation by guardian of minor co-parcener with permission of Court—Suit by minor to have sale set aside and to get possession of his share by partition—Guardian not made party – Estoppel—Court's discretion to grant equitable relief.

A minor co-parcener on attaining majority sued the alienee in possession for partition and possession of his share, alleging that his cousin, a member of a joint H[illegible] family, having got himself appointed guardian of his person and property and having obtained the permission of Court to sell the property, had alienated it to discharge his own personal debts:

Held, (1) that the guardian not having been made a party to the suit, the Court could not adjust the equities between him and the alienee and would not deprive a *bona fide* purchaser for value without notice;

(2) that the plaintiff having relied on the Court's order of appointment to support a part of his claim, was estopped from repudiating it to support another part.

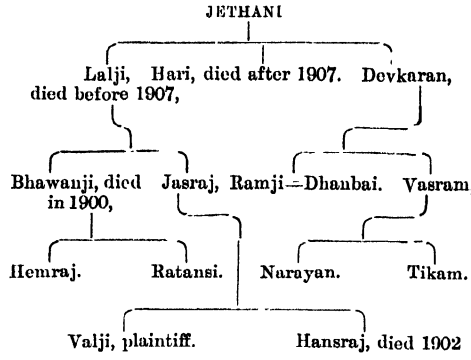
Mr. *A. R. D'Cruz*, for the Plaintiff.

Mr. *Wadhumal Oodharam*, for Defendant No. 1.

Mr. *Tolasing Khushalsing*, for Defendant No. 2.

Mr. *Hirdaram Mewaram*, for Defendant No. 3.

JUDGMENT.—The genealogy of the parties concerned in this case is as follows:—



In the year 1897, Hari Narayan and Tikam, sons of Visram, Dhanbai, widow of Ramji, and Bhawanji, for himself and on behalf of Valji and Hansraj, minor sons of Jasraj, executed a deed of partition (Exhibit 5) whereby, after reciting that Jasraj was dead and had left two sons and that Bhawanji was their guardian, all the joint property was partitioned, and it was declared that the western portion of Survey No. 1, sheet C. 6, measuring 114 yards, in Daryalal Street was to be taken by Bhawanji, Hansraj and Valji and that all the parties had separated themselves from one another.

On the 26th November 1898, Bhawanji, on behalf of himself and on behalf of his minor nephews Hansraj and Valji, mortgaged the said property, to secure the payment of two thousand rupees, with Amalmal, son of Lilaram. On the 3rd January 1901 the property was further charged to the same mortgagee with the re-payment of one thousand rupees.

On the 2nd of April 1901 Hemraj, for himself and his minor brother, Ratansi, and his minor cousins, Hansraj and Valji, mortgaged the same property with Seth Lovji Hari and others to secure the re-payment of Rs. 3,500. It was recited that the money had been utilised for redeeming the two mortgages in favour of Amalmal.

On the 22nd of September 1903, Hemraj for himself and for the same three minors further charged the property with the re-payment of one thousand rupees to the same

mortgagees. In the deeds of 26th November 1898, of the 3rd January 1901 and of the 22nd September 1903 it is not stated for what purpose the money was borrowed.

On the 15th of August 1904, Hemraj applied to the District Court of Karachi to be appointed guardian of the person and property of the minor Valji and also asked for permission to sell the property and pay off the mortgagees. In this application, it is stated that Valji had half share in the property aleady described and bearing Survey No. 1, sheet C 6. There is no allegation that Hemraj and Valji were joint. The learned Joint Judge appointed Hemraj as guardian of the person and property of Valji and gave permission for the sale. The property was, on the 17th October 1904, sold to Seth Nensi Gopal for Rs. 6,950. Hemraj executed the deed of transfer on behalf of Valji by virtue of the Court's order.

On the 6th January 1908 the said Nensi Gopal sold the property to Anandji Bechar, who sold it to Tayabji Mulla Mahmedbhoy, the present defendant. Nensi Gopal is dead, defendants No. 2 are the executors of his Will, Anandji is also dead, and defendant No. 3 is his heir and legal representative. All the above facts are recited in the plaint, and are relied on by the learned Pleader for the plaintiff.

Plaintiff Valji attained 21 years on the 8th September 1911. He files this suit asking the Court to set aside the sale of the shares by Hemraj to Nensi Gopal and also the subsequent sales, for partition and possession of his share and for accounts of the mesne profits from defendant No. 1. He sues in *forma pauperis*. It is asserted in the plaint that the order of the Joint Judge of the 9th September 1904 appointing Hemraj guardian of the plaintiff's share in the property was without jurisdiction, and that, according to Hindu Law, no such guardian could be appointed, and that, therefore, such appointment and the permission of the Court to sell the property might be ignored.

But defendants contended that when the application for appointment of guardian was made, Valji was not joint with Hemraj, but had been separated by the deed of partition of 1897, and beyond doubt there are substantial grounds for making this assertion; and if Valji was separate, or even if the Joint Judge formed the opinion that he was, it is impossible to treat the appointment as an absolute nullity. And it cannot be presumed that the Court took a view of the facts which would make the order illegal.

It is urged that all the High Courts have held that a guardian cannot be appointed of the joint property of a minor co-parcener. The grounds on which these decisions are based is that the interest of the member of such family is not individual property, and that a guardian, if appointed, would have nothing over which to exercise his guardianship. But it is an arguable proposition of Law that a minor co-parcener has at least one element of individual property on which an appointment of guardianship could operate, namely, the right of alienating his share which a major co-parcener possesses, at any rate, in this Presidency. And if the Court considered, on the facts of this particular case, that there were rights of property which neither the minor nor the manager could exercise unless the manager were appointed guardian, then also it is impossible for this Court to treat the order as wholly without jurisdiction and void; and it cannot be assumed that the Court when making this order had not in view facts which would constitute it a legal one.

The plaintiff has actually approved the Court's order of appointment, and it seems to me, therefore, that to treat the order of the learned Joint Judge as an absolute nullity is not proper and that it is not necessary to set aside the order. So long as this order stands the plaintiff has no case.

Again, the plaintiff is approving the Court's order of appointment so far as it appointed Hemraj guardian of his person and is actually relying on it as extending his minority up to 21 years, in order to meet the plea of limitation. He cannot be allowed to rely on the order to support one part of his case, and to treat it as a nullity to support another part.

The plaintiff alleges that the true facts of the case were not put before the Court, and offers evidence to establish that the debts for which the property had been mortgaged were really private liabilities

of Hemraj and his father; but the learned Joint Judge took evidence on this point, and was satisfied that the debts were such that the minor was responsible for them. This Court cannot now try the question over again.

Again, whether the Court acted legally or illegally, Hemraj was, as a matter of fact, appointed guardian, and he did, as a matter of fact, transfer the property to Nensi Gopal. Mr. D'Cruz asserts that Nensi Gopal was guilty of fraud, but there is scarcely a direct allegation to that effect and no proof of it is offered beyond evidence that the money borrowed prior to 1904 was for the private purposes of Bhawanji and Hemraj, and this would not constitute fraud in Nensi. But it is not denied that Nensi gave good consideration, a sum of Rs. 6,950 for the property, and this on reliance of the Court's order. Nor is it alleged that Anandji was not a *bona fide* purchaser for good consideration without notice of fraud. Nor is it alleged that the present owner, defendant No. 1, was not a *bona fide* purchaser for good consideration; there is no reason whatever to suppose that he was not. By what rule of equity can the Court deprive defendant No. 1 of the property without compelling Hemraj to restore the consideration? But neither Hemraj nor his mortgagees are parties to the suit, and the Court cannot do injustice to one party in order to do equity to the other. The Court has always a discretion in granting equitable relief, and it would be contrary to all traditions of the Courts of Chancery to permit plaintiff to let Hemraj, the person who is said to have defrauded him, go scot free, making apparently no attempt whatever to make him account for the consideration received, and secure from a perfectly innocent person property which he has lawfully purchased. Snell states:—"Where the defendant who sets up the defence has the legal estate, a Court of Equity will grant no relief against him. For nothing can be clearer than the general rule that a purchaser for valuable consideration, without notice of a prior equitable right, who obtains the legal estate at the time of his purchase, is entitled to priority in equity as well as at law, according to the maxim, where the equities are equal, the law must prevail." Defendant No. 1 has the fullest legal estate which the law of this country can confer, and he is as much entitled to the protection of the Court as the plaintiff. No relief can be given as against defendants Nos. 2 and 3; they are not the purchasers of any property belonging to the plaintiff nor have they been guilty of any breach of contract, or of any tort. Mr. D'Cruz is quite unable to show that the plaintiff has any cause of action against them.

I hold on the second issue that the plaint discloses no cause of action against any of the defendants. No finding is necessary on other issues. The suit is, therefore, dismissed. The plaintiff to pay all costs in the suit.

Suit dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 249 OF 1910.

July 22, 1914.

Present:—Sir John Edward Power Wallis, Offg. Chief Justice, and Mr. Justice Kumaraswamy Sastri.

Sri Rajah SATRACHERLA VEERABHADRA SURYANARAYANA RAJU BAHADUR GARU, DIED, AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 14—Inam—Gadaba *service, whether private or public—Resumption, power of, in whom vested, whether in* zemindar *or Government—Illegal resumption by Collector—Grant on* jeroyiti pattah—*Suit for possession by* zemindar.

Gadaba or palanquin-bearing service is a private service.

The right to resume lands which had been granted by a *zemindar* for the performance of private service to the *zemindar*, is in the latter and not in the Government.

Sree Rajah Venkatarangayyah v. *Poranki Appalarazu*, 8 Ind. Cas. 546; 8 M. L. T. 429; 20 M. L. J. 728 and *Sri Raja Parthasarathy Appa Rao* v. *Secretary of State for India*, 21 Ind. Cas. 871; 14 M. L. T. 514; 26 M. L. J. 39; (1913) M. W. N. 959, followed.

Article 14 of the Limitation Act, 1908, has no application to a case where a *zemindar* sues for possession of certain lands of his on the ground that the Collector, who during his minority was in possession of his estate, treated the suit property, which had been granted to others for *gadaba* service, as the property of the Government and resumed the lands and regranted them to the then occupants thereof on *jeroyiti pattas*.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Vizagapatam in Original Suit No. 16 of 1908.

FACTS.—The facts of the case sufficiently appear for the purpose of this report from the judgment.

Mr. *V. Ramesam*, for the Appellants:—The lands having been granted for *gadaba* service, which was private service, they could be resumed by the *zemindar* alone. The interference of the Government was wholly unauthorised, as it had no interest at all in the village, which was included in the *zemindari* at the Permanent Settlement, its income having been taken into consideration in fixing the *peishkush*. Article 14 of the Limitation Act did not apply, as the *zemindar* was not a party to the resumption which was null and void.

The *Government Pleader*, for the Crown, argued *contra*.

JUDGMENT.—This is an appeal from the judgment of the Subordinate Judge of Vizagapatam. The plaintiff, who is the *zemindar* of Peda Merangi, sued the Secretary of State and the *ryots* of the hamlet of Gadabavalasa for possession of the village and for mesne profits for three years, on the ground that this village had been granted to the ancestors of defendants Nos. 2 to 13 as a service *inam*, the service being that of palanquin-bearers to the *zemindar*, and on the ground that the services were no longer being rendered and that he was entitled to resume the village. He joined the Government as a defendant, because, as alleged in paragraph III (*f*) of the plaint, "while the plaintiff was a ward (of the Court) the Government treated the suit lands as at their disposal and granted *jeroyiti pattas* to the defendants Nos. 2 to 13 for these lands, freeing them from the burden of service, and placed the defendants in possession thereof. In other words, he alleged that during his minority the Government had purported to resume this village as not included in the *zemindari* and to grant *pattas* to the defendants Nos. 2 to 13 reserving the full assessment, whereas the plaintiffs' case is that this village was included in the *zemindari* at the Permanent Settlement and Government has no right to interfere with it.

Taking the case first as between the plaintiff and the first defendant, the Secretary of State, the Subordinate Judge has found that the assets of the *zemindari*, upon which the *peishkush* was fixed in the year 1802, included the demand of Rs. 100 from this village, and that finding is borne out by the evidence, because we have the accounts of 1797, 1798 and 1799, Exhibits O, O1, O2, and P upon which the *peishkush* was settled, and in each of these accounts we find included a demand of Rs. 100 in respect of this village. In respect of certain other lands situated in the ambit of the *zemindari*, certain alienated villages and certain *inams*, we find that deductions were made, but no such deduction was made in respect of this village or the *peishkush* payable in respect of it. It follows, therefore, that the *peishkush* was settled having regard to the income derived from this village, and that this village must be taken to be included in the *zemindari*. At the same time it appears also in evidence that the Rs. 100 which was payable to the *zemindar* from this village was not actually paid to him, but that the *ryots* were allowed to retain it as payment for the service of palanquin-bearing which they rendered. That, however, was a matter between the *zemindar* and the *ryots*, and in no way affects the inference to be drawn from the fact that the Government included the demand in the assets of the *zemindari* when settling the *peishkush*. The Subordinate Judge, for reasons which we are not very well able to appreciate, has come to the conclusion that the entry of the Rs. 100 was fictitious; but we do not see how the entry can be said to have been fictitious, as it was not subsequently deducted as were some other items, but formed part of the amount on which the *peishkush* was fixed. One of the documents on which the Subordinate Judge relies, Exhibit M, so far from bearing him out, rather tends in the opposite way. Exhibit M, which is the final report of the Collector, says that in consideration of the difficulty which the *zemindar* had in paying the *peishkush* and his embarrassed circumstances and the unfavourable predicament which the *zemindar* found himself in owing to unfavourable seasons and also in consideration of his being subject to a considerable charge for ready money allowances to peons, the *peishkush* should not be fixed at the full figure of two-thirds of the total demand but at a smaller figure. This very passage shows that these payments to peons were not excluded from the settlement, but were treated as payments which the *zemindar* would be obliged to incur out of the total demand, and it shows that demand such as

this, where the demand was returned in the shape of remuneration to peons and others, was taken into account in fixing the *peishkush*. We think that in this case, upon the findings of the Subordinate Judge, it is clearly shown that the demand of this village was included in the assets of the *zemindari* upon which the *peishkush* was fixed. That is proved by positive evidence in this case. But we have been also referred to cases in which it has been held that, even where there is no positive evidence of that, it may be inferred from the nature of the services which are remunerated in this way, that is to say, from the fact that they are private services. These are *Sree Rajah Venkatarangayyah* v. *Poranki Appalarazu*(1) and *Sri Raja Parthasarathy Appa Rao* v. *Secretary of State for India* (2). We think that the present case would fall within these authorities, because upon the evidence we have come to this conclusion that this palanquin service is a private service and it is nowhere alleged in the pleadings or in the evidence to be a public service. However, we need not, as we said, rely upon any presumption in this case, because we have positive evidence. The authorities are clear that where the service is private service, the right of resumption is in the *zemindar* and not in Government.

As regards limitation we do not think that Article 14 has any application to this case, and it is sufficient to say that it is not shown that the *zemindar* was a party to the proceedings for the resumption, even if that would be sufficient to bring the case within the Article, and if the order was anything more than a nullity.

As regards the relief of possession sought against the tenants they have not contested the plaintiff's claim, being apparently disposed to make common cause with the plaintiff against the first defendant. During the hearing of the appeal, however, the appellant's Vakil has stated that his client does not desire to eject the defendants, but is content to resume the *melvaram* of the village and leave them in possession of the *kudivaram* or occupancy right. In these circumstances all we can do in the present suit is to declare the plaintiff's right to the *melvaram*, leaving him to have the rent ascertained in a proper proceeding. We must reverse the decision of the Subordinate Judge and declare that the alleged enfranchisement by the Government is void as against the plaintiff, and also declare that the plaintiff is entitled to the *melvaram* rights of the village as against the other defendants.

The plaintiff has failed in his demand for mesne profits against the Government as he has not shown any cause of action against the Government in respect of mesne profits. In these circumstances we direct that both parties, that is, the plaintiff and the 1st defendant, should pay and receive proportionate costs. As regards the other defendants we make no order as to costs.

Decree modified.

(1) 8 Ind. Cas. 546; 20 M. L. J. 728; 8 M. L. T. 429.
(2) 21 Ind. Cas. 871; (1913) M. W. N. 959; 14 M. L. T. 514; 26 M. L. J. 39.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1635 OF 1912.

April 27, 1914.

Present:—Mr. Justice Coxe and Mr. Justice Mullick.

HALDHAR JHA—DEFENDANT—APPELLANT

versus

Syed SHAH MAHAMMAD ASHRAF ALAM—PLAINTIFF—RESPONDENT.

Kabuliat, *stipulation in - Suit to enforce stipulation after expiry of term —Waiver —Restrictions on enhancement of rent —Bengal Tenancy Act (VIII of 1885), s. 30 —Court's duty - Civil Procedure Code (Act V of 1908), O. XLI, r.* 11, *O. XLVII, r.* 4 *- Appeal dismissed under O. XLI, r.* 11, *revival of, by Division Bench, whether can be questioned.*

An order of a Division Bench of the High Court reviving an appeal dismissed under Order XLI, rule 11, cannot be questioned by the Bench hearing the appeal.

If a tenant holds over after the expiry of the *kabuliat*, the landlord is not entitled to enforce a stipulation contained in it, which he had waived during the term itself.

Obiter. — Under the Bengal Tenancy Act enhancement of the rent of *raiyats*, whether occupancy or non-occupancy, is greatly restricted. These restrictions constitute a valuable protection for the tenants and the Courts should always be very careful to prevent landlords from evading these restrictions by inducing improvident tenants to take lands at low rates with a stipulation for future enhancement.

Appeal against the decree of the District Judge of Bhagalpur, dated the 13th March 1912, modifying that of the Munsif, second

Court of that place, dated the 6th May 1911.

Babus *Upendra Nath Chatterji* and *Naresh Chandra Sinha*, for the Appellant.

Moulvi *Mohammad Khurshed Hussain*, for the Respondent.

JUDGMENT.

COXE, J.—This was a suit for rent based on a *kabuliat*. The suit has been decreed by the Courts below and defendant appeals.

A preliminary objection is taken that the appeal is incompetent for the reasons given in Order XLVII, rule 4, proviso (A). It appears that this appeal was dismissed under Order XLI, rule 11, and was revived without notice to the opposite party. It appears to me, however, that as the order reviving the appeal was passed by a Division Bench of this Court, it cannot be questioned by us.

The *kabuliat* on which the suit was based has expired and it is contended on behalf of the plaintiff that the tenant held over under the *kabuliat* and is bound by its terms. The terms of the *kabuliat* are stated by the District Judge as follows:—"The land was settled with him in order that it might be planted with grafted mangoes. He was to plant the mangoes in the first year of his lease and to have them ready for bearing at the end of five years. At the outset he was to hold at a total *jama* of Rs. 23-4 which is at the rate of Rs. 3 per *bigha*. As soon as the mango trees came into bearing, he was to hold the orchard on *bhauli* terms and to pay half of the produce as rent. If he failed to plant the trees he was to pay rent at the rate of Rs. 10 per *bigha*". It appears to me that the plaintiff in this case is not entitled to more than Rs. 3 a *bigha*. The case comes clearly under the Tenancy Act, as the land was leased for horticultural purposes, and the *kabuliat* was executed long before the amendment of section 1 of the Act by Bengal Act of 1907. Under the Tenancy Act enhancement of the rent of *raiyats*, whether occupancy *raiyats* or non-occupancy *raiyats*, is greatly restricted. These restrictions constitute a valuable protection for the tenants, and, in my opinion, the Courts should always be very careful to prevent landlords from evading these restrictions by inducing improvident tenants to take lands at low rents with a stipulation for future enhancement. In the present case, however, these considerations do not arise. The *kabuliat* was for the years 1304 to 1312. Mangoes were to be planted in the first year of the lease and were to be made ready for bearing at the end of five years, that is to say, at the end of 1308. If the tenant failed to carry out these conditions, he was liable for rent at the rate of Rs. 10 per *bigha*. The District Judge found that the tenant did not plant any trees and, therefore, it is quite clear that from the end of 1308, if the stipulations in the *kabuliat* were binding upon him, he was liable for rent at the rate of Rs. 10 a *bigha* for the years 1309 to 1312. The plaintiff, however, sued for rent for those years at the rate of Rs. 3 a *bigha*. That being so, I do not think that after the expiration of the *kabuliat* he could obtain any higher rate. If the tenant held over, he held over under the same terms as in the years 1309 to 1312. There was no change in the condition of the land after the year 1312 and the plaintiff having sued for rent after the default of the tenant at the rate of Rs. 3 a *bigha*, he was not, in my opinion, entitled, after the expiry of the *kabuliat*, to enforce the stipulation which he had waived during the term itself.

The appeal should, therefore, in my opinion, be allowed and the plaintiff should obtain a decree for rent at the rate admitted by the defendant with interest at the rate of 12 per cent. per annum, and the appeal is decreed accordingly.

The parties will bear their own costs throughout.

MULLICK, J.—I agree.

Appeal allowed.

PUNJAB CHIEF COURT,

CIVIL REVISION PETITION NO. 749 OF 1912.

November 28, 1912.

Present:—Mr. Justice Rattigan.

JAGGAN NATH-NATHU MAL—DEFENDANTS—PETITIONERS

versus

RAM DAS-BRIJ DAS—PLAINTIFFS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), ss. 93, 94, 105 and 107—Hundi—Notice of dishonour—Indorsers—Delay of six months—Drawer to be co-defendant—Civil Procedure Code (Act V of 1908), O. I, r. 6.

JAGGAN NATH-NATHU MAL *v.* RAM DAS-BRIJ DAS.

The holder of a bill of exchange or *hundi* is bound to give notice of its dishonour at the earliest opportunity to all the parties whom he desires to make liable thereon. Consequently his neglect to give such notice within reasonable time from the date of dishonour exonerates the indorsers and others concerned, specially where they are most likely to suffer damage from such neglect, as for instance, where the drawer becomes insolvent or otherwise unable to pay the amount due.

Hait Ram v. *Ganpat*, 159 P. R. 1882, followed.

The drawer is a necessary party to the case based on a *hundi*.

Baldeo Prasad v. *Grish Chandar Bhose*, 2 A. 754, referred to.

Petition, under section 25 of Act IX of 1887, for revision of the order of the Judge, Small Cause Court, Amritsar, dated the 29th January 1912, decreeing the claim.

Lala *Durga Das*, for the Petitioners.

Lala *Hari Chand*, for the Respondents.

JUDGMENT.—The facts of the case so far as they are material for present purposes are that the petitioners' firm indorsed for value a *hundi* (said to have been payable after sight) to the plaintiffs on the 16th March 1910. The plaintiffs sent the said *hundi* for encashment to their agent and the latter received it on or about the 17th March 1910. Upon presentment the *hundi* was dishonoured, and according to the evidence the plaintiffs' agent thereupon sent it back by post to the plaintiffs with a covering letter informing plaintiffs of the dishonour of the *hundi*. It seems that this letter was lost together with the *hundi* in transit, and plaintiffs' allegation is that they did not receive notice of the loss and dishonour until some six months afterwards when they made up accounts with their said agent. They then apparently applied to the defendants to give them another *hundi* of the same tenor, and defendants, in turn, appear to have made endeavours to secure a duplicate from the persons immediately liable to them upon the *hundi*, but without success.

Plaintiffs now sue the defendants and the drawer of the *hundi*, who was subsequently impleaded as a co-defendant under Order I, rule 6, Civil Procedure Code, and in accordance with the ruling in *Baldeo Prasad* v. *Grish Chandar Bhose* (1), for the principal and interest due upon the *hundi*. The drawer did not appear and the suit proceeded against him *ex parte*, but the present petitioners pleaded—

(1) that they did not receive due notice of the dishonour of the *hundi* within reasonable time, within the meaning of sections 35, 105, 106 and 107 of the Negotiable Instruments Act, XXVI of 1881;

(2) that they could not supply plaintiffs with a duplicate of the lost *hundi*, because the drawer had in the meanwhile become insolvent; and

(3) that as they were unable to recover from the drawer, they were not liable to the plaintiffs.

The judgment of the Small Cause Court found (1) that plaintiffs gave notice of the loss of the *hundi* to the petitioners seven months and eleven days after the loss occured; (2) that petitioners made some efforts to obtain a duplicate; (3) that there was no clear evidence that the drawer had become insolvent; and (4) that as petitioners had not suffered any damage, the delay in giving them notice of the loss of the *hundi* did not relieve them from liability. He accordingly granted plaintiffs the decree prayed for, but made it a condition that plaintiffs should first exhaust their remedies against the drawer before proceeding to execute the decree against the petitioners. The latter have applied to this Court to revise this order on the ground that plaintiffs by their delay in giving notice of the loss and dishonour of the *hundi* have debarred themselves from claiming relief against the petitioners who were merely indorsers of the *hundi*.

In my opinion, the petitioners' contention is sound. The plaintiffs admittedly sent the *hundi* to their own agent for encashment on the 16th March 1910, and they appear thereafter to have taken no trouble to inquire from their agent whether the *hundi* was or was not honoured. They allege that they only received notice of dishonour some six or seven months afterwards when, on going through their accounts with their agent, they discovered that they had not been given credit for the amount of the *hundi*, and received the explanation from their agent that the *hundi* had been dishonoured and returned to them by post in March 1910. Now, it is quite clear from the provisions of sections 93, 94, 105, 106

(1) 2 A. 754,

and 107 of the Negotiable Instruments Act that the plaintiffs, as holders of the *hundi*, were bound to give notice of dishonour to the other parties whom they desired to make liable upon the *hundi*, and that such notice should have been given at the earliest opportunity. Can, then, plaintiffs excuse the delay in giving such notice by urging that they did not become aware of the fact until some six or seven months later on? I do not think so, and the ruling of this Court in *Hait Ram* v. *Ganpat* (2) upon very similar facts supports the view I take. As pointed out in that case, it was the duty of the plaintiffs to inquire from their agent whether the *hundi* had or had not been honoured and they are not entitled to plead ignorance of facts which they could have ascertained, had they made reasonable inquiry.

Furthermore, in the present case the plaintiffs after they had become aware of the fact that the *hundi* had been dishonoured did not, in the first instance, notify the indorsers (present petitioners) of that fact, but merely called upon them to provide a duplicate as the original had been lost. This was in itself rather an ingenious proceeding, and in calling upon the *indorsers* for the duplicate, the plantiffs disregarded the provisions of section 45A of the Act. I do not, however, lay stress upon this aspect of the case. The really important point is that plaintiffs, through their negligence, failed to notify the indorsers of the dishonour within a reasonable time. It is urged, however, that as the indorsers have suffered no damage thereby, this failure on the plaintiffs' part cannot relieve the latter of liability. But I am by no means satisfied that the indorsers have not suffered damage; as it is, I think, very obvious that the drawer has in the meanwhile become insolvent and was in all probability insolvent before notice was given to the petitioners. I am aware that the lower Court was not satisfied that such was the case, but that its finding was erroneous is apparent from the admitted fact that though the decree was passed in January last, the plaintiffs have made no attempt to execute it against the drawer. I am told that this was due to the fact that the petition for revision was pending in this Court, but I fail to see how the pendency of this petition could prevent plaintiffs from trying to execute their decree against the drawer who is no party to the present proceedings and against whom the decree was passed *ex parte*. It is, however, clear that the petitioners would, in all probability, have to sue the prior indorsers if in such circumstances as the present they attempted to recover the money from the latter. It is incorrect, therefore, to say that they *cannot possibly* suffer damage owing to the plaintiffs' failure to give them due notice of dishonour, [section 98 (*c*) of the Act]. As a result, I hold that due notice of dishonour was not given to the indorsers and that consequently the latter are not liable upon the *hundi*. I accordingly accept this petition and dismiss plaintiffs' suit, *with costs* as against the present petitioners.

Petition accepted.

(2) 159 P. R. 1882.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 66 OF 1913.

August 11, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

KUNCHAPUDY ANANTHA VENKATA VEERARAGHAVA CHARYULU—COUNTER-PETITIONER—DEFENDANT—APPELLANT

versus

SRIMAUT RAJAH YARLAGADDA MALLIKARJUNA PRASADA NAIDU—BAHADUR *Zemindar* GARU—PETITIONER—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 153, O. XXI, r. 57—Application for execution dismissed—Attachment, effect on—Subsequent application for sale only defective—Amendment.

As an attachment of property in execution ceases upon the dismissal of the application for execution, a subsequent application for execution by sale only is defective.

Such a defect, however, can be cured by amendment under section 153, Civil Procedure Code.

Appeal against the order of the District Court of Kistna at Masulipatam, in Appeal Suit No. 562 of 1912, dated 3rd April 1913, preferred against that of the Court of the Principal District Munsif of Masulipatam, in Execution Petition No. 835 of 1911, in Original Suit No. 40 of 1899.

GOLAM MUJAHAR CHOWDHERY v. GOLOKE CHARAN DAS.

FACTS.—Certain immoveable property belonging to the judgment-debtor was attached in execution. The execution application was subsequently dismissed. Some time later the decree-holder filed a fresh petition for sale of the attached property. The District Munsif ordered its sale and the District Judge on appeal confirmed the order. The judgment-debtor then preferred this Civil Miscellaneous Second Appeal to the High Court.

Mr. *G. Venkataramiah*, for the Appellant:—The provisions of Order XXI, rule 57, Civil Procedure Code, are imperative. The attachment previously effected ceased to exist on the dismissal of the application. The erroneous belief of the decree-holder was of no avail.

Mr. *C. V. Ananthakrishna Iyer*, for the Respondent:—The decree-holder thought *bona fide* that the attachment subsisted. This is borne out by his applying for sale only in the subsequent application. If the Court were of a different opinion, he can be allowed to amend the petition by adding a prayer for attachment. The power of the Court as regards amendments is very wide.

JUDGMENT.—The lower Courts were in error in holding that the effect of the plain words of Order XXI, rule 57, of the Code of Civil Procedure, under which "upon the dismissal" of an application "the attachment (made in execution) shall cease," can be nullified merely because the decree-holder thought otherwise, or prayed only for sale of the attached property in a subsequent petition on the footing that the attachment would continue notwithstanding the dismissal of the former petition.

However, our powers to allow amendments of proceedings and pleadings are very wide under the new Code (see section 153 of the Code of Civil Procedure); and on the application of Mr. C. V. Ananthakrishna Iyer (who appears for the decree-holder-respondent) we permit his client to amend the Petition No. 835 of 1911 within three days by adding a prayer for attachment of the property sought to be sold. On such amendment being made, the District Munsif's order on that petition will be modified by directing attachment and sale instead of merely directing the sale of the said property. As the decree-holder ought to have applied for this amendment long ago, he should bear the appellant's costs in the District Court and this Court and bear his own costs in these two Courts.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 313 OF 1913.

April 27, 1914.

Present:—Mr. Justice Woodroffe and Mr. Justice Mullick.

GOLAM MUJAHAR CHOWDHERY AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

GOLOKE CHARAN DAS—DECREE-HOLDER—RESPONDENT.

Limitation Act (IX of 1908), s. 18—Exercise of right delayed through fraud, whether extends time—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 2, cl. (2).

Section 18 of the Limitation Act applies only when a party is kept from his knowledge of right to do a certain thing by the fraud of the other party but not where he is so kept from exercising his right.

Where the period of limitation within which an application by the judgment-debtor under clause 2 of rule 2 of Order XXI of Civil Procedure Code is to be presented to the Court has expired, it is not open to him to secure an investigation of the same matter by an application under section 47, Civil Procedure Code.

Appeal against the order of the Subordinate Judge, first Court of Sylhet, dated the 7th of April 1913.

FACTS.—This appeal arose out of an execution proceeding taken on 30th October 1912 in respect of a decree in a money Suit No. 5 of 1909 passed on the 6th October 1909. The judgment-debtors filed their objections on the 24th November 1912 to the effect that the decree had been satisfied by a written amicable adjustment of the same executed on the 14th December 1909 and that the decree-holder while not certifying the fact to the Court, fraudulently represented to the objectors that it had been so done. The decree-holder pleaded Order XXI, rule 2 (2), of the Code of Civil Procedure of 1908 in bar of the objection. On these facts two questions were raised in appeal as well as in the lower Court *viz*:—(1) whether

the judgment-debtor can claim an extension of time under section 18, Limitation Act, IX of 1908, and (2) whether he can re-open the matter by an application under section 47 of the Civil Procedure Code, Act V of 1908.

Babus *Tarakishore Choudhri*, *Broja Lal Chakravarti* and *Bhudeb Haldar*, for the Appellants.

Babu *Gobind Chandra De Roy*, for the Respondent.

JUDGMENT.

WOODROFFE, J.—It appears to me that the two points which have been argued in this case are clearly covered by the decision in *Biroo Gorsain* v. *Jaimurat Koer* (1). The first point is one which arises in reference to section 18 of the Limitation Act. There the learned Judges say that "Even if it is established that the conduct of a decree-holder is fraudulent, the judgment-debtor is not entitled to obtain an extension of the time within which to make an application to the Court under clause (2) of rule 2 of Order XXI, because the judgment-debtor is not, by means of fraud, kept from the knowledge of his right to make the application within the meaning of section 18 of the Limitation Act but from the exercise of his right to make the application." The learned Judges in that case also pointed out that if there be such fraud, as was there alleged and as is alleged in this case, then it would be open to the judgment-debtors to institute a suit for damages for the alleged fraud.

Then it has been contended before us that even if an application under Order XXI, rule 2, was barred for the reason stated, such an application would lie under section 47 and that we should convert this application into a suit under that section. The answer, however, to this argument is also given in the case to which I have referred.

The only point of difficulty which arises is whether or not the decision in *Gadadhar Panda* v. *Shyam Churn Naik* (2) conflicts with the argument which has been laced before us on behalf of the resp ent; but as to this the learned Judges say that when that case is analysed, they are of opinion that "it does not support the contention of the appellant and that the learned Judges did not intend to lay down that although the period of limitation within which an application by the judgment-debtor under clause (2) of rule 2 of Order XXI is to be presented to the Court has expired, it is still open to him to secure an investigation of the same matter by an application under section 47". I also think that the contention that a party may be barred under Order XXI, rule 2, and yet may move for the same relief under section 47, is unsound.

These being the two points which have been argued before us, the appeal fails and must be dismissed with costs which we assess at two gold *mohurs*.

MULLICK, J.—I agree.

Appeal dismissed.

(1) 13 Ind. Cas. 63; 16 C. W. N. 123; 16 C. L. J. 174.

(2) 12 C. W. N. 485.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 280 OF 1912.

December 11, 1913.

Present:—Mr. Justice Chitty.

FREEMAN—PLAINTIFF

versus

P. & O. S. N. CO., LTD.—DEFENDANT.

Carrier—Wrong delivery of goods—Liability of carrier—Duty of consignee—Calcutta Port Act (Bengal Act IX of 1890), s. 91.

The plaintiff, Noel William Freeman, sent goods from London to Calcutta under a bill of lading, the consignee in the bill being N. W. Freeman, Calcutta. The goods were in the ordinary course landed by the defendant Company and made over to the Port Commissioners. No one appeared to take delivery and the defendant Company sent a notice of arrival addressed, as was the bill of lading, to 'N. W. Freeman, Esquire, Calcutta.' This was delivered by the Post Office to one Nigel W. Freeman, who after the execution of an indemnity bond took delivery of the goods:

Held, (1) that under section 91 of the Calcutta Port Act, 1890, the contract of carriage was admittedly at an end when the goods were made over by the defendant Company to the Port Commissioners; and

(2) that the act of the defendant Company in sending out the notice of arrival and issuing a delivery order to a person whom they *bona fide* thought to be the person entitled to the possession of the goods, was not an unauthorized act for which they could be made liable.

It is the duty of the consignee to ascertain when the goods will arrive and to be ready to take delivery.

FREEMAN v. P. & O. S. N. CO., LTD.

Mr. *Langford James*, for the Plaintiff.

Messrs. *Buckland* and *Camell*, for the Defendant.

JUDGMENT.—This is a suit brought by the plaintiff against the P. & O. S. N. Co. to recover a sum of Rs. 2,242 as damages for the loss to him of articles of wearing apparel contained in a case delivered to one Nigel W. Freeman. The claim for Rs. 142, part of the above sum, on account of the plaintiff's expenses between Nagpur and Calcutta and his evidence here is clearly unsustainable. The plaintiff values the entire contents of the case at Rs. 3,000, and those articles of clothing which were returned to him by Nigel W. Freeman at Rs. 900. The balance claimed is thus Rs. 2,100. The facts of the case are not in dispute. In January 1911 the plaintiff, Noel William Freeman, who is a Barrister-at-Law, intended to come out to Nagpur in the Central Provinces. He was then coming to India for the first time and proposed to travel by America and Japan, arriving at Calcutta from the East about the end of April. He purchased an outfit, packed and locked the box now in question and left England in January 1911. Before leaving he requested his mother to send on his things to Calcutta. There were two packages, the case in question containing clothes, a medicine chest and a revolver, and a crate containing a gun and golf-sticks. The packages were sent by Mrs. Freeman by the defendant Company's s.s. "Namur" under a bill of lading dated 3rd February 1911. She signed a declaration of value in which the contents of the case were valued at £15 and of the crate at £7. The plaintiff had given his mother no directions on this point. The consignee in the bill of lading was N. W. Freeman, Calcutta. The plaintiff did nothing with regard to taking delivery of the cases on arrival, either by notifying the defendant Company or by instructing an agent to clear the goods on his behalf. The packages arrived on 10th March 1911 and were in the ordinary course landed by the defendant company and made over to the Port Commissioners. The responsibility of the defendant Company thereby ceased under section 91 of the Calcutta Port Act, 1890. As no one appeared to take delivery, the defendant Company on 30th March 1911 sent a notice of arrival addressed, as was the bill of lading, to "N. W. Freeman, Esq., Calcutta." This was delivered by the post office to one Nigel W. Freeman, an employee in the paper mill at Kankinarah. That person requested a Mr. W. H. Powell to take delivery of the packages on his behalf. Mr. Powell accordingly attended at the defendant Company's office, produced the notice of arrival, executed in the defendant Company's favour an indemnity bond and thereupon received a delivery order dated 18th April 1911. Armed with this he accompanied Miss Adelaide Freeman, a sister of Nigel W. Freeman, to the Customs House, where the packages were lying, as they contained arms. The packages were opened at the Customs House, as, of course, Mr. Powell had not the keys, and the contents were there appraised at Rs. 491. The duty was paid by Miss Freeman or Mr. Powell and the packages were delivered to them. It is difficult to understand how these persons can have taken delivery without some inquiry, as the box bore the name "Noel Freeman" clearly painted in large white letters. It is still more difficult to understand how Nigel Freeman could have retained the goods, knowing, as he must have known, that they were not his. He did, however, retain them. He did more. He wore many of the clothes and used and broke the gun.

On 4th April 1911 Mr. Max Freeman, a brother of the plaintiff, wrote to the defendant Company in Calcutta stating that the bill of lading had been sent to catch Mr. N. W. Freeman on his way to India from Japan, and asking them to store the baggage until Mr. N. W. Freeman could get the bill of lading and communicate with them as to what he wished to do. This letter must have reached the Calcutta office of the defendant Company on 24th April and was answered on the 25th. Mr. M. Freeman was informed that the delivery order had been granted to Mr. Powell on a letter of guarantee, as he had applied personally for delivery of the packages on instructions from Mr. N. W. Freeman.

The plaintiff had changed his intention of arriving in Calcutta in April. He turned aside in America and went as far north as Alaska, from which country he wrote to the defendant Company on 26th August 1911 that he had just received the bill of lading and should probably claim the packages in

person very shortly. As a fact he first called at the defendant Company's office in person with the bill of lading on 13th November 1911, when he found that the goods had been delivered to the other Mr. N. W. Freeman. Mr. Nigel Freeman was then addressed both by the defendant Company and the plaintiff. Eventually in December 1911 he returned to the plaintiff the gun and revolver, for which no claim is now made, and some of the articles of wearing apparel. For the non-production of the remainder he gave no satisfactory account. No criminal proceedings were instituted against him and I am told that he has now gone to Australia. Such being the facts of the case, the sole question for my determination at present is whether the defendant Company are liable to the plaintiff. The question of the extent of such liability, if any, has been allowed to stand over until the other point has been decided.

In the *first* place, it is now conceded that no liability can attach by reason of the contract contained in the bill of lading. The contract of carriage was admittedly at an end when the packages were made over by the defendant Company to the Port Commissioners. It is, therefore, unnecessary to consider the several provisions of the bill of lading or to determine whether, if at all, the defendant Company could be made liable under that contract, having regard to the undervalue stated in the declaration made by Mrs. Freeman and other circumstances.

Secondly, it is conceded that the defendant Company were not bailees in the ordinary sense, inasmuch as they had not possession of the goods at the time when they were delivered to Nigel Freeman.

It was contended for the plaintiff that the defendant Company were liable because they had done an unauthorized act in sending out the notice of arrival of 30th March 1911, and again in issuing the delivery order of the 18th April 1911. The words "unauthorized act" are taken from the case of *Hiort* v. *Bott* (1) on which plaintiff's Counsel strongly relied. That case appears to me to be clearly distinguishable from the present. There was no authority whatever to the defendant to make over the goods to Grimmett or any one else. He did so innocently no doubt, but having chosen Grimmett as his agent to return the goods to the plaintiff, he was held responsible for that person's misappropriation of the goods. There was in that case no contract, as there is here, between the plaintiff and the defendant. The case of *The Stettin* (2) cited by plaintiff's Counsel has not, in my opinion, any application in the present case. That decision turned upon the bill of lading. I am unable to hold that the act of the defendant Company in sending out the notice of arrival and issuing a delivery order to a person whom they *bona fide* thought to be the person entitled to the possession of the goods, was an unauthorized act for which they can be made liable. Their duty under the bill of lading was to carry the goods to Calcutta and there deliver them to the consignee. Here the Legislature has conferred on the Port Commissioners the duty of actually delivering goods which arrive by sea, but it is the practice of shipping companies, and certaintly of the defendant Company, to issue such notices of arrival. This, as the evidence shows, is done out of courtesy to the consignees and not as a duty. On the contrary it is clearly the duty of the consignee to ascertain when the goods will arrive and to be ready to take delivery. As to the delivery order, the evidence shows that the bill of lading is released or a delivery order issued on an indemnity being taken, rather to show the Port Commissioners that the shipping Company have no outstanding lien for freight or other charges, than as an authority to the Port Commissioners to deliver. The only circumstance that suggests any liability on the part of the defendant Company is that they consider it necessary to take an indemnity bond at all. Why they do so Mr. Arnold Jenkins was unable to explain, except by saying that it is and has long since been the invariable practice. The Port Commissioners also take such bonds, in cases too where the shipping Company has taken one. Whether that course was followed here does not appear. In my opinion what the Court has to see is whether the defendant Company in doing what they did acted in a reasonable and proper manner. If they did, they cannot be held liable simply because the

(1) (1874) 9 Ex. 86; 43 L. J. Ex. 81; 30 L. T. 25; 22 W. R. 414.

(2) (1889) 14 P. D. 142; 58 L. J. Adm. 81; 61 L. T. 200; 38 W. R. 96; 6 Asp. M. C. 395.

notice got into the hands of a wrong person who acted fraudulently in the matter. It was argued for the plaintiff that the sending out of the notice addressed simply "N. W. Freeman, Esq., Calcutta", indicated gross negligence on the part of the defendant Company. I am unable to accept this contention. That was the address given by the plaintiff himself, or on his behalf, in the bill of lading, and the defendant Company had no order. It might be a perfectly sufficient address or it might not. The defendant Company cannot be held responsible for the fact that the plaintiff was not at hand to receive the notice and take delivery, while there was another person of the same name who was unscrupulous enough to do so. The case of *Heugh* v. *London and North-Western Ry. Co.* (3) is more like the present case in its facts, and the remarks in the judgments in that case are very much in point. The plaintiff is certainly entitled to sympathy for the loss of his effects, but I cannot hold that the defendant Company are liable to make good that loss.

It follows that the suit must be dismissed, and except as regards the costs of the commission to England it must be dismissed with costs, including reserved costs, if any, on scale No. 2. As regards the commission, I have considered the correspondence between the parties previous to its issue. The question of authority to make the declaration was not gone into in England and Mrs. Freeman was not in fact examined. I accordingly direct that the plaintiff and defendant Company do each bear their own costs of that commission.

Suit dismissed.

Attorneys for the Plaintiff: Messrs. *Sanderson & Co.*

Attorneys for the Defendant Company: Messrs. *Watkins & Co.*

(3) (1870) 5 Ex. 51; 39 L. J. Ex. 48; 21 L. T. 676.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 477 OF 1910.

October 6, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Phillips.

NALLAPPA REDDI—DEFENDANT No. 2—APPELLANT

versus

VRIDHACHALA REDDI AND ANOTHER—PLAINTIFF No. 2 AND DEFENDANT No. 1—RESPONDENTS.

Estoppel – Contract of indemnity—Equitable estoppel.

The defendant had agreed, while the plaintiff was a minor, to manage the plaintiff's properties and to pay interest due on the minor's debts. He had also undertaken to indemnify the plaintiff if, in consequence of the breach of the covenant on his part to pay the interest on debts, the plaintiff was put to any loss. Interest was not paid on one of the debts and in consequence the creditor instituted a suit to which both the plaintiff and the defendant were parties. The defendant contended in that suit that he had paid up the interest, but owing to his failure to adduce evidence a decree was passed against the plaintiff. The plaintiff paid the amount and sued the defendant to recover the damages sustained by him in consequence of the defendant's failure to pay:

Held, that whether the technical rule of *res judicata* was applicable or not the defendant was equitably estopped from raising in the second suit the contention that he had really paid the interest due to the creditor.

If both the indemnifier and the party entitled to indemnity were parties to an action by the third party or if the indemnifier had notice given to him of the suit against the party entitled to the indemnity, the judgment would be conclusive against the indemnifier even as an adjudication by Court.

Second appeal against the decree of the District Judge of Trichinopoly, in Appeal No. 48 of 1909, dated the 1st November 1909, presented against that of the District Munsif of Kulittalai, in Original Suit No. 720 of 1903.

The Hon'ble Mr. *T. V. Seshagiri Ayyar*, for the Appellant.

Mr. *N. Rajagopalachariar*, for the first Respondent.

JUDGMENT.—The question raised in this case is one of some importance. The second defendant had agreed, while the plaintiff was a minor, to manage the plaintiff's properties and to hand over possession to him after his attainment of majority. One of the duties that the second defendant undertook to perform was the payment of interest due on the debts. He did not pay the interest on one of the debts and in consequence the creditor instituted a suit (Original Suit No. 521 of 1897) in the Kulittalai District Munsif's Court. The plaintiff and the second defend-

ant were both parties to that suit, the second defendant being the third defendant there. He contended in that suit that he had paid up the interest, but failed to adduce evidence to prove his contention. The plaintiff subsequently paid the amount to the creditor, and instituted this suit to recover the damages sustained by him in consequence of the second defendant's failure to pay.

The lower Appellate Court has held that the second defendant is bound by the finding in Original Suit No. 521 of 1897 and cannot now be permitted to allege or prove that, as a matter of fact, the interest due to the creditor had been discharged by him prior to the previous suit. Mr. Seshagiri Ayyar contends that the rule of *res judicata* is not applicable to the case as the plaintiff and the second defendant were co-defendants in the previous suit and as it was not necessary to determine the question as between them to give relief to the plaintiff there. We consider it unnecessary to determine whether the case would really come strictly within the rule of *res judicata*, as we have no doubt that the second defendant must be held to be equitably estopped from raising the contention that he had really paid the interest due to the creditor. He, as co-defendant in the previous suit, had an opportunity to prove it. It was his duty to do so in order to prevent a decree being passed against the plaintiff here. He failed to do so. He had undertaken to indemnify the plaintiff if, in consequence of the breach of the covenant on his part to pay the interest on debts, the plaintiff was put to any loss. Owing to his failure to adduce evidence a decree was passed against the plaintiff and he was obliged to pay the creditor. It would be monstrous in the circumstances to allow the second defendant now to do that which by his failure to do before he put the plaintiff to loss. The case of the plaintiff, however, might be put even on broader grounds than in the circumstances it is necessary to do. It has been held by both the English and American Courts that, where there is a contract to indemnify, if a decree has been passed against the person entitled to indemnity, the correctness of that decree cannot be impeached by the person bound to indemnify. The contract of indemnity might, no doubt, strictly be said to require that it should be proved that the indemnifier acted in violation of his duty as well as that his act caused loss to the party entitled to indemnity. But the Courts have held, and we think rightly if we may say so, that the contract is substantially broken when the Court has found in a suit honestly defended by the party entitled to indemnity that there has been a violation of duty by the indemnifier which has entitled a third party to the damages for which the indemnity has been given. It has further been held that, if both the indemnifier and the party entitled to indemnity were parties to the action by the third party, as in this case, or if the indemnifier had notice given to him of the suit against the party entitled to the indemnity, the judgment would be conclusive against the indemnifier even as an adjudication by Court.

Whether the technical doctrine of *res judicata* is applicable or not, there can be no doubt that the second defendant must be held to be estopped from contending that the debt was discharged. It is unnecessary to refer to the authorities at length.

The earlier cases are referred to in the judgment of Mellish, L. J., in *Parker* v. *Lewis* (1). See also *Mercantile Investment and General Trust Company* v. *River Plate Trust, Loan, and Agency Company* (2), Verman on Estoppel and Res Judicata, pages 171 to 173, and Bigelow's Law of Estoppel, pages 131 to 145. Our judgment is also in accordance with the decision of this Court in *Krishnan Nambiar* v. *Kannan*(3). We dismiss the second appeal with costs.

Appeal dismissed.

(1) (1873) 8 Ch. App. Cas. 1035 at p. 1058; 29 L. T 199; 21 W. R. 928; 43 L. J. Ch. 281.
(2) (1894) 1 Ch. 578; 63 L. J. Ch. 366; 8 R. 791; 9 L. T 131; 42 W. R. 365.
(3) 21 M. 8.

VENKATACHELAPATHY *v.* BOMMAVARA SATYANARAYANA.

MADRAS HIGH COURT.

CIVIL APPEAL No. 42 OF 1910.

November 5, 1912.

Present:—Sir Charles Arnold White, KT., Chief Justice, and Mr. Justice Sankaran Nair.

P. VENKATACHELAPATHY—PLAINTIFF—APPELLANT

versus

Sri Rajah BOMMAVARA SATYANARAYANA VARAPRASADA SIVA ROW NAIDU BAHADUR, MINOR UNDER THE COURT OF WARDS AND OTHERS—DEFENDANTS—RESPONDENTS.

Madras Court of Wards Act (I of 1902), s. 49—Suit on promissory note—Suit relating to property of ward—Notice of suit—Mere demand, no notice.

A money suit based on a promissory note against a ward is a suit relating to the property of the ward within the meaning of sub-section (1) of section 49 of the Madras Act I of 1902.

A letter that comes to nothing more than a demand cannot be said to amount to a notice of suit.

Appeal against the decree of the Subordinate Judge of Cocanada, in Original Suit No. 76 of 1908.

The Hon'ble Mr. *L. A. Govindaraghava Ayyar*, for the Appellant.

Dr. *S. Swaminadhan*, for Respondent No. 1.

Mr. *P. Nagabhushanam*, for Respondents Nos. 3 to 5.

JUDGMENT.

WHITE, C. J.—One of the points first raised in this appeal is not altogether free from difficulty, but as we have made up our minds about it, we do not think anything is to be gained by further consideration. The two points which have been raised by Mr. Govindaraghava Ayyar on behalf of the appellant arise under the second issue in the case, *viz.*, whether the second defendant, the Collector, was entitled to notice of suit under section 49 of Madras Act I of 1902; and if so, was a valid notice served on him? Section 49 is in these terms: "No suit relating to the person or property of any ward shall be instituted in any Civil Court until the expiration of two months after notice in writing has been delivered to or left at the office of the District Collector specified in the notification under section 19 or the Collector appointed under section 46, as the case may be."

Mr. Govindaraghava Ayyar has argued, *first*, that no notice is necessary; and *secondly*, if notice was necessary, the notice which the evidence shows was given in this case was sufficient. As regards the first point, the question turns on the construction of the words "No suit relating to the person or property of any ward shall be instituted, etc.," and the question we have to consider is what is, the meaning of the words "relating to the person or property of any ward" for the purpose of the section? Mr. Govindaraghava Ayyar has pointed out that the words are "relating to the person or property" and not "affecting or which may affect the person or property" of a ward. The suit before us is a money suit, a claim on a promissory note, in which it was sought to make the ward or the estate of the ward liable. There can be no question that if the plaintiff succeeds in this suit, the estate of the ward will be affected because execution will have to go against the estate. But the words are not "affecting," but "relating to." It is quite clear if we adopt Mr. Govindaraghava Ayyar's construction, we shall have to exclude from the scope of the section every money suit, because such a suit, according to him, though the result may affect the estate, does not relate to the estate. But a suit for money in which a decree may be realised in execution against the estate of the ward seems as much within the mischief of the section as a suit relating to the specific property of any ward, which according to Mr. Govindaraghava Ayyar is what the Legislature meant. According to Mr. Govindaraghava Ayyar so far as I can see the suits which come within the section, would be limited to mortgage suits and ejectment suits. However that may be, a suit for money would certainly be excluded from the operation of the section.

On the other hand, the construction which Dr. Swaminadhan on behalf of the respondent contends is the right construction which no doubt leads to this: It is difficult to think of a suit against a ward which does *not* relate to the person or property of the ward, and that being so, his construction to a great extent, if not entirely, renders the words "relating to the person or property of any ward" superfluous or meaningless and the section might as well well run: "no suit against a ward shall be instituted in any Civil Court." Dr. Swaminadhan suggests, and there is some force in the suggestion, that the words "relating to the person or property" were

adopted as a compendious form of expression having regard to the general scheme and scope of the Court of Wards Act which gives protection to the person and property of the ward. The conclusion I have come to, although the point is not altogether free from doubt, is that the learned Judge is right in the construction which he adopted, that a suit for money is a suit relating to the property of a ward within the meaning of sub-section (1) of section 49 of Madras Act I of 1902.

Our attention has been called to a few authorities. I do not think that the decision in *Sri Venkatachellapathy Subyya Vyavasaya Company* v. *Kanakasabapathi Pillai* (1) to which Mr. Govindaraghava Ayyar called our attention, helps him much. That was a case in which a question as to the construction of the words "relating to trust" within the meaning of Article 18 of the Schedule II to the Provincial Small Cause Courts Act arose, and it was there held that the suit in that case was not a suit relating to a trust. A case which is more in point is an English case—*In re Staines; Staines* v. *Staines* (2). The question there was with reference to the construction of Order LI, rule 1, of the English Rules of the Supreme Court. That rule provides that if in any cause or matter relating to any real estate it appears necessary that the real estate should be sold, the Court or a Judge may order the same to be sold. The question was whether the "cause or matter" in question related to real estate. The action was by the next friend of an infant claiming an account of the personal estate and rents and profits of the real estate. North, J., held that that was not a cause or matter relating to real estate. He said it was really an action for the recovery of rents and profits and that the Court had no power to sell an infant's real estate merely because it thought it would be for his benefit that it should be sold. The words of Order LI, rule 1, are "relating to real estate." Here the expression is much wider: "relating to person or property." The property may be real or personal. As has been pointed out, the Legislature could not have adopted wider or more comprehensive words than "relating to" and I am of opinion that the words "relating to the person or property" are wide enough to include a case in which a claim for money is made against a ward.

The second point I can dispose of very shortly. Here again I think the learned Judge was right. It seems to me that neither Exhibit E read alone nor Exhibit E read by the light of the other documents and the other facts proved or admitted can be said to constitute a notice of suit for the purpose of section 49 of Madras Act I of 1902. They all come to nothing more than a demand and cannot be said to amount to a notice of suit. That being so, it is really unnecessary to consider whether the notice was bad on the further ground that it was not delivered to or left at the office of the District Collector, and it is not necessary to consider whether in a case where the evidence shows that notice was given to the manager and brought to the knowledge of the Collector it is enough for the purpose of the section.

On both the points I think the learned Judge was right and I dismiss the appeal with costs, one set to first respondent and Rs. 50 to respondents Nos. 3 to 5.

SANKARAN NAIR, J.—I agree.

Appeal dismissed.

(1) 5 Ind. Cas. 912; 33 M. 494; 20 M. L. J. 146; 8 M. L. T. 67.

(2) (1886) 33 Ch. D. 172; 55 L. J. Ch. 913; 35 W. R. 75.

MADRAS HIGH COURT.

APPEAL FROM ORDER No. 294 OF 1913.

July 29, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Napier.

SRIMATH KIDAMBI JAGANNATHA CHARYULU AYYAVARLU—PLAINTIFF—APPELLANT

versus

PIDIPITI KUTUMBARAYADU AND ANOTHER—DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 3 (2) (d)—*Estate*—Inam *village*—*Presumption that land revenue alone has been granted*—*No presumption as to ownership of* Kudivaram—*Party seeking to oust jurisdiction of ordinary Civil Court*—*Burden of proof.*

SRIMATH KIDAMBI *v.* PIDIPITI KUTUMBARAYADU.

The party seeking to oust the jurisdiction of the ordinary Civil Courts must establish his right to do so.

A village is an estate within the meaning of section 3 (2) *(d)* of the Madras Estates Land Act (I of 1908) when (1) the land revenue alone has been granted in *inam* and (2) the grantee was a person not owning the *kudivaram*.

Proof or admission of the *inam* character of the village will raise a presumption that the first requirement of section 3 (2) *(d)* has been complied with, but there is no necessary or probable connection between the grant of an *agraharam* and the grantee's possession prior to it of any right in the land and, therefore, no presumption arises as regards the second requirement of the section.

Appeal from the order of the Court of the Temporary Subordinate Judge of Masulipatam, in Appeal Suit No. 172 of 1912, preferred against that of the Court of the Additional District Munsif of Masulipatam, in Original Suit No. 479 of 1910 (Bezwada).

Mr. *P. Nagabhushanam*, for the Appellant.

Mr. *P. Somasundaram*, for the Respondents.

JUDGMENT.—The learned Subordinate Judge has held that the plaintiff, an *agraharamdar*, should have sued to eject his tenants, the defendants, in a Revenue Court, not before the District Munsif, on the ground that the suit village is an estate. The appeal has been argued on the grounds that (1) the burden of proof regarding the character of the suit village was imposed on the plaintiff wrongly, (2) there was, in any case, a failure to consider material evidence.

The plaintiff does not rely on section 8, Estates Land Act; and the question, therefore, is only whether this village is an estate within the meaning of section 3 (2) (*d*); that is whether (1) the land revenue alone has been granted in *inam*, (2) the grantee was a person not owning the *kudivaram*. Now if the nature of his tenure were under consideration with direct reference only to his right to sue in ejectment, there is no doubt that the authorities cited by the lower Court would have been in point and its conclusion correct. But the dispute at present is as to jurisdiction, and as to it the first rule is that the party seeking to oust the jurisdiction of the ordinary Civil Courts must establish his right to do so. This is recognised in *Indety China Nagadu* v. *Potu Kanchi Venkatasubbaya*(1), a case closely resembling the present and *Tadikonda Buchi Virabhadrayya* v. *Sonti Venkanna* (2). This rule is founded on clear and general considerations and distinct reason must be required to justify departure from it. Of course, as observed in the second decision referred to, an anomaly seems apparently to exist in the onus being placed on different parties in the same suit for the purpose of deciding the question of jurisdiction and for deciding the question of the landlord's right to eject. And this led one of the learned Judges in *Adusumilli Suryanarayana* v. *Acchutta Potanna* (3) to describe this distinction as "a little too fine and far-fetched," whilst the other thought it necessary to explain it. In doing so he first, as we understand him, accepted the validity of the general rule as above stated; but he then referred to the presumption "which Courts have recognised about grants from the Crown being grants of the revenue only" as sufficient to turn the scale in the defendant's favour in the absence of other grounds for an affirmative conclusion. If this means only that proof or an admission of the *inam* character of the village will raise a presumption that the first requirement of section 3 (2) (*d*) has been complied with, *i.e.*, that the grant was of the land revenue alone, it may be accepted. And it is probable that this interpretation is correct, since such a presumption was a sufficient ground of decision in the case then under disposal, one in which plaintiff relied only on pleas that his grant included both *melvaram* and *kudivaram* or in the alternative that he had subsequently acquired the latter. These alternatives alone were considered in *Upadrasta Venkata Sastrulu* v. *Devi Sitaramudu* (4) and only the second of them in *Ponnuswamy Padayachi* v. *Karupudayan* (5), the judgment of Miller, J., stating expressly that the first of them as well as the alternative relied on in the

(1) 8 Ind. Cas. 365; (1910) M. W. N. 639; 8 M. L. T. 376.

(2) 20 Ind. Cas. 769; 24 M. L. J. 659; (1913) M. W. N. 782.

(3) 22 Ind. Cas. 339; 26 M. L. J. 99; 15 M. L. T. 268.

(4) 24 Ind. Cas. 224; 26 M. L. J. 585.

(5) 24 Ind. Cas. 217; 26 M. L. J. 285; 1 L. W. 218; 15 M. L. T. 299.

present case, the plaintiff's ownership of the *kudivaram* prior to the grant, were negatived by the circumstances. All these cases in fact differed from the present, because the question in them was only of the extent of the grant or the plaintiff's subsequent acquisition of the *kudivaram*, not of his ownership at the date of the grant regarding which plaintiff here admits nothing, arguing that it is for the defendants to prove that it was not his.

The reply attempted to this argument is that the point is covered by a presumption which must be drawn in the defendants' favour. But it has not been shown how such a presumption can be justified on its merits or supported by authority. On the merits it is not clear that there is any necessary or probable connection between the grant of an *agraharam* and the grantee's possession prior to it of any right in the land; and if it is contended that the reasons against presuming a grant of the *kudivaram* to non-resident Brahmins are valid also against a presumption that they did not own the *kudivaram* at its date, the answer is that in the present case the non-residence of the plaintiff's ancestor, the grantee, has yet to be proved and that, when the defendants have proved it, it will, no doubt, afford a ground of decision. As regards authority no recognition of the presumption proposed is to be found or is to be expected in the majority of the cases already referred to, since it was unnecessary for their decision. On the other hand the learned Judges responsible for *Tadikonda Buchi Virabhadrayya* v. *Sonti Venkamma* (2) said: "It is not easy to hold that such a presumption is justifiable." And its legitimacy was negatived directly in *Indety China Nagadu* v. *Potu Kanchi Venkatasubbaya* (1). Adequate reason for dissent from these two decisions has not been shown. The conclusion entailed is in accordance with *Indety China Nagadu* v. *Potu Kanchi Venkatasubbaya* (1) that the lower Court erred in imposing the burden of proof on the plaintiff in respect of the second question arising under section 3 (2) (*d*), that relating to the ownership of the *kudivaram* at the date of the grant of the *inam*.

The lower Court's decision must, therefore, be set aside. It must re-admit the appeal and dispose of it in the light of the foregoing. Provision for costs in this Court will be made in its final decree in accordance with the result. In these circumstances it is unnecessary to deal with the other ground argued in this Court, that material evidence was not considered.

Appeal accepted; Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 634 OF 1913.

October 5, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

CHALLA NARSI REDDI AND OTHERS—DEFENDANTS NOS. 3 TO 6—APPELLANTS

versus

VUDUMULA VIRAREDDI AND OTHERS—PLAINTIFFS NOS. 1 AND 2—DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

Hindu Law—"Affiliation", meaning of—Gift to affiliated son—Subsequent adoption by affiliator's widow, whether valid.

By the term "affiliation" is meant the act of taking another into one's family without performing the ceremony of adoption.

A gift to the affiliated son of an undivided moiety of the affiliator's property is quite valid and is not affected by any subsequent adoption by the affiliator's widow.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Guntur, in Appeal Suit No. 573 of 1910, preferred against that of the Principal District Munsif of Guntur, in Original Suit No. 423 of 1909.

Mr. *V. Ramadoss*, for the Appellants.

Messrs. *B. N. Sarma* and *P. Narayana Murthy*, for the Respondents.

JUDGMENT.—Both the lower Courts have found as a fact that Busi Reddi was "affiliated" into the family of Guruva Reddi: and this finding cannot be questioned in second appeal. We were at first in some doubt as to the meaning to be attached to the term "affiliated": but after a consideration of the lower Courts' judgments, the wording of issue 2 and the plaint allegations, we are satisfied that the term was used and understood as a convenient expression for the averments in paragraph 3 of the plaint. By these we understand it to be implied that

Guruva Reddi without performing an adoption in the usual sense understood among Hindus took his nephew Busi Reddi into his family, gave him an undivided moiety of his property and jointly enjoyed the property with him till his (Guruva Reddi's) death. The lower Courts find that this was done: and further, that after Guruva Reddi's death, an actual partition was effected and the property was divided between Busi Reddi and Guruva Reddi's daughter, Atchamma.

No ground is shown for holding such a transaction to be illegal or inoperative. It took place 70 years ago: and it is not denied that Guruva Reddi was sole owner of the property and could do what he liked with it.

If this gift to Busi Reddi of a moiety of the property be held valid it cannot be affected by any adoption by Guruva's widow after Guruva's death.

The decision of the lower Courts is correct, and the appeal is dismissed with costs of respondents Nos. 1 and 2. The 3rd and 4th respondents' memorandum of objections is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1291 OF 1910.

November 18, 1912.

Present:—Mr. Justice Miller and Mr. Justice Abdur Rahim.

B. AYYAPARAJU—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Specific Relief Act (I of 1877), s. 42—Possession for less than twelve years—Declaration of title—Penal assessment—Not to be levied unless land communal.

Unless the land sought to be assessed is shown to be communal land, the Secretary of State would have no right to collect penal assessment from a person in possession thereof simply on the ground that he is not the legal owner of the land, but somebody else.

Per *Abdur Rahim, J.* (*Ayling, J.*, dubitante).—In a suit for declaration of title under section 42 of the Specific Relief Act if the plaintiff has been in possession even though for less than 12 years, he is entitled to a declaration that he is in lawful possession as against a wrong-doer who interferes with his possession.

Second appeal against the decree of the Subordinate Judge of Kistna at Ellore, dated 20th December 1909, in Appeal No. 128 of 1908, preferred against that of the District Munsif of Narasapur, in Original Suit No. 373 of 1906.

Mr. *P. Narayanamurthi*, for the Appellant.

Mr. *C. F. Napier*, Government Pleader, for the Respondent.

JUDGMENT.

ABDUR RAHIM, J.—In this case the plaintiff sued the Secretary of State asking for a decree declaring his title to a house-site in a certain village, for recovering a certain sum of money which had been levied from him as penal assessment and for perpetual injunction restraining the defendant from levying any such assessment on the lands in question. The defendant's case was that the land *ashalmenaha* being what is called Potter's *inam*, does not belong to the plaintiff and that on that ground the defendant was entitled to collect penal assessment from the plaintiff.

Both the lower Courts, on a consideration of the evidence, have found that the plaintiff did not succeed in proving the ownership of the land. It is found, however, at the same time that the plaintiff is in possession of the land and has been so for about three years. He is in possession under two documents of title derived from two persons, Venkatasami and Subarayudu, one of whom at least was in possession of the land. There is no finding by either Court as to whether the land is *ashalmenaha* or Potter's *inam* or not. They thought that, inasmuch as the plaintiff failed to prove the title of his vendors, the suit must be dismissed. In my opinion that would not be sufficient to conclude this suit. It is found that the plaintiff is in possession of the land and we may take it that he is in possession under a *prima facie* title derived from persons in possession of the land. That being so, if the defendant failed to prove that the land was an *ashalmenaha* or Potter's *inam* and he had a legal title to it, the plaintiff would be entitled at least to the declaration that he is in lawful possession of the land, to use the language of the Privy Council in *Ismail Ariff* v. *Mahomed Ghous* (1). It is contended, however, by the learned Pleader who appeared for the respond-

(1) 20 C. 834 (P. C.); 20 I. A. 99.

ent that mere possession is not sufficient to found a declaration of title; and in support of this he cited *Hanmantrao* v. *Secretary of State for India* (2) and *Rassonada Rayar* v. *Sitharama Pillai* (3). The ruling in *Hanmantrao* v. *Secretary of State for India* (2) does not, it seems to me, support the contention of the respondent. All that is laid down there is that, if the possession is shown to be wrongful, then the plaintiff would not be entitled to a declaration of title. But here it cannot be said upon the findings as they now stand that the plaintiff's possession is wrongful. It is not necessary to discuss *Rassonada Rayar* v. *Sitharama Pillai* (3), because, in my opinion, the subsequent judgment of the Privy Council in *Ismail Ariff* v. *Mahomed Ghous* (1) is quite clear and conclusive on the point. I may observe that at first I was inclined to entertain some doubt as to whether in a case where the defendant has not actually dispossessed the plaintiff, the plaintiff would be entitled to a declaration of his title on the strength merely of possession not extending over the statutory period. But it seems that the decision of the Privy Council at least goes to the extent that, if the plaintiff has been in possession even though for less than 12 years, he would under section 42 of the Specific Relief Act be entitled to a declaration that he is in lawful possession as against a wrong-doer who sought to interfere with his possession. The levying of penal assessment on the land, if it was not justified, would amount to unlawful interference with the plaintiff's possession.

Then apart from the question whether the plaintiff is entitled to a declaration in the terms asked for by him, it seems to me to be clear that, if the land is not shown to be communal land, the Secretary of State would have no right to collect penal assessment from a person in possession thereof simply on the ground that he is not the legal owner of the land, but somebody else. It thus becomes necessary that we should have a finding on the question whether the land in dispute is *ashalmenaha* land or not. The finding must be on the evidence on record. The finding will be submitted within three months from the date of this order and 10 days will be allowed for filing objections.

(2) 25 B. 287; 2 Bom. L. R. 1111.
(3) 2 M. H. C. R. 171.

AYLING, J.—I concur in the order proposed by my learned brother.

I am not altogether satisfied that in face of the findings of the Subordinate Judge the plaintiff's prayer for a declaration of title to the suit site is sustainable, although at this stage I am not prepared to differ. On the other hand it seems to me clear that for the disposal of the second and third of the plaint prayers the findings are defective. The right of the Government to levy penal assessments is conditional on the land being communal or, as it is here described, *ashalmenaha*; and the learned Subordinate Judge seems to have overlooked the fact that, although the plaintiff may not have established his title to the suit land, he may nevertheless claim immunity from penal assessment thereon unless the land is *ashalmenaha*. There is no finding as to this and a finding on this point indicated by my learned brother becomes necessary.

In compliance with the order contained in the above judgment, the Subordinate Judge of Kistna at Ellore submitted the following

FINDING.—I am directed to submit my finding on the evidence on record on the following issue:—

Whether the land in dispute is *ashalmenaha* land or not?

The suit site is situated in the village of Vandram. It is deposed to by plaintiff's witnesses Nos. 1 to 4 and admitted by defendant's witnesses Nos. 11 and 15 that the suit site lies in the middle of the village surrounded by houses. The defendant's witnesses Nos. 1 to 10 are admittedly residents of other villages who do not know anything about the suit site. The defendant's witness No. 12 only speaks to his attestation of a certain mortgage document. The only material evidence is that of defendant's witnesses Nos. 11, 13, 14, 15 and 16.

The defendant's witness No. 11 is G. Venkataswami, who is a resident of Vandram. The defendant's witness No. 11 deposed that plaintiff's vendor Subbarayudu lived in Vandram only for three years on the suit site, but the witness was unable to state in his cross-examination to whom the suit site belonged. The witness stated that the suit site is in the middle of the

village and that potters "come and occupy it and go."

The defendant's witness No. 12 did not say anything about the ownership of the suit site. The defendant's witness No. 13, A. Narasimulu, is the most important witness. He was the *karnam* of the village Vandram for 40 years from 1860 to 1900. The witness deposed that plaintiff's vendor Subbarayudu came to the suit site in 1900 and lived there for three years. The witness further deposed that Subbarayudu's brother Venkataswami, defendant's witness No. 3, was not known to him. In his cross-examination, defendant's witness No. 13 stated that as he had not reported the encroachment of Subbarayudu when it occurred, he (witness) was fined after it was reported by him. I may here observe that the defendant's case, as set out in the written statement (*vide* paragraph 1), was that the suit site is a portion of an *ashalmenaha* land set apart for communal purposes. But not a single question appears to have been asked by defendant's Vakil about this to defendant's witness No. 13 in his examination-in-chief. And the only facts elicited in his cross-examination by plaintiff's Vakil are that "those who came to live on the suit site were not *Circar* servants, that they used to live in a *paka* (shed) on a cent of land and that the potters have a (separate) *inam* in the village. With reference to this admission of defendant's witness No. 13 it is argued for this plaintiff that the suit site was not the "*ashalmenaha*" land of defendant. It is further argued that if the suit site had really been a part of *ashalmenaha*, the defendant would have certainly produced the accounts showing the *ashalmenaha* lands. In other words, the best evidence would have been the production of the accounts relating to *ashalmenaha* lands. The non-production of the said accounts is a very strong circumstance against defendant because the presumption is that the production would be unfavourable to him.

The evidence of the remaining defendant's witnesses, Nos. 14 to 16, tends to show that the suit site was in the enjoyment of successive potters for a long period before plaintiff's vendor, Subbarayudu, came to reside on the suit site in 1900. The evidence on plaintiff's behalf is that the villagers introduced the several potters in succession and allowed them to remain on the suit site. It is not proved by defendant that the several potters occupied the suit site with the permission of the *Village Officers* as stated in paragraph 3 of defendant's written statement. On the contrary the admissions elicited in the cross-examination of the *karnam* (defendant's witness No. 13) to the effect that "those who came to live on the suit site were not *Circar* servants" and that "there was a separate *inam* for potters in the village" lend strong support to the plaintiff's case that the suit site was in the enjoyment of successive potters who were introduced by the villagers themselves as the site in question did not belong to Government. The plaintiff's witnesses Nos. 5 and 6 deposed that the Government had no right to the suit site at any time.

Thus with reference to the evidence discussed *pro* and *con* in the foregoing paragraphs, I hold that the onus of proving that the suit site is a part of *ashalmenaha* lay on the defendant and that this onus has not been discharged. Nothing was elicited in the examination of the *karnam* (defendant's witness No. 13) as to the right set up by defendant in respect of the suit site as *ashalmenaha* land. The defendant could have produced the accounts relating to *ashalmenaha* lands. This would have been the best evidence. But such evidence has not been produced and the *karnam* himself does not depose that the suit site is a part of *ashalmenaha* land. I, therefore, find the issue in the negative.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—There is evidence in support of the finding and we must accept it.

A question is now raised for the first time that the cause of action for the recovery of the money was barred by the provisions of the Act III of 1905; we cannot decide that question in the

appellant's favour, seeing that neither of the Courts below was asked to consider it.

Accepting the finding we reverse the decree of both Courts and declare that the plaintiff is in lawful possession of the land in suit, directing the payment to him of Rs. 6-4-0 wrongfully collected from him.

The plaintiff's costs throughout should be paid by the defendant. Six months' time will be allowed under section 82 of the Code.

Decree reversed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 319 OF 1913.

August 10, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.

MANIKKA MUDALIAR AND OTHERS—APPELLANTS

versus

SOUBAGIA AMMAL—RESPONDENT.

Hindu Law - Joint family — Maintenance — Widow of brother -Maintenance to be fixed with reference to family income at date of suit—Waiver, effect of —Charge upon property - Personal decree.

The widow of a deceased member of a joint Hindu family is entitled to have her maintenance fixed with reference to the family income at the date of suit and not at the date of her husband's death.

In the absence of waiver by her of her claim a widow is entitled to arrears of maintenance.

The maintenance awarded need not be a charge on the entire family property and unless some reason is shown for it, a personal decree should not be passed against the defendants.

A daughter-in-law may not be entitled to claim any maintenance out of the self-acquired property in the hands of her father-in-law if her husband dies before his father, but she would be entitled to claim it out of the same property after it descends to her brothers in-law as ancestral property.

Appeal from the decree of the District Court of South Arcot, in Original Suit No. 44 of 1911.

Messrs. *T. Rangachariar* and *C. Padmanabha Aiyangar*, for the Appellants.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondent.

JUDGMENT.—The Judge has awarded the sum of Rs. 50 per month for maintenance to the plaintiff, who is the widow of a deceased member of a joint Hindu family. The defendants, her husband's brother and brother's sons, appeal.

It is first contended that the District Judge is wrong in fixing the maintenance with reference to the present income of the family. The major part of the income is derived from the family trade in which the plaintiff's husband took part at the time of his death and which has developed considerably since. The District Judge estimates the present income at Rs. 17,500 a year. It is contended for the appellants that it was not more than Rs. 500 in 1897 when the plaintiff's husband died, and the rate of maintenance should be fixed with reference to that income.

It is not contended that the property out of which the plaintiff seeks to be maintained is not joint family property; that the defendants did not take her husband's interest by survivorship and that formed in part the nucleus of this acquisition. It is also clear that if the family income had been reduced, the plaintiff would only get a reduced rate of maintenance and she would not be entitled to have it fixed with reference to the family income at the date of her husband's death. A daughter-in-law may not be entitled to claim any maintenance out of the self-acquired property in the hands of her father-in-law if her husband dies before his father. But she would be entitled to claim it out of the same property after it descends to her brothers-in-law as ancestral property. The character of the property at her husband's death does not, therefore, always limit her claim. The cases *Adhibai* v. *Cursandas Nathu* (1) and *Madhavrao Keshav Tilak* v. *Gangabai* (2) support the view that the share the husband would get if he had been alive at the time of the suit, should be taken into consideration and not the share, if any, he was entitled to on his death. We agree with the decision in *Sukan Sahu* v. *Gangajali* (3). The decision in *Bangaru Ammal* v. *Vijayamachi Reddiar* (4) that altered circumstances would justify an increased rate of maintenance, proceeds on the same principle.

In the cases cited by Mr. Rangachariar there has been no change in the circumstances of the family and they are not, therefore, in point.

(1) 11 B. 199.
(2) 2 B. 639.
(3) 13 Ind. Cas. 136.
(4) 22 M. 175.

It is then argued that the family properties do not yield Rs. 17,500 a year and the rate of Rs. 50 is too high.

The defendants have not given any evidence as to the income; they did not file their account books, and we are not prepared to say that the Judge is wrong in his estimate of the income, which is only approximate.

It is also urged that as the plaintiff was living with her father, she is not entitled to any past maintenance, but the finding is that when the two branches of the family became divided and began to live apart, she asked the defendants to make some arrangements for her and though they promised to do so eventually they failed to keep their promise. In these circumstances she was obliged to go to her father's house. There was no waiver by her of her claim.

It is unnecessary to make the maintenance a charge on the entire family property. It will be made a charge on items 4 to 25.

No reason is shown why a personal decree should be passed against the defendants. It will be modified in that respect also.

For these reasons we dismiss the appeal with costs with the modification of the decree above indicated.

Appeal modified.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1537 OF 1910.

January 5, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

KATIL SHEIK UMMAR SAHEB—DEFENDANT—APPELLANT

versus

KHAZI BUDAN KHAN SAHEB—PLAINTIFF—RESPONDENT.

Khazis' Act (XII of 1880), ss. 2, 4—Appointment as Khazi confers no exclusive right to perform functions of office.

The object of the Khazis Act of 1880 was merely to appoint a person whose duty it would be to render certain services to such Muhammadans as may choose to resort to him for certain purposes, and does not confer on him any exclusive right to perform the functions which his office requires him to discharge.

Muhammad Yusub v. *Sayad Ahmed*, 1 B. H. C. R. App. 18; *Sayed Hashim Saheb* v. *Huseinsha*, 13 B. 429; *Mira Mohidin* v. *Asan Mohidin*, 17 M. L. J. 421, distinguished.

An office which requires the holder to perform duties in connection with an institution would ordinarily carry with it rights of an exclusive character, and does not interfere with the right possessed by all persons to exercise any profession or calling they might choose to adopt.

Second appeal against the decree of the District Judge of South Canara, in Appeal No. 78 of 1909, presented against that of the District Munsif of Kundapur, in Original Suit No. 623 of 1907.

Mr. *G. Annaji Rau*, for the Appellant.

Mr. *B. Sitarama Rau*, for the Respondent.

JUDGMENT.—The plaintiff, who is the Khazi of the Kundapur Jumma Masjid appointed by Government, instituted the suit in this case against the defendant to restrain him from officiating at marriages celebrated in the place and for the recovery of a sum of Rs. 11 which the defendant had received as fees for four *nikahs* performed by him in violation of the plaintiff's rights. The Munsif dismissed the suit, holding that the plaintiff had no cause of action against the defendant, as he acquired no exclusive right by his appointment as Khazi to officiate at marriages. The District Judge reversed his judgment and passed a decree in the plaintiff's favour. The Munsif relies, in support of his conclusion, on section 4 of the Khazis Act XII of 1880, clauses (*b*) and (*c*) of which lay down that "nothing herein contained, and no appointment made hereunder, shall be deemed to render the presence of a Kazi or Naib Kazi necessary at the celebration of any marriage or the performance of any rite or ceremony, or to prevent any person discharging any of the functions of a Kazi." We agree with the Munsif that the section shows that an appointment under the Act does not confer on the appointee any exclusive franchise or any exclusive right to officiate at marriages. Section 2 of the Act enacts that the Local Government may, if it thinks fit, after consulting the principal Muhammadan residents, appoint one or more Khazis whenever it appears to it that any considerable number of Muhammadans resident in any local area desire that one or more Khazis should be appointed for such local area. This section supports the view adopted by the Munsif. So far as any claim under the Act is concerned, it is clear to our minds that the plaintiff has no right to restrain any person from discharging any of the functions of a Khazi. Regulation III of 1808, which was in force until it was repealed by Act IX of 1864, also contained no provisions conferring

any exclusive right on a person appointed as Khazi under it. The opinion of Sir Rowland Wilson, the learned writer on Muhammadan Law, is also in support of the Munsif's construction. See page 137. Mr. Sitarama Rau for the respondent relies on *Muhammad Yussub* v. *Sayad Ahmed* (1) in support of his contention that the plaintiff has an exclusive right. But the plaintiff in that case did not claim the office under an appointment made under any statute. He was appointed by the Governor of Bombay as the representative of the Sovereign power which according to Muhammadan Law had the right to appoint Khazis. The office so created was a judicial and administrative office, and registration of marriages and officiating at them were only part of the functions of the office-holder. The plaintiff there complained of the breach of his rights in general, including his judicial and administrative rights. There can be no doubt that a judicial or administrative office created by the Sovereign confers rights and privileges of an exclusive character. Act XII of 1880 expressly says that a Khazi appointed under that Act is to have no judicial or administrative powers. We must hold that that case has no bearing on the one before us. Another case was relied on for the respondent —*Sayed Hashim Saheb* v. *Huseinsha* (2). The suit in that case related to the office of Khatib in a mosque; as also *Mira Mohidin* v. *Asan Mohidin* (3), which was also cited for the appellant. An office which requires the holder to perform duties in connection with an institution would ordinarily carry with it rights of an exclusive character, and does not interfere with the right possessed by all persons to exercise any profession or calling they might choose to adopt. The object of the Khazis Act of 1880 was merely to appoint a person whose duty it would be to render certain services to such Muhammadans as may choose to resort to him for certain purposes, and does not confer on him any exclusive right to perform the functions which his office requires him to discharge. This was the view alopted in *Bhoolwa* v. *Syud Unwur Ulee* (4) and in *Zeenutoollah Cazee* v. *Nujeeboollah* (5).

(1) 1 B. H. C. R. App. 18.
(2) 13 B. 429.
(3) 17 M. L. J. 421.
(4) (1851) S. D. A. N. W. P. 127
(5) (1835) 6 Ben. S. D. A. 36: 6 Sel. Rep. 36.

The respondent also contends that by the custom of Muhammadans the Khazi has the exclusive right of officiating at marriages. But as pointed out in *Muhammad Yussub* v. *Sayad Ahmed* (1) the office of Khazi is not one created by the community of Muhammadans but by the Sovereign, whose administrative power is the source of the Khazis' rights. Moreover, we do not understand the plaint in this case as asserting any right based on an enforceable legal custom.

We reverse the decision of the lower Appellate Court and restore that of the Munsif with costs here and in the lower Appellate Court.

Order reversed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL FROM ORDER No. 580 OF 1912.

June 5, 1914.

Present:—Mr. Justice Stephen, and Mr. Justice Mullick.

BHAKTA MAHTO—DEFENDANT—APPELLANT

versus

Thakur UDIT NARAIN SINGH DEO —PLAINTIFF—RESPONDENT.

Chota Nagpur Tenancy Act (VI of 1908)—Remand by Judicial Commissioner—Appeal, whether competent—Revision.

No appeal lies from an order of remand passed by the Judicial Commissioner of Chota Nagpur in a case tried by a Revenue Court, as none of the provisions of the Civil Procedure Code has been incorporated in the Chota Nagpur Tenancy Act, nor can the order be interfered in revision.

Appeal against the order of the Judicial Commissioner of Manbhum and Sambalpur, dated the 30th of August 1912, reversing that of the Deputy Collector of Singbhum, dated the 27th May 1912, and remanding the suit to his Court for trial on the merits.

Babus *Surendra Nath Ghoshal* and *Hari Bhushan Mukherjee*, for the Appellant.

Babu *Bepin Behari Ghosh* (Senior), for the Respondent.

JUDGMENT.—This is a suit decided in appeal by the Judicial Commissioner of Chota Nagpur in which he remands the case tried by the Deputy Collector of Singbhum. The order of remand comes before us on appeal. But as it appears that none of the provisions of the Code of Civil Procedure has been in-

corporated, as they might have been, in the Chota Nagpur Tenancy Act, we hold that this appeal is incompetent. An application has been made to us that we should now interfere in revision on the ground that this remand has been made without jurisdiction. We are, however, in this difficulty that we cannot consider the correctness of the law laid down by the Judicial Commissioner, and putting that on one side we cannot interfere with the order of remand.

The result is that this appeal is dismissed with costs, the hearing fee being assessed at one gold *mohur*.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1627 AND 2231 OF 1912.

July 14, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

BOMMAYA HEGADE—PLAINTIFF—APPELLANT

versus

IN APPEAL NO. 1627 OF 1912.

SRINIVASA HEBBARA—DEFENDANT—RESPONDENT

IN APPEAL NO. 2231 OF 1912.

JALAYAKSHI, MINOR, BY HER GUARDIAN ANANDARAM MADI—DEFENDANT—RESPONDENT.

Hindu Law—Will—Maintenance provided to widow for life—Terms clear and unambiguous—Unchastity not to affect right to maintenance.

Unless there is an ambiguity in the terms of the Will of a Hindu testator, the rule that the Will of a Hindu must be construed with due regard to Hindu habits and notions has no application.

There is no certain and necessary implication that a Hindu, who by Will provides for the maintenance of his wife after his death, intended to deprive her of the maintenance if she becomes unchaste.

Parami v. *Mahadevi*, 5 Ind. Cas. 960; 12 Bom. L. R. 196; 34 B. 278, followed.

Where a Will gave the testator's widow a clear right to receive till her death a certain amount as maintenance, she could not be deprived of such right by adding to the Will certain words and terms which the tastator might be presumed to have intended to add if certain future contingencies had been in his mind when he made the Will.

Second appeals from the decrees of the Court of the Subordinate Judge of South Canara, in Appeal Suits Nos. 524 and 523 of 1910, preferred against those of the District Munsif of Udipi, in Original Suits Nos. 435 and 434 of 1909 respectively.

Mr. *B. Sitarama Rao*, for the Appellant.

Mr. *K. Y. Adiga*, for the Respondent.

JUDGMENT.—Following *Parami* v. *Mahadevi* (1) we hold that unless there is an ambiguity in the terms of the Will of a Hindu testator, the rule that the Will of a Hindu must be construed with due regard to Hindu habits and notions has no application. That rule can be properly applied only for the purpose of construing the terms of the Will and not for the purpose of controlling or adding to its provisions. Even if that rule is applied, it was held in that case that there is no certain and necessary implication that a Hindu who by Will provides for the maintenance of his wife after his death, intended to deprive her of the maintenance if she becomes unchaste. Their Lordships of the Privy Council say in *Rajah Venkata Narasimha Appa Row* v. *Rajah Parthasarathy Appa Row* (2): "The Court is in no case justified in adding to testamentary dispositions . ..The Court never adds to a Will anything which needs to be done by testamentary dispositions. In all cases it must loyally carry out the Will as properly construed, and this duty is universal and is true alike of Wills of every nationality and every religion or rank of life."

The Will in this case gives the testator's widow a clear right to receive till her death a certain quantity of rice yearly for her maintenance and she could not be deprived of such right by adding to the Will certain words and terms which the testator might be presumed to have intended to add if certain future contingencies had been in his mind when he made the Will.

Discharging, therefore, the decrees of the lower Courts the plaintiff will be given a decree for recovery of the value of the maintenance due for all the four years mentioned in the plaint at the rates decreed by the Munsif and with interest as mentioned therein with costs in all Courts.

A similar decree will be given in the connected second appeal.

Appeals accepted.

(1) 5 Ind. Cas. 960; 34 B. 278; 12 Bom. L. R. 196.

(2) 23 Ind. Cas. 166; 26 M. L. J. 411 at p. 424; (1914) M. W. N. 299; 12 A. L. J. 315; 18 C. W. N. 554; 15 M. L T. 285; 16 Bom. L. R. 328; 37 M. 199 (P. C.).

KANAKAMMAL *v.* ANANTHAMATHI AMMAL.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 870 OF 1910.

November 13, 1912.

Present:—Sir Charles Arnold White, KT., Chief Justice, and Mr. Justice Sankaran Nair.

KANAKAMMAL—DEFENDANT No. 1—APPELLANT

versus

ANANTHAMATHI AMMAL AND OTHERS—PLAINTIFFS AND DEFENDANT No. 2—RESPONDENT.

Hindu Law—Stridhanam—*Order of Succession*—*Husband's* sapindas—*Widow's blood relations*—*Mother preferred to brother*—*Brother's widow not entitled*—*Suit against trespasser*—*Plaintiff to prove his own title.*

The *stridhanam* of a Hindu female, married according to an orthodox form and dying without issue, devolves on her husband, and failing her husband, on his *sapindas* in the order laid down in the *Mitakshara* with reference to the succession to the property of a male.

On failure of the husband's *sapindas* qualified to succeed, the widow's blood relations would succeed to the exclusion of the Crown. As between the mother and the brother, the mother is the preferential heir.

A brother's widow is no doubt a *gotraja sapinda*, but she is not entitled to succeed as an heir under the Madras system of inheritance.

A plaintiff seeking to oust a trespasser in possession must prove his own title.

Second appeal against the decree of the District Judge of North Arcot, in Appeal No. 128 of 1908, presented against that of the District Munsif at Ranipet, in Original Suit No. 16 of 1907.

Messrs. *T. R. Ramachandra Aiyar* and *P. Elayalwar Aiyangar*, for the Appellant.

The Hon'ble Mr. *L. A. Govindaraghava Aiyar*, for Respondents Nos. 1 and 2.

JUDGMENT.—The suit out of which this second appeal arises was brought by the mother and brother of one Manikkammal (deceased) to recover, with mesne profits, certain lands belonging to her, which are now in the possession of first defendant, who is the widow of Manikkammal's husband's bother.

It may be premised that both Manikkammal's husband and his brother (first defendant's husband) predeceased Manikkammal: and that the findings of the lower Courts, (*a*) that the property was of the nature of *stridhanam* and (*b*) that Manikkammal's marriage was in an approved form, are not now contested.

The District Munsif dismissed the suit on the ground that first defendant was the proper heir to the suit property: but the District Judge found (1) that first defendant was not an heir at all, (2) that second plaintiff was in the line of succession and (3) that in the absence of any allegation in defendants' written statement of the existence of a nearer heir, second plaintiff was entitled to succeed. He accordingly gave a decree for possession of the suit lands, though without mesne profits which were not proved.

All the above points (and no others) have been argued before us.

As regards the first point, the principles governing succession to the *stridhanam* of a Hindu female, married according to an orthodox form and dying without issue, have been considered in a very recent judgment of this Court to which one of us was a party. *Marya Pillai* v. *Sivabagyathachi* (1). It was held that such property devolved on her husband and, failing her husband, on his Sapindas *in the order laid down in the* Mitakshara *with reference to the succession to the property of a male.* No authority has been quoted for the suggestions of the learned Vakil for appellant that the term *sapinda* in *Mitakshara*, Chapter II, section 11, plac. 11, should be understood in a different sense to that in which it would be used in reference to inheritance from a male; and applying this test to the case before us, we must hold that first defendant cannot be recognised as an heir.

A brother's widow is, no doubt, a *gotraja sapinda*: but it does not follow that she is entitled to succeed as an heir, and as a fact under the Madras system of inheritance she is not.

This is clearly laid down in *Balamma* v. *Pullayya* (2): "The law as settled in this Presidency is that a widow can only succeed to her husband's property which was actually vested in him either in title or in possession at the time of his death. As observed by Mr. Mayne, she must take at once at her husband's death, or not at all. No such right can accrue to her as widow in consequence of the subsequent death of any one to whom her husband would have been heir if he had lived."

Neither of the cases quoted by appellant's Vakil, *Mari* v. *Chinnammal* (3) and

(1) 12 Ind. Cas. 128; (1911) 2 M. W. N. 168; 21 M. L. J. 850; 10 M. L. T. 494; 36 M. 116.
(2) 18 M. 168 at pp. 169, 170; 5 M. L. J. 22.
(3) 8 M. 107 (F. B.).

Venkatasubramaniam Chetti v. *Thayarammah* (4), are in any way opposed to this. The former indeed contains a specific expression of the same opinion (*vide* page 129, Muttuswami Ayyar, J.). The latter recognises the claims of a husband's brother's *daughter* (not wife) to succeed as a *bandhu* to a woman's *stridhanam*,—a totally different case.

Passing to the second point, it is argued on behalf of the appellant that on failure, of husband's *sapindas* qualified to succeed the line of succesion is exhausted, and the property escheats to the State.

This is a doctrine contrary to the general spirit of Hindu Law of inheritance, and one to which we should be loth to give effect. It is unsupported by any text to which our attention has been drawn. No ruling has been quoted on either side, but Dr. Bannerjee in his Hindu Law of Marriage and Stridhanam discusses the point, and comes to the conclusion that the widow's blood relations would, at any rate, succeed to the exclusion of the Crown (see page 378). The same view is deducible from West and Buhler, page 544: and we concur in it.

It may be remarked here that although there is no contest between the two plaintiffs, the learned District Judge is in error in giving the decree in favour of second plaintiff. As remarked by Dr. Bannerjee in the passage quoted above, the mother (first plaintiff), and not the brother, is the preferential heir, and respondents' Vakil agrees that the decree must be modified in this respect.

There remains only the third point, regarding which the District Judge appears to us to be in error. On the findings indicated above first defendant is in the position of a mere trespasser: but it is nonetheless necessary for plaintiffs, who seek to oust her, to prove their own title. Her failure to plead a *jus tertii* does not absolve them of this duty. We must, therefore, call for a finding on the following issue:

At the time of the death of Manikkammal, were plaintiffs the nearest heirs to her?

Fresh evidence may be adduced by either side: the finding should be submitted in six weeks and seven days will be allowed for filing objections.

In compliance with the above order the District Judge of North Arcot submitted the following

ORDER.—I have been directed to return a finding on the following issue, *viz.*: "Whether at the time of the death of Manikkammal, plaintiffs were the nearest heirs to her."

The Vakils who appeared for the appellants and respondents in the High Court stated that they had no instructions and did not propose to call any evidence. I am unable from the records to record any finding on the issue sent down.

This second appeal coming on for hearing after receipt of the report from the lower Appellate Court in pursuance of an order of the High Court, dated 27th September 1911, calling for a finding the Court (the Chief Justice and Ayling, J.) made the following

ORDER.—The Vakils on both sides now say their clients are in a position to adduce evidence. The case will go back to the District Court for a finding on the issue framed on the 27th September 1911 in the above second appeal.

The finding will be submitted within one month after the re-opening of the District Court and the parties will be at liberty to file memorandum of objections to the said finding within seven days after notice of return of the same shall have been posted up in this Court.

In compliance with the above order, the District Judge of North Arcot submitted the following

FINDING.—I have been directed to return a finding on the following issue: "Whether at the time of the death of Manikkammal, plaintiffs were the nearest heirs to her?"

Three witnesses were examined on behalf of the first defendant (appellant in the High Court). The plaintiffs (respondents in the High Court) did not appear in person and were not represented by a Vakil. It appears from the evidence of the witnesses examined before me that one Yesotha Nainar, the father-in-law of first defendant and the deceased Manikkammal, had an elder brother named Santhinatha Nainar who is dead. The latter had a son Appasami Nainar who died leaving him surviving

(4) 21 M. 263.

two sons, Yesotha Nainar and Santhinatha Nainar, who are alive. The father of Yesotha Nainar (first defendant's father-in-law) had a younger brother named Santhinatha Nainar who is dead. It is stated that he had four sons who are now living. Their names are Appachi Nainar, Ananthanatha Nainar, Lokapala Nainar and Jenathos Nainar. Plaintiffs in the suit are respectively the mother and brother of the deceased Manikkammal. The evidence of the witnesses examined before me appears to be trustworthy and is not contradicted. I would, therefore, return a finding that the plaintiffs were not the nearest heirs to the deceased Manikkammal at the time of her death and her nearest heirs were her husband's *dayadis*, Yesoda Nainar, Santhinatha Nainar, Appachi Nainar, Ananthanatha Nainar, Lokapala Nainar and Jenathos Nainar. The two former appear to be the nearest heirs being the grandsons of Manikkammal's husband's father's brother.

This second appeal coming on for final hearing after the receipt of the finding from the lower Appellate Court, the Court delivered the following

JUDGMENT.—The respondents do not appear and there is no memorandum of objections.

On the finding which we accept, the decree of the District Judge is set aside and that of the Munsif restored with costs here and in the lower Appellate Court.

The Vakil for respondents appeared later and said he did not contest the findings.

Decree set aside.

CALCUTTA HIGH COURT.

CIVIL APPEAL FROM ORDER NO. 418 OF 1912.

January 13, 1914.

Present:—Mr. Justice Carnduff and Mr. Justice Richardson.

HARI CHARAN SAHA AND OTHERS—DEFENDANTS—APPELLANTS

versus

BARAN KHAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLIII, r. 1 (w), O. XLVII, r. 7—Review—Order granting review—When appealable.

Order XLIII, rule 1, clause *(w)* of the Code of Civil Procedure, must be read with, and subject to, rule 7 of Order XLVII of the Code, and an order granting an application for review may be appealed against only on grounds mentioned in rule 7 of Order XLVII.

Appeal against the order of the Officiating Subordinate Judge of Backergunge, dated May 3rd, 1912.

Babu *Dwarka Nath Chuckerbutty* (with him Babu *Gopal Chandra Dass*), for the Appellants.

Babu *Heramba Chandra Guha*, for the Respondents.

JUDGMENT.—This is an appeal against an order granting a review of judgment.

The first question that arises is whether it is competent or not.

Order XLVII, rule 7, of the Civil Procedure Code, provides that an order rejecting an application for review shall not be appealable, but that an order granting such an application may be objected to on certain grounds. None of those grounds can be asserted in this case, and it is quite clear that, in so far as rule 7 of Order XLVII goes, no appeal lies.

But it is contended that an appeal lies under Order XLIII, rule 1, clause (*w*), which provides in general terms for an appeal against "an order under rule 4 of Order XLVII granting an application for review."

It has, on at least three occasions, been held by this Court that Order XLIII, rule 1, clause (*w*), must be read with, and subject to, rule 7 of Order XLVII. We refer to the decisions in *Jagar Nath Prosad Singh* v. *Ramavatar Singh* (1), *Tripura Charan Kul* v. *Shoroshi Bala* (2) and *Surendra Nath Talukdar* v. *Sitanath Das Gupta* (3). Following those three decisions we must hold that this appeal is incompetent and should be dismissed with costs.

Appeal dismissed.

(1) 14 Ind. Cas. 39.
(2) 22 Ind. Cas. 773.
(3) 21 Ind. Cas. 943.

MAHRAJA *v.* SUKHRANI.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 110 OF 1912.

August 28, 1914.

Present:—Mr. Stuart, J. C., and Mr. Kendall, A. J. C.

Musammat MAHRAJA—PLAINTIFF—APPELLANT

versus

Musammat SUKHRANI—DEFENDANT—RESPONDENT.

Partition suit between two widows—Minor heir not made party—Minor's title to share in deceased's estate recognised—Decree absolute refused until security for person and property of minor given by one of widows—Jurisdiction—Security, order as to, ultra vires—*Plaintiff entitled to unconditional decree.*

In a partition suit between two Hindu widows it transpired that there also existed a minor heir to the deceased, who was living with the defendant widow and was not made a party to the suit and whose title to a certain fixed share in the deceased's estate was recognised. The Court ordered that the minor should live with one of the widows and that no decree absolute for partition should be passed if either of the widows failed to produce security for the proper care and maintenance of the minor and her property:

Held, that the Court had no jurisdiction to impose any conditions as to the security and that the plaintiff widow was entitled to an unconditional decree for the partition of her share.

Appeal from the decree of the Subordinate Judge, Rae Bareli, dated 28th May 1912.

Syed *Wazir Hasan*, for the Appellant.

Pandit *Gokaran Nath Misra*, for the Respondent.

JUDGMENT.—The parties to the suit out of which this appeal has arisen, are the two widows of one Raghunandan Prasad. Plaintiff, now appellant, brought this suit for partition of her half share on the allegation that disputes had arisen between the two widows.

In the course of the suit it transpired that there was in existence another heir, *Musammat* Chabilia, daughter of a third wife who predeceased her husband. She was not made a party by the plaintiff, nor did the lower Court cause her to be made a party. Her existence, and her right to a share of one-eighth in the deceased's estate, is recognised, and it is out of the manner with which this portion has been dealt with by the lower Court that this appeal has arisen.

Musammat Chabilia is a minor, the lower Court has not found where the child is living, but in this Court the defendant has stated that the child is with her, and the appellant does not dispute this. The point is of no great importance.

The lower Court finds that the child should live with one of the parties. It has ordered that if the defendant files security in Rs. 3,000 within one month, binding herself to maintain the minor and to get her suitably married out of the income of the estate, and not to cause waste of the property of the minor, then she, the defendant, may take the child and her property into her guardianship, and that if she fails to produce such security then the plaintiff will be entitled to guardianship of the child. It has further found that if both parties fail to give security for the proper care and maintenance of their niece, no decree absolute for partition shall be passed, and that if the defendant, or on her failure the plaintiff, do so produce security the partition shall be carried out by an *Amin*; and the partition is ordered to be by a division into three shares, *viz.*,—

7 annas for the plaintiff.

7 annas for the defendant.

2 annas for the niece, who is no party to the suit.

Presumably it proposed that the daughter's share was to be administered by the party producing security, the defendant having a prior right.

The parties to this appeal are both agreed that this decree is eminently unsatisfactory; the appellant prays for an unconditional decree, and urges that the lower Court had no jurisdiction to impose such a condition as has been ordered.

We agree that the conditions are quite out of place in this suit, nor do they appear to be in any way efficient even if they could be otherwise supported.

It being admitted that *Musammat* Chabilia is entitled to a 2-annas share, there remain 14 annas for distribution and of this the plaintiff is entitled to 7 annas. The plaintiff admits that she cannot be entitled to more. The matter seems to us quite clear. The plaintiff is entitled to 7 annas and, otherwise upholding the findings of the lower Court, we direct that *Musammat* Mahraja,

plaintiff, is to receive a 7-annas share by partition, and this partition the lower Court will carry into effect according to law. It might be well for *Musammat* Sukhrani, defendant, to apply to the District Judge for a certificate of guardianship under the Guardians and Wards Act in respect of the person of her minor niece, and of the undivided 2-annas share in the remaining 9 annas which are remaining in her possession as a result of this decree. And it was beyond the province of the lower Court to impose any conditions upon and to call for any security from the defendant with respect to her position as *de facto* guardian in possession.

We may note that the parties were agreed before us as to the form of decree now prescribed. The decree of the lower Court is varied accordingly. In the circumstances let the parties bear their own costs in this Court.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 183 OF 1913.

June 5, 1914.

Present:—Mr. Stuart, J. C.

RAM ADHIN MISRA—DEFENDANT—APPELLANT

versus

SITLA BAKHSH SINGH AND ANOTHER—PLAINTIFFS AND PIRTHI SINGH—DEFENDANT NO. 2—RESPONDENTS.

Mortgage—Subsequent deed of mortgage creating personal covenant not to redeem prior mortgage before satisfaction of subsequent mortgage, effect of.

Where the executant of a deed of mortgage executes a subsequent deed, by which he creates a personal covenant not to redeem the prior mortgage until he has satisfied the amount due on the subsequent deed:

Held, that the covenant can be enforced against him personally, but not against a subsequent transferee of the mortgaged property.

Hari Mahadaji Savarkar v. *Balambhat Raghunath Khare*, 9 B. 233; *Sada Sheo* v. *Mahabir Prasad*, 11 O. C. 248, distinguished.

Appeal against the decree of the District Judge, Fyzabad, dated 7th February 1913, upholding that of the Munsif, Akbarpur, dated 6th September 1912,

Mr. *J. P. C. Bhattacharji*, for the Appellant.

Mr. *Mumtaz Husain*, for the Respondents.

JUDGMENT.—In this case Dip Narain executed a deed of usufructuary mortgage, dated 5th June 1894, in favour of Ram Adhin and, on 4th June 1896, borrowed Rs. 99 from Ram Adhin and executed a registered deed in his favour, which he described as a deed of further charge and by which he agreed that, until he had satisfied the amount due under the deed of 4th June 1896, he should not be permitted to redeem the deed of 5th June 1894. Subsequently Dip Narain died and his rights under the deed passed to his son Pirthi Singh. Pirthi Singh executed a deed of usufructuary mortgage, dated 9th November 1907, in favour of the plaintiffs, Sitla Bakhsh Singh and Amres Singh. It was necessary for the plaintiffs to redeem the deed of 5th June 1894 before they could obtain possession under the deed dated the 9th November 1907. They sued for redemption of the deed of 5th June 1894 accordingly. Ram Adhin met their suit, amongst other pleas, with the plea that it was necessary for them to satisfy the amount due under the deed of 4th June 1896 before they could obtain possession of the mortgaged property. This point has been decided against Ram Adhin by the learned District Judge. He appeals to this Court. Certain points are raised in his grounds of appeal which have been withdrawn in argument.

The only point for decision is, whether the plaintiffs should satisfy the amount due on the deed, dated 4th June 1896, before they can enter into possession of the mortgaged property. It is necessary to decide first the nature of this deed. In the body of the deed there is nothing to show that any interest in immoveable property is transferred, and if the deed stood alone, it could not possibly be considered as other than a simple bond for the payment of money in return for consideration received. The fact that a mortgage existed and that the executant of the deed covenanted that he should not be allowed to redeem that mortgage until he had satisfied the deed, does not render the deed a deed of mortgage or a deed of further charge, and the fact that the deed is described as a deed of further charge has also not the effect of making it a deed of further charge. Examining the deed, I find that it is a simple

deed and not a deed of further charge. There is considerable diversity of opinion as to whether a condition in a deed of this nature deferring redemption of a mortgage until the amount due under such a deed is satisfied, can be enforced against the executant. It may be taken that this Court holds that the terms of such a deed can be enforced against the executant, but the further point remains,—can they be enforced against an assignee? There is authority both for and against such enforcement. This question has not yet been decided by this Court. There is a decision in *Sada Sheo* v. *Mahabir Prasad* (1) in which Mr. Chamier refused to enforce what purported to be a second mortgage. But in that case the alleged mortgage was contained in an unregistered deed. I have considered the authorities for and against the appellant on the point and have listened with great interest to the arguments of the learned Counsel on both sides. I consider that the point is correctly decided by the decision in *Hari Mahadaji Savarkar* v. *Balambhat Raghunath Khare* (2), which lays down that by the execution of such a deed no further charge is created on the mortgaged premises. The original mortgagor who passes such bonds is under a personal covenant to comply with their provisions and can be prevented from redeeming the mortgage without paying the amounts due on such deeds. But this personal liability is that of the mortgagor alone, not that of his transferee, and a subsequent mortgagee is not liable under the conditions of such a deed.

For the above reasons I find that the contention of the appellant must fail, and I, therefore, dismiss this appeal. The appellant will pay his own costs and those of the respondents.

Appeal dismissed.

(1) 11 O. C. 248
(2) 9 B. 233.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1569 OF 1912.

September 10, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

PEETIYAKKAL VATAKKA PURAYIL MULLAHI-DEFENDANT No. 5—APPELLANT

versus

MARAKKARAKATH AHAMMAD AND OTHERS—PLAINTIFFS Nos. 1 TO 4 AND DEFENDANTS Nos. 1 TO 4 AND 6 TO 11—RESPONDENTS.

Civil Procedure Code (Act V of 1908) s 63 - Successive attachments by two Courts - Sale under second attachment, whether effectual.

Where there are two successive attachments of the same property under the decrees of two different Courts, it is only the Court which first attached the property that can bring it to sale A sale by the other is ineffectual and no suit is necessary to set it aside

Second appeal against the decree of the District Court of North Malabar, in Appeal Suit No. 261 of 1911, preferred against that of the District Munsif of Quilandy, in Original Suit No. 553 of 1909.

Mr. *K. Govinda Marar*, for the Appellant.

Mr. *C. V. A. Iyer*, for the Respondents.

JUDGMENT.—The only point for decision is whether the Court sale on 7th June 1899 evidenced by Exhibit XV is valid or not. The lower Courts have both held that at the time it took place, the property sold was under two attachments (1) in pursuance of a Small Cause decree (*vide* Exhibit XXIV), dated 24th March 1889 and sent for execution to the District Munsif, the attachment being effected in 1898, and (2) in pursuance of a decree of the Subordinate Judge's Court (Exhibit XXVIII), dated 24th August 1887, the attachment being effected on the 8th October 1890.

Both Courts have found as a fact that the attachment under the Subordinate Judge's Court's decree was still in force at the time of Exhibit XV. It is argued for the appellant that the lapse of time between 1890 and 1899 is by itself sufficient ground for presuming that the attachment had been released. The only authority he quotes for this contention is a decision of the High Court reported as *Musammat Goonjessur Koonwar* v. *Luchmee Narain Singh* (1). We

(1) 20 W. R. 418.

are fully alive to the practical inconvenience of allowing attachments to remain effective for such long periods: but we cannot treat this single ruling dating from so long ago as 1873 as justifying us in departing from the usually observed rule that under the old Code an attachment not shown to have been released remained in force. If the attachment of the Subordinate Judge's Court was still in force, then under section 285 of the old Code, it was for that Court alone to bring the property to sale. Appellant quotes *Kunhayan* v. *Ithu Kutti* (2); but this is of no use to him.

In the present case the Munsif has found that Pookunhi Koya (appellant's predecessor-in-title) was aware of the attachment; and from the tenour of his judgment we must understand the District Judge to concur in this finding, though he would have done well to have said so specifically.

Appellant's last contention is that although in consequence of the Pookunhi Koya's having notice of the Subordinate Judge's Court's attachment his sale is liable to be set aside, this can only be done by a suit specially brought for that purpose. No authority is quoted for this and we cannot accept it.

The second appeal must be dismissed.

Appeal dismissed.

(2) 22 M. 295; 9 M. L. J. 1.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL APPLICATION No. 23 OF 1914.

July 17, 1914.

Present:—Mr. Kendall, A. J. C.

GHAZANFAR HUSAIN—JUDGMENT-DEBTOR—APPLICANT

versus

Lala RAM RATAN AND ANOTHER—DECREE-HOLDERS AND JAGAN NATH PRASAD—AUCTION-PURCHASER—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Formal array of parties in preamble of application, necessity of.

There is no absolute necessity for a judgment-debtor, filing an application under Order XXI, rule 90, Civil Procedure Code, to set out in the preamble of the application any formal array of parties and, therefore, such an application should not be thrown out simply because an auction-purchaser was not shown therein as a party.

Surendra Mohini Debi v. *Loharam Chattopadhya*, 14 Ind. Cas. 67; 16 C. W. N. 570, 39 C. 687, referred to.

Appeal against the order of the District Judge of Fyzabad, dated 25th November 1913, upholding that of the Subordinate Judge, Fyzabad, dated 28th July 1913.

Syed *Ali Mohammad*, for the Applicant.

Babu *Basudev Lal*, for the Opposite Party.

JUDGMENT.—The applicant in this Court was the judgment-debtor, whose property was sold on the 20th of May 1913 by Lala Ram Ratan, opposite party, in the execution of the latter's decree. On the 2nd of June 1913 the applicant filed an application before the lower Court under Order XXI, rule 90, to have the sale set aside. With the merits of that application this Court is not at present concerned. A date was fixed for disposal and meanwhile, on the 21st of June 1913, he filed an application that notice should also go to the auction-purchaser. The lower Courts have agreed in rejecting the application, dated the 2nd June 1913, *in toto*, on the grounds that the auction-purchaser was a necessary party, and that he had not been impleaded within the statutory period of 30 days—*vide* Article 166 of the Limitation Act, Schedule I. They have relied on a ruling in *Karamat Khan* v. *Mir Ali Ahmed* (1). That ruling as also another ruling in *Ali Gauhar Khan* v. *Bansidhar* (2) was dissented from in *Surendra Mohini Debi* v. *Loharam Chattopadhya* (3), the head note of which is to the effect that an auction-purchaser is not a necessary party to an application under section 311 of the Code. Order XXI, rule 90, has taken the place, in the present Code, of the old section 311. The applicant has, therefore, come to this Court arguing that his application was not barred by limitation; and that the Court of first instance has failed to exercise a jurisdiction vested in it or, at any rate, has acted in the exercise of that jurisdiction illegally. The learned Advocate for the opposite party has referred this Court to *Ram Shankar Pershad* v. *Gobardhan Das* (4) which followed an apparently unreported ruling of

(1) A. W. N. (1891) 121.
(2) 15 A. 407; A. W. N. (1893) 173.
(3) 14 Ind. Cas. 67; 39 C. 687; 16 C. W. N. 570.
(4) Select Case No. 289.

a Bench of this Court, *Raja Udai Narain Singh* v. *Bank of Upper India, Lucknow* (5) and which followed *Ganga Prasad* v. *Jag Lal Rai* (6). He has argued, therefore, that if this Court is of opinion that the Bench ruling referred to should not be followed, this present application should be referred to a Bench. The ruling, however, was passed under the old Code of Civil Procedure. In Order XXI, rule 92, of the present Code an additional proviso has been added to the following effect :—"Provided that no order shall be made (under rule 89, rule 90 or rule 91) unless notice of the application has been given to all persons affected thereby." This proviso was not in the former Code; and the law, therefore, on this point is not the same as it was at the time the Bench ruling was promulgated.

It is quite clear that the ruling in *Surendra Mohini Debi* v. *Lohoram Chattopadhya* (3) is correct and ought to be followed. The present misapprehension has arisen over the entirely unnecessary use, in this connection, of the word " party." Rule 90 provides that any person whose interests are affected by the sale may apply to the Court to set aside the sale on certain grounds; and Article 166 of the first Schedule to the Limitation Act provides that that application must be filed within 30 days of the date of sale. There is, in my opinion, no necessity whatever for a judgment-debtor filing an application under rule 90 to set out any formal array of parties. His is an application which would be sufficiently described as an application under Order XXI, rule 90, in case number so-and-so of such-and-such year, *A B* plaintiff v. *C D* defendant. Rule 92 being considered the Court will then call upon him to file the necessary process-fees for notices to be issued. If the judgment-debtor or other person whose interests are affected by the sale make his application within the prescribed time, that application is in form and he is entitled to have it heard and adjudicated upon.

In coming to the above decision this Court is dissenting from *Ram Shankar Pershad* v. *Gobardhan Das* (4) and from the apparently unreported Bench ruling. But as noted above I am of opinion that it is entitled to do so, the law not being exactly the same as the law of which those rulings are an interpretation.

The application is, therefore, allowed and the order of the Courts below is set aside. The Court of first instance should now take up the application and dispose of it according to law. Applicant may have his costs in this Court and in that of the District Judge and they should be set off against what is due from him under the decree out of which these proceedings have arisen.

Application allowed.

(5) Mis. App. No. 108 of 1891.
(6) 11 A. 333; A. W. N. (1889) 115; 13 Ind. Jur. 471.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 87 OF 1913.
October 22, 1914.

Present:—Mr. Lindsay, J. C.

ORI LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

MUHAMMAD YAKUB AND OTHERS—PLAINTIFFS—RESPONDENTS.

Declaratory relief—Discretion of Court—Muhammadan's right to sacrifice cattle—Cow-sacrifice—Slaughter of cattle for purpose of food, right as to—Common Law right—Denial, bare, of general right—Specific Relief Act (I of 1877), s 42—Decree, purely declaratory and incapable of execution, not to be passed.

The grant of declaratory relief is a matter within the discretion of the Court.

A Muhammadan's right to sacrifice cattle is one which he enjoys in common with all those who profess the religion of Islam; and his right to slaughter cattle for the purpose of food is the Common Law right which every man enjoys in accordance with the principle *sic uteri tuo ut alienum non lædas* (*i.e.*, a man is entitled to enjoy his own property in such a manner as he chooses provided that in doing so he does not invade the legal rights of his neighbour).

A bare denial of a general right arising out of the common or personal law, *e.g.*, right to personal safety or freedom or to reputation or a Muhammadan's right to sacrifice cattle or slaughter them for the purpose of food, does not amount to such an infringement of the right as to justify the granting of a declaration.

Shahbaz Khan v. *Umrao Puri*, 30 A. 181; 5 A. L. J. 147; A.W.N. (1908) 64; 7 Cr. L. J. 381, distinguished from.

The general policy of section 42 of the Specific Relief Act is to enable the Courts to grant relief where no relief at Common Law is available and not that the Courts should make declarations of abstract right exclusive of practical equity.

ORI LAL v. MUHAMMAD YAKUB.

A Court ought not to pass a declaratory decree when it practically confers no benefit upon the plaintiff.

Appeal from the decree of the District Judge, Hardoi, dated 13th June 1913.

Messrs. *F. G. D. Lincoln* and *A. P. Sen*, for the Appellants.

Mr. *St. G. Jackson*, Mirza *Sami Ullah Beg* and Mr. *Wasi-ul-Hasan*, for the Respondents.

JUDGMENT.—This is an appeal from a decree of the District Judge of Hardoi passed in a suit brought by three Muhammadan plaintiffs against four Hindu defendants for the purpose of obtaining a declaration that plaintiffs and the other Sunni Muhammadans of the town of Bilgram are entitled to slaughter cows inside their houses at all times for purposes of sacrifice as well as for other necessities.

This declaration was sought as against the defendants "and other Hindus of Bilgram."

In the plaint it was stated that the plaintiffs were suing on their own behalf and as representatives of the Sunnis of Bilgram; it was also stated that the four defendants were representatives of the Hindu community of the town. In order that the suit might be treated as a representative suit an application was made by the plaintiffs purporting to be one under Order I, rule 8, of the Code of Civil Procedure. In this application after having recited the fact that the suit was being brought on behalf of all the Sunnis of Bilgram the plaintiffs declared it would be exceedingly inconvenient if all these persons had to attend in Court. Similarly it was alleged that the four defendants were the leaders (*sarghana*) of the Hindu community and might be treated as representing the entire body in the suit. Accordingly they asked the Judge to issue a notice under the provisions of Order I, rule 8, sub-rule (1).

The learned Judge, however, refused to make such an order. In dealing with this matter he referred in the first place to the allegations contained in the plaint in which were set out the facts said to constitute the causes of action. In the fifth paragraph of the plaint it was stated that in the year 1911 when the plaintiffs had desired to sacrifice a cow at the time of the *Id-uz-Zuha*, they had been frustrated in their purpose by the "adverse action of all the Hindus and particularly of the defendants."

The particular act of hostility here referred to was the making of some application to an Honorary Magistrate as the result of which he stopped the sacrifice pending the orders of the District Magistrate, impounded the cow and bound over the plaintiffs and the defendants in this suit to keep the peace.

The learned Judge (though he did not correctly interpret the statements made in this paragraph of the plaint) held that the facts as alleged did not constitute any cause of action as against the Hindus of Bilgram in general and that it could not be said that all the Hindus of Bilgram had the same interest in the suit as the defendants.

The Judge next dealt with the allegations in paragraph 6 of the plaint in which it was stated that in December 1911 an order was passed by the Deputy Commissioner of Hardoi putting an end to the sacrifice of cows in Bilgram. It was not stated in this paragraph of the plaint what the Hindus of Bilgram in general or the defendants in particular had to do with the issue of any such order, assuming (for it has not been proved) that any such order was ever in fact passed. Probably the meaning was that the order had been given out in consequence of some report made to the Deputy Commissioner by the Honorary Magistrate referred to in the preceding paragraph of the plaint. The learned Judge speaking of this order describes it as a general cause of action affecting all the Muhammadans of Bilgram, but he does not explain against whom the cause of action had arisen in this connection. He then went on to point out that the plaintiffs wished to sue on behalf of the Sunni Muhammadans alone because the Shia Muhammadans had refused to join in the suit, but that the right to do sacrifice (*qurbani*) was not confined to the Sunnis alone. He added that in any case there was nothing to show that the other Sunnis of Bilgram had any desire to be represented in the suit by the plaintiffs. In short, what the Judge decided was that the claim of the plaintiffs to represent all their Sunni brethren was not established and that there could be no reason for assigning to the defendants, even if they were willing to accept it (which they were not), the character of representatives of the Hindu population of Bilgram. As the Judge said, there was nothing to show any community of interest between the defendants and the other

Hindus. This order of the Judge, therefore, deprived the suit of the representative character which the plaintiffs sought to attribute to it and the case then proceeded as one between three plaintiffs on one side and four defendants on the other. For the suit on this footing a cause of action was discovered in the 7th, 8th and 9th paragraphs of the plaint, the facts alleged being that the plaintiffs had in October 1912 made an application to the Deputy Commissioner for permission to sacrifice, that a Deputy Magistrate had been deputed to make an inquiry into the matter and that the defendants had, in the proceedings thereupon taken by the Deputy Magistrate, filed a reply to the plaintiffs' petition in which they denied the right to do cow sacrifice in Bilgram. It was not made to appear that these defendants did anything more than file this reply before the Deputy Magistrate, or that any obstruction of the (plaintiffs') rights ensued from the denial contained in the statement put in by the defendants; for according to the statement in the 9th paragraph of the plaint the plaintiffs withdrew their application to the Deputy Commissioner before any order was passed and intimated their intention of seeking relief in the Civil Courts. The result of the trial, therefore, has been that a decree has been given to the plaintiffs as against the defendants declaring that they have the right claimed, namely, " to kill cows in their houses for sacrifice or other purposes, provided that in the exercise of such right they do not commit a nuisance or offend any rule or regulation lawfully promulgated and applicable to Bilgram."

No injunction was sought in the plaint and no such relief has been awarded by the decree.

The defendants have appealed on seven grounds set out in their petition of appeal. For the purpose of disposing of the case it will be sufficient for me to deal with one of them only, namely, the sixth in which it is contended that under the circumstances no declaratory decree should have been made.

It has been argued on behalf of the appellants that section 42 of the Specific Relief Act, the section under which the suit was laid, has no application in this case because, it is said, the right with respect to which the declaration has been sought is not a "right as to any property" within the meaning of that expression as used in section 42. The proposition is, I think, an arguable one, but I do not consider it necessary here to discuss the question of the applicability of section 42 to the case on this ground. I shall assume that the suit does lie under section 42 and confine myself to the question whether upon the facts disclosed, the case is one in which a declaratory decree should have been passed. The grant of relief of this description is a matter within the discretion of the Court, and in deciding this appeal I am not unmindful of the authorities which lay down that a Court of appeal should be slow to interfere in cases where this discretion has been exercised by the Court below. That the learned Judge of the lower Court appreciated the fact that he had a discretion to grant or withhold the relief, is apparent from the language of the twelfth issue framed by him at the time of the trial: that issue reads: –

"(12) Is the declaration sued for one which

(*a*) the Court can grant?

(*b*) the Court ought to grant?."

In the portion of this judgment of the 12th June 1913 the learned Judge dealt with the first part of this issue and decided upon the authority of a ruling of the Allahabad High Court, *Shahbaz Khan* v. *Umrao Puri* (1) that the Court could grant the relief.

As regards the second part of the issue 12 (*b*), all that the Judge remarked in this portion of the judgment was that he was not prepared at that stage of the proceedings to say that the discretion should be exercised against the plaintiffs.

From this observation it might be inferred that the Judge intended to discuss the question of discretion at a later stage of the trial. But he finally disposed of the case by an order passed on the following day, the 13th June, and reading that order I have been unable to find any discussion at all of the question whether or not the case was a proper one in which the Court's discretion should be exercised in the plaintiffs' favour so as to give them the declaration they asked for. In these circumstaces it

(1) 30 A. 181; 5 A. L. J. 147; A. W. N. (1908) 64; 7 Cr. L. J. 381.

is not possible to argue that the question of discretion is one which cannot be debated here.

To turn now to the nature of the right asserted by the plaintiffs in this case. So far as it relates to the sacrifice of cattle, they say it is a right under their religious law which enjoins them to make such sacrifices. As to their right to slaughter their cattle for the purpose of food, that, I take it, is based upon the Common Law principle embodied in the maxim, *sic uteri tuo ut alienum non lædas*, that is to say, a man is entitled to enjoy his own property in such a manner as he chooses provided that in doing so he does not invade the legal rights of his neighbour.

It is not, of course, contended that the right so set up is in any way peculiar to the three plaintiffs in this case. So far as it relates to sacrifices, the right is one which they enjoy in common with all those who profess the religion of Islam: while so far as the slaughter of cows for the purpose of food is concerned, the right is the Common Law right which every man enjoys in accordance with the principle above referred to. This being so the question arises whether in a case like the present, where the only tangible act of denial of the right alleged is the fact that the defendants on one occasion in a petition filed before a Magistrate by way of reply to a petition put in by the plaintiffs themselves denied the right now set up by the plaintiffs, the bare denial of the right constitutes such an invasion of it as would justify the granting of declaratory relief. In my opinion the question must be answered in the negative. A bare denial of the general right of this character does not amount to such an infringement of the right as renders it expedient to grant the plaintiffs a declaration. It is hardly to be imagined that a person who under the Common Law has a right, say to personal safety or freedom or to reputation, can come to Court with a suit under section 42 and ask for a declaration against another person whose interference with the exercise of the right has been confined to a bare statement that the right does not exist. It does not appear to me that section 42 of the Specific Relief Act was designed to meet cases of this kind. The general policy of the section appears to be to enable the Courts to grant relief where no relief at Common Law is available, and it is not intended that the Courts should make declarations of abstract right exclusive of any practical equity.

Further, there is the consideration of the nature of the relief awarded in this case. At the time of arguing the appeal, I asked the learned Counsel for the respondents in what way his clients derive any benefit from the declaration which has been given to them. All he could say was that the passing of this decree operates in some way to close the mouths of these particular defendants so as to prevent them in future from repeating their denial of the plaintiffs' right. But the decree as it stands is purely declaratory and as such is incapable of execution, so that no steps under this decree could be taken against these defendants in case they thought fit again to deny the right which the plaintiffs put forward in this case. It appears to me, therefore, that this decree leaves the parties exactly where they were before and has in no proper sense of the word conferred any relief upon the plaintiffs. I may remark here that the plaintiffs have accepted the decree for, although they have filed objections by way of cross-appeal, those objections have not been pressed here.

The result, therefore, is that for the reasons above stated I have come to the conclusion that in view of the facts alleged and proved there was no ground upon which the discretion of the lower Court could be properly exercised in the plaintiffs' favour so as to give them this decree.

With regard to the ruling of the Allahabad High Court in *Shahbaz Khan* v. *Umrao Puri* (1) upon which the lower Court acted and upon which the respondents' learned Counsel has relied strongly in this appeal, all I need say is that one case cannot be decided upon the facts of another and that in the present instance I cannot treat the ruling in question as an authority applicable to the facts of this case, which are not in all respects similar to the facts which their Lordships of the Allahabad Court had to consider.

I allow the appeal, set aside the decree of the Court below, and direct that the plaintiffs' suit be dismissed with costs. The respondents will pay the appellants' costs of this

appeal. The cross-objections filed by the respondents are dismissed for want of prosecution.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 234 OF 1913.

August 10, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C.

DURGA SINGH AND ANOTHER—PLAINTIFFS —APPELLANTS

versus

Nawab Mirza MUHAMMAD RAZA HUSAIN KHAN—DEFENDANT—RESPONDENT.

[*Mortgage — Redemption not before certain date—Covenant in mortgage-deed, effect of—Court's power to allow redemption irrespective of oppressive and unreasonable terms in mortgage-deed.*

As a general rule a mortgagor cannot compel the mortgagee to accept payment of the mortgage-money before the date fixed for redemption, where there is a covenant in the mortgage-deed that redemption shall not take place before that date. But a mortgagor cannot be precluded by any covenant from redeeming altogether, and where the effect of a covenant is to postpone redemption for an unduly long period without any corresponding advantage to the mortgagor or there are circumstances indicating that the covenant postponing redemption is unreasonable and oppressive and intended to fetter the right to redeem, a Court may allow redemption irrespective of that term as it may think fit.

Appeal against the decree of the Additional District Judge, Lucknow, dated 20th March 1913, upholding that of the Munsif, North Lucknow, dated 10th May 1912.

Mr. *A. P. Sen* and Babu *Hargobind Das*, for the Appellants.

Babu *Ajit Prasad*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for redemption of a mortgage effected by Jawahir Singh in favour of Nawab Muhammad Raza Husain Khan on the 5th June 1878. One of the plaintiffs is the grandson and heir of the mortgagor. The other plaintiffs are assignees of the former of a portion of the equity of redemption. The mortgage-deed provided that the mortgagee shall remain in possession of the mortgaged property for a period of 101 years in lieu of interest and that after the expiry of the said period, the mortgagor shall be entitled to redeem the mortgage in the month of *Jeth* by payment of the entire mortgage-money with any arrears of revenue and *takavi*, due in respect of the property mortgaged, in one lump sum and out of his personal funds and that, if he allowed a year to elapse thereafter without redeeming the property, the mortgage shall operate as a sale. The mortgage-deed further provided that, if the profits of the mortgaged property during the first three years fell short of Rs. 44-11-1, the mortgagor shall pay the deficiency, but if they were in excess of that amount, the benefit of that excess shall go to the mortgagee. The defence was that the suit was premature. The Courts below dismissed the claim.

In appeal it is contended that on the face of the mortgage-deed the transaction was hard and unconscionable, that the terms of the deed operated as a clog on the equity of redemption and that the plaintiffs were in any case not bound by the conditions imposed by the mortgage, inasmuch as there was no legal necessity for borrowing the money on such oppressive terms.

As a general rule a mortgagor cannot compel the mortgagee to accept payment of the mortgage money before the date fixed for redemption, where there is a covenant in the mortgage-deed that redemption shall not take place prior to that date. But a mortgagor cannot be precluded by any covenant from redeeming altogether, and where the effect of a covenant is to postpone redemption for an unduly long period without any corresponding advantage to the mortgagor or there are circumstances indicating that the covenant postponing redemption is unreasonable and oppressive and intended to fetter the right to redeem, a Court may allow redemption irrespective of that term as it may think fit. In *Teevan* v. *Smith* (1) Jessel, M. R., observed that, although the law would not allow a mortgagor to be precluded from redeeming altogether, yet he might be precluded from redeeming for a fixed period, such as five or seven years. The principle of the rule is that a mortgage is a security for the payment of a debt, but the security should be terminable at some time or another on the payment or discharge of the debt. It is open

(1) (1882) 20 Ch. D. 724 at p. 729; 51 L. J. Ch. 621; 47 L. T. 208; 30 W. R. 716.

to a mortgagee, as held in *Biggs* v. *Hoddinott* (2) to stipulate for a collateral advantage at the time and as a term of the advance, provided the equity of redemption is not thereby fettered, and the bargain is a fair and reasonable one entered into between the parties while on equal terms without any improper pressure, unfair dealing or undue influence. But the advantages or disadvantages should be mutual, not one-sided, for if they are one-sided, they afford evidence of exaction and oppression. In *Morgan* v. *Jeffreys* (3) where a mortgage-deed contained a proviso against redemption for a period of 28 years without any corresponding obligation on the part of the mortgagee not to call in the mortgage-money, it was held that the proviso, even if it might be supported in a case where there was a similar provision against calling in the mortgage, exceeded all reasonable limits and could not be enforced.

The mortgage-deed in the present case secures no advantages to the mortgagor beyond the money which was paid to him at the time of the mortgage. It burdens him with the payment of the mortgage-debt, arrears of revenue and *takavi* advances, which in the ordinary course are payable by the person in possession or taking the advances. It allows the mortgagee to appropriate all surplus profits exceeding the amount of the profits then estimated to accrue from the property at the time of the mortgage and throws the responsibility for making up any deficiency accruing for the first three years on the mortgagor. It postpones redemption for a period of 101 years, amounting approximately to three generations, and then gives the mortgagor only one solitary month of *Jeth* to redeem the property if he has funds of his own on pain of foreclosure. The bargain is all in favour of the mortgagee and secures him not only his interest in the mortgage-money but prospective improvements in profits for a very long period. It ties up the hands of the mortgagor in a manner which can only be regarded as unconscionable and oppressive and places burdens which no mortgagor can reasonably be expected to discharge. In *Bhawani* v. *Sheodihal* (4) Stanley, C. J., and Burkitt, J., observed: "The right of redemption may undoubtedly be postponed by a covenant that during a certain period the estate shall remain irredeemable—arrangements of this nature are of common occurrence. It is advantageous to both parties, the mortgagee obtaining the advantage of a continuing security for his money; while the mortgagor is free from the expense and trouble of finding new lenders. Where a restraint upon redemption extends for a long period, of say, 30 years or upwards, the contract may no doubt be regarded by a Court of equity as unconscionable or oppressive; and it might also be considered unreasonable if the mortgage-deed enabled the mortgagee at any time during the term arbitrarily to call in his debt whilst the mortgagor was restrained from redeeming." There was no occasion in this case for authorising the mortgagee to call in his debt because the mortgage was usufructuary. In *Sayad Abdul Hak* v. *Gulam Jilani* (5) it was held that a Court of equity would not enforce any agreement in restraint of the right of redemption which was oppressive and unconscionable, as giving the mortgagee an advantage not belonging to the contract of mortgage. In *Kanaran* v. *Kuttooly* (6) where a mortgage-deed contained a stipulation that if the mortgage-money was not paid on the due date the mortgagor would sell the property to the mortgagee at a price to be fixed by umpires, it was held that the stipulation was unenforceable as constituting a fetter on the equity of redemption. The Courts below relied on the decision in *Ram Prasad* v. *Jagrup* (7). But in that case, beyond the fact that the mortgage was entered for 58 years, there were no other conditions showing an intention to fetter the equity of redemption.

The nature of each transaction is to be judged by the terms expressed in the document evidencing the same. The covenants contained in the mortgage-deed in suit impose an unreasonable fetter on the equity of redemption and cannot, therefore, be sustained. The other points at issue in the case

(2) (1898) 2 Ch. 307; 67 L. J. Ch. 540; 79 L. T. 201; 14 T. L. R. 504; 47 W. R. 84.
(3) (1910) 1 Ch. 620; 79 L. J. Ch. 360; 74 J. P. 154; 26 T. L. R. 324.
(4) 26 A. 479; A. W. N. (1904) 60; 1 A. L. J. 133.
(5) 20 B. 677.
(6) 21 M. 110; 8 M. L. J. 62.
(7) 15 Ind. Cas. 880; 10 A. L. J. 157.

have not been dealt with by the Courts below.

The appeal is, therefore, allowed and the case remanded to the lower Appellate Court with a direction to re-instate the appeal under its original number and to dispose of it in accordance with law. The costs will abide the result.

Appeal allowed; *Case remanded.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 102 OF 1912.

September 8, 1914.

Present:—Mr. Stuart, J. C., and Mr. Kanhaiya Lal, A. J. C.

GUR SAHAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

Raja MUHAMMAD ABUL HASAN KHAN—PLAINTIFF—AND THE HON'BLE SIR *Maharaja* BHAGWATI PRASAD SINGH—DEFENDANT—RESPONDENTS.

Jurisdiction of Civil and Revenue Courts—Lessees of village, perpetual or for term Ejectment—Declaratory suit—Cause of action—Enhancement of rent, right as to—Enhanced rent, refusal to pay, right to eject in case of—Civil Courts not to express opinion on matters cognizable by Revenue Courts alone.

The lessees of a village, whether perpetual or for a fixed period, cannot be ejected through a Civil Court: the landlord must, if he wishes to eject them, take proceedings in the Rent Court.

Where it was found that the lessees had merely put forward their rights as lessees and never set up any proprietary or under-proprietary rights:

Held, that there was no cause of action for the landlord to go to the Civil Court for a declaration that the lessees had no proprietary or under-proprietary rights.

A landlord's right to raise the rent of lessees-at-will and to eject them if they refuse to admit this right, cannot be decided by a Civil Court but by a Revenue Court alone.

A Civil Court ought not to express its opinion upon such matters as can only be decided by a Revenue Court, but ought to leave them open for decision by that Court.

Appeal from the decree of the Subordinate Judge, Gonda, dated 21st May 1912.

Pandit *Gokaran Nath Misra*, for the Appellants.

Babu *Baslev Lal*, Mirza *Sami Ullah Beg* and *Syed Wazir Hasan*, for Respondent No. 1.

JUDGMENT.—These appeals arise out of suits for possession of the village of Pipra Surajman, Gonda District, brought by the Raja of Belahra and the Maharaja of Balrampur. After institution the latter's interest became merged in the interests of the former who is now the sole plaintiff-respondent in both appeals. The plaintiff-respondent's case was to the effect that the defendants-appellants had at no time a right in the village superior to that of ordinary lessees or *thekedars*, and that as they had refused to pay an enhanced rent demanded by the proprietors they became trespassers and as such liable to ejectment through a Civil Court. The plaintiff, therefore, sued for their ejectment, and, in the alternative, asked for a declaration that the defendants had no superior or inferior, or *zemindari* or under-proprietary, rights in the said village. The learned Subordinate Judge accepting the plaintiff-respondent's pleas decreed the ejectment of the defendants-appellants and awarded mesne profits against them, and in addition he gave a decree for a declaration that the defendants had no under-proprietary, *zemindari*, or any sort of proprietary rights in the said village. The present appeals are filed against those decrees.

The plaintiff is admittedly superior proprietor of the village. The defence urged was

(1) that the appellants are hereditary lessees with non-transferable rights under a decree made at the time of the first Regular Settlement;

(2) that the *talukdar* had no right to enhance their rents except under the orders of the Settlement Court;

(3) that they could not be dispossessed by an order of the Civil Court or in any manner other than under a suit brought in accordance with the provisions of sections 52 and 108 (4) of Act XXII of 1886; and

(4) that as they had never asserted under-proprietary rights no case arose for the granting of a declaratory decree, and that, in any circumstances, as the same point was in dispute in Settlement proceedings in 1902 which bound both the plaintiffs, a remedy for a declaration was time-barred.

The plea taken to the effect that the defendants-appellants cannot be dispossessed by an order of a Civil Court or otherwise, than

by a suit brought in a Rent Court under the provisions of sections 52 and 108 (4) of Act XXII of 1886 is clearly made out. The learned Counsel for the plaintiff-respondent frankly admitted at the commencement of argument that he could not possibly support the decree for dispossession, and impliedly admitted that he could not support the decree for mesne profits. We need not give the reasons which support the conclusion that this portion of the decree cannot be maintained, as the point is too clear to require discussion and as the parties now agree that such a relief was impossible. There thus remains the simple point whether the declaratory decree should be allowed to stand. We cannot find anything in the pleadings which goes to show that the defendants-appellants ever set up a claim to under-proprietary, *zemindari*, or any sort of proprietary rights. The second paragraph of the plaint is to the effect that the ancestor of the appellants had brought a claim for under-proprietary rights with respect to this village, and that his claim was settled according to the terms of a compromise under a decree by the Settlement Officer conducting the first Regular Settlement. Both the decree and the compromise are dated 15th November 1869. The defendants-appellants replied in the second paragraph of their written statement that Surajman had made a claim for under-proprietary rights, and that that claim had been settled according to the terms of the compromise quoted, and stated that the contents of the compromise would show the nature of title that they had received. In the third paragraph of their written statement they asserted that they were perpetual lessees of the village. In the 14th, 15th and 16th paragraphs they asserted that as according to the plaintiff's own showing they were lessees they could not be dispossessed by a Civil Court, and that the prayer for a declaratory decree could not be allowed as no cause of action was disclosed, and further that it was barred by time. In the 21st paragraph of their written statement they asserted that their status as perpetual lessees had been recognised by a decree of the Judicial Commissioner's Court sitting as a Court of Revenue. Nowhere can we find that they ever asserted a title as proprietors, under-proprietors or the holders of any *zemindari* rights, and the circumstance that in their written reply they maintained that any action against them lay in a Revenue and not in a Civil Court makes even more clear that they did not assert such rights. It is true that in paragraph 15 of his replication the plaintiff asserted that after he had issued notice to the defendants-appellants, the latter began to give out that they were under-proprietors. There is no evidence to support this statement and we find that in reply to the notice in question, which was a notice directing the defendants-appellants to pay a higher rate of rent, the defendants-appellants made no assertion of proprietary, under-proprietary, or similar rights. A translation of their reply is as follows:—

"The notice issued by you was received on the 17th October 1910. We the applicants have been in possession of *Mauza* Pipra Surajman, *Pargana* Gonda, under the decrees passed by the Honorable Judicial Commissioner and the members of the Board of Revenue. The rent, having been fixed at Rs. 243 by the recent Settlement Court, an order was passed to the effect that we should pay the rent fixed. Therefore, we are bound by that order. We are not obliged to pay rent higher than that."

Thus we find on the facts that the defendants-appellants have never asserted anywhere that they had the rights of proprietors, under-proprietors, or of a *zemindari* nature.

The real dispute between the plaintiff-respondent and the defendants-appellants is with regard to the right claimed by the plaintiff-respondent to raise the rent of the defendants-appellants-at-will, and to eject them if they refuse to admit this right. The questions which are thus really in dispute are not questions which we can decide as a Civil Court. They are questions which can be decided by a Revenue Court only, and for this reason we consider it advisable to express no opinion with regard to the nature of the rights possessed by the defendants-appellants beyond deciding that those rights are not the rights of proprietors, under-proprietors or the like, or the terms under which they hold the village, or the right of the plaintiff-respondent to raise their rent, or his right to eject them through the Revenue Court in event of acts or omissions on their part. We do not say that the plaintiff-respondent has or has not any

particular rights. We do not say that the defendants-appellants have or have not any particular rights. We purposely and deliberately refrain from expressing any opinion upon these points so as to leave decision upon them, as it should be left, to the Revenue Court. But in so far as we are concerned with the remedy open to the plaintiff-respondent as disclosed in the plaint, we have on hesitation in finding that he has not made out a case for the granting of any relief by a Civil Court, and we, therefore, allow these appeals and direct that both the suits be dismissed and that the plaintiff-respondent pay his own costs and those of the defendants-appellants in all Courts.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 275 OF 1910.

August 26, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

MARKAPULI REDDIAR—DEFENDANT—APPELLANT

versus

THANDAVA KONE AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Madras Estates Land Act (I of 1908), ss. 6 and 8 — Occupancy right—*Ryoti *land—Purchase by landlord —Merger—Tenant in possession, whether entitled to claim occupancy rights.*

The *ryoti* land purchased by a landlord for arrears of rent in an auction held before the Estates Land Act came into force continues to be "*ryoti*."

Therefore, a tenant in possession of such land on the date the Madras Estates Land Act came into force acquires by virtue of section 6 of that Act occupancy rights in it.

Second appeal against the decree of the Court of the Subordinate Judge of Tuticorin, in Appeal Suit No. 8 of 1912, preferred against that of the District Munsif of Kovilpatti, in Original Suit No. 900 of 1910.

Mr. *M. D. Devadoss*, for the Appellant.

Mr. *K. R. Rangasamy Iyengar*, for the Respondents.

JUDGMENT.—We must take it that in 1878 when the landlord brought the tenant's interest in the land to sale for arrears of rent and purchased it himself, it was *ryoti*

land. Section 8 of the Madras Estates Land Act enacts that the occupancy and land lord's rights did not merge by the purchase and that the landlord did not acquire occupancy right. The land remained *ryoti*, and 2nd defendant being in possession as a *ryot* when the Act came into operation, must be taken to have acquired occupancy right by virtue of section 6, if he did not possess it before.

The suit must, therefore, fail, and is dismissed. First defendant will bear 2nd defendant's costs throughout, and 1st defendant and plaintiff will bear their own.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 325 OF 1913.

July 22, 1914.

Present:—Mr. Stuart, J. C.

Rani SUBHADRA KUAR—PLAINTIFF—APPELLANT

versus

BIRESHWAR PRASAD—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 17—Appellant absent—Appeal dismissed—Order of dismissal not stating appellant's absence as reason for dismissal—Cross-objections adjudicated upon on merits, illegality of—Dismissal, order of, to be considered as one on preliminary point—Second appeal—Remand—Fresh proceedings.

Where an appeal is dismissed under Order XLI, rule 17, Civil Procedure Code, the cross-objections cannot be adjudicated upon on the merits.

Where on the appellant being absent and unrepresented at the time that the appeal was called on for hearing, the Court dismissed the appeal without entering into the merits, without deciding any point raised in the grounds of appeal and without stating that the appeal was being dismissed owing to the absence of the appellant, and dismissed the cross-objections on the merits after argument:

Held, (1) that the appeal not having been dismissed under the provisions of Order XLI, rule 17, Civil Procedure Code, but under an erroneous impression as to the law of procedure, which had the effect of a dismissal upon a preliminary point, an appeal lay from the order of dismissal;

(2) that the order dismissing the cross-objections was also incorrect;

(3) that the hearing of the appeal and the cross-objections should proceed *de novo* and the previous proceedings be considered a nullity.

GUR NARAIN *v.* GULZARI LAL.

Appeal against the decree of the Additional Judge, Lucknow, dated 23rd June 1913, upholding that of the Munsif, South Lucknow, dated 4th February 1913.

Mr. *C. F. S. Oehme*, for Mr. *St. G. Jackson*, for the Appellant.

Syed *Shahinshah Husain*, for the Respondent.

JUDGMENT.—In this case Appeal No. 38/36 of 1913 was called on for hearing in the Court of the Additional Judge, Lucknnw, on 23rd June 1913. The appellant was absent and unrepresented at the time that the appeal was called on for hearing. The respondent was represented. The respondent filed cross-objections. It was open to the learned Additional Judge to dismiss the appeal under the provisions of Order XLI, rule 17, owing to the absence of the appellant. But if he had done so, it would not have been open to him to adjudicate upon the cross-objections on the merits. The course which he adopted was to dismiss the appeal without entering into the merits, without deciding any point raised in the grounds of appeal and without stating that he was dismissing it owing to the absence of the appellant, and to dismiss the cross-objections on the merits after argument. It has been argued by the learned Counsel for the respondent that the appeal was, as a matter of fact, dismissed under the provisions of Order XLI, rule 17, and that in the circumstances no second appeal lies to this Court and that the appellant's remedy was under the provisions of Order XLI, rule 19. If I were of opinion that the appeal had been dismissed under the provisions of Order XLI, rule 17, I should have accepted this preliminary objection. But I do not find that the appeal was dismissed under the provisions of Order XLI, rule 17. I find that it was dismissed under an erroneous impression as to the law of procedure which has the effect of a dismissal upon a preliminary point, and setting aside the order upon that point I allow the appeal, set aside the decree and remand the appeal to the Court of the Additional Judge, Lucknow, for re-admission under its original number and for re-hearing. As the order dismissing the objection was also not correct the effect of my present order will be to allow the respondent again to urge the cross-objections and to have them decided in a proper manner. In other words the hearing of the appeal and the cross-objections before the Additional Judge will proceed *de novo*. The previous proceedings will be considered as a nullity. Costs will follow the result.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 5 OF 1912.

September 1, 1914.

Present:—Mr. Stuart, J. C., and Mr. Kendall, A. J. C.

GUR NARAIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GULZARI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Joint family property, disposal by Will of—'Married woman' as used in Civil Procedure Code, meaning of—Burden of proof—Decree against Hindu father, sons' liability to satisfy.

A member of a joint Hindu family is not competent to dispose of the joint family property by Will.

The word "married woman" as used in the Code of Civil Procedure, 1882, refers to *femme covert* as opposed to *femme sole* and, therefore, does not apply to a widow.

Where a decree has been obtained against a Hindu father whose children are minors upon a mortgage executed by him of joint family property, whether or not there has been a sale of the property in execution of the decree, it is for the sons who come into Court to escape liability thereunder to prove that the debt was contracted for an immoral or illegal purpose or that the debt was of an illusory character.

Appeal against the decree of the Additional Judge, Hardoi, dated 31st August 1911.

Pandit *Gokaran Nath Misra*, for the Appellants.

Mr. *Nabi Ullah*, for the Respondents.

JUDGMENT.—One Kandhaiya Lal was the head of a joint family of which he and his son Lachmi Narain were members. Kandhaiya Lal died on the 7th May 1892. It is in evidence that Kandhaiya Lal's health completely broke down and that he was nearly blind for some time before his death, and that Lachmi Narain was managing the joint family property on his behalf. It is suggested that Lachmi Narain was addicted to extravagant living and

gambling. Lachmi Narain executed a large number of deeds for sums varying from Rs. 20 to Rs. 400, between the 15th May 1891 and 28th June 1894. Gulzari Lal, mortgagee, filed a suit in which he obtained possession as mortgagee on the 12th March 1896 against Lachmi Narain alone, on the basis of a mortgage-deed of the 23rd April 1892 for Rs. 200 and three mortgage-deeds of additional charge of July, September and December 1892, of an aggregate consideration of Rs. 550, in each of which one-eighth shares of Chak-mafi-Hasannagar and Chak-mafi-Salempur were hypothecated. He brought another suit in which he obtained possession as mortgagee on the 11th March 1901 in respect of two mortgage-deeds of July and October 1892, of an aggregate consideration of Rs. 400, in each of which 1 *biswa* 5 *biswansis* of *Mauza* Lalpur Kanahri were hypothecated. To this latter suit the plaintiffs, sons of Lachmi Narain, under the guardianship of their grandmother *Musammat* Rukmin Kuar, widow of Kandhaiya Lal, were parties. Plaintiff No. 1 has attained majority. The suit out of which the appeal has arisen has been brought for a declaration that the six mortgage-deeds and the two decrees are not binding on the plaintiffs ; and in paragraph 8 of the plaint it is simply alleged with reference to the decree, dated 12th March 1896, that the plaintiffs were not parties to that suit. But by reason of paragraph 7 of the plaint it may be taken that the declaration is prayed for also on the ground that, *after the death of Kandhaiya Lal*, Lachmi Narain transferred the property without legal necessity. With respect to the decree dated the 11th March 1901, it is sought to ignore it by an allegation in paragaph 9 of the plaint that the plaintiffs' guardian *ad litem* was guilty of gross negligence in not producing the original Will of Kandhaiya Lal, dated the 29th February 1892, by virtue of which they had become owners of the property after his death to the exclusion of Lachmi Narain. The fact that Kandhaiya Lal and his son constituted a joint family and that the property in suit was ancestral property, was denied in the lower Court, but it was proved, and in this Court has been admitted, that this property was joint family property in the hands of Kandhaiya Lal. The lower Court has found that the Will of Kandhaiya Lal is not proved and that he was not competent to execute a Will in any case. It has also found that the proceedings in the former suit were not conducted with gross negligence. It has also found that Lachmi Narain was the ostensible owner of the property mortgaged during Kandhaiya Lal's life-time and that the deeds executed were valid and binding. It has, therefore, dismissed the suit.

The third to fifth grounds of appeal to this Court deal with the Will of Kandhaiya Lal, alleging that it is proved and that he was competent to execute it. The sixth ground of appeal alleges gross negligence in the prosecution of the former suit by the then minors' guardian *ad litem*. The seventh ground deals with the question of ostensible ownership. The eighth ground is to the effect that the appellants are not bound by the deeds in dispute as the debts were borrowed for immoral purposes ; while the ninth ground is to the effect that the appellants are not bound by those deeds as it is not shown that the debts borrowed were incurred for family necessity, nor that the mortgagee advanced money after due inquiry. The first two grounds of appeal which deal with the question of joint family property have been withdrawn.

We agree with the lower Court in its finding that the Will of Kandhaiya Lal dated the 29th February 1892 is not proved. The evidence in support of it is most unsatisfactory. It was produced for the first time in 1896, after Lachmi Narain had completed his transfers. Two blank drafts have been produced, one of which was drawn up by Amjad Ali, Vakil, and in the second of which certain additional details purport to have been added by Lachmi Narain. The first blank draft was prepared without any names or property having been given; and it is probable that Lachmi Narain may have had this draft prepared by Amjad Ali after the death of Kandhaiya Lal in order to have a legally correct basis on which to fabricate the contemplated Will. Amjad Ali, while proving the draft to be in his handwriting, is unable to say when he was asked to prepare it, and no reason has been shown as to why, when Lachmi Narain was having it prepared as is pretended, he should have suppressed from Amjad

Ali the fact that it was a draft of his father's Will, if his father was in existence and capable of making a Will at the time. But even if it be admitted that it is sufficiently proved that this Will was executed by Kandhaiya Lal when of a sound disposing mind, we find that he was not competent to dispose of the joint family property in this manner. The point was decided by their Lordships of the Privy Council in *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (1). It has been explained by Mr. Mayne in his well-known treatise that there can be no competency in this respect, as the right by survivorship of the other co-parceners is at conflict with the right by devise; and the title by survivorship being the prior title takes precedence to the exclusion of that by devise.

We come now to the question whether the decree of the 11th March 1901 is or is not *ipso facto* binding upon the plaintiffs. It is not necessary to consider whether *Musammat* Rukmin Kuar by the exercise of slight diligence might have been able to ensure the production of the Will. It was at that time apparently upon a record in the Revenue Courts, it having been filed some years before by *Musammat* Rukmin Kuar herself. It is argued for the appellants that the very fact that she thus failed to produce an important piece of evidence, is sufficient to justify this Court in holding the plaintiffs not bound by the decree. In *Kali Bakhsh Singh* v. *Ram Gopal Singh* (2) their Lordships of the Privy Council were dealing with the question of the possession of independent advice by a *pardanashin* woman; and they remark "that if the obtaining of independent advice would not really have made any difference in the result, the deed ought to stand." That principle we apply in this present case where we find that neither was Kandhaiya Lal competent to execute the Will nor, if he was competent, did he execute it. It is manifest that the production of that document, purporting to be his Will, could have had no effect on the result of those proceedings.

It has been further argued that the plaintiffs are not bound by the former decree inasmuch as their grandmother was a married woman, and, therefore, incompetent under the Code of Civil Procedure, as it then stood, to appear as their guardian. We have no doubt that the term "married woman" in the Code of Civil Procedure of 1882 referred to *femme covert* as opposed to *femme sole*, to a person, that is, who is subject to the control of a living husband; and that it did not refer to a person who had once had a husband. Cases are continually occurring in which minor defendants are represented by widows as guardian *ad litem*. For convenience we may quote *Suresh Chunder Wum* v. *Jugut Cunder Deb* (3) and *Walian* v. *Banke Behari Pershad Singh* (4).

The question of ostensible ownership hardly appears to us to call for discussion. It is proved that Lachmi Narain was managing the family property as *karta* for some time before Kandhaiya Lal's death owing to the weak health of the latter. The appellants have not proved that the debts in dispute were incurred for immoral purposes; and, therefore, they are liable to pay them. Even if it be taken as proved that Lachmi Narain was addicted, at one time of his life, to gambling or extravagant living, that is not sufficient to impute immorality to any of the four debts in connection with which Gulzari Lal obtained his first decree on the 12th March 1896. It has been repeatedly ruled that the burden of proving that a debt was contracted for an immoral or illegal purpose is not discharged by showing that the father led an extravagant or immoral life; but that a direct connection between the debt and the immoral life must be proved. And it is to be further noted that according to paragraph 7 of the grounds of appeal, there was no allegation of immorality with respect to the first mortgage which was executed during the life-time of Kandhaiya Lal.

The last ground of appeal is to the effect that the appellants are not bound by these deeds, inasmuch as it is not shown that the debt was incurred for family necessity or that money was advanced after due inquiry as to such necessity. The question of family necessity is not one which can be raised with

(1) 7 I. A. 181; 7 C. L. R. 320; 5 B. 48.

(2) 21 Ind. Cas. 985; 16 O. C. 378 at p. 384; 18 C. W. N. 282; (1914) M. W. N. 112; 12 A. L. J. 115; 15 M. L. T. 130; 19 C. L. J. 172; 1 O. L. J. 67; 26 M. L. J. 121; 16 Bom. L. R. 147; 36 A. 81 (P. C.).

(3) 14 C. 204 (F. B.)

(4) 30 C. 1021 (P. C.); 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 882.

reference to a *debt* contracted by a father in a joint Hindu family. A father cannot *alienate* the joint family property without family necessity; but he can incur *debts*, when he thinks it necessary, which a son is bound to pay unless he can show illegality or immorality in connection with such debts.

Our attention has, however, been drawn to *Mahabir Prasad* v. *Basant Singh* (5). There it is ruled that where a grandson sues to recover his share of ancestral property mortgaged by his grandfather for consideration, the mortgagee is bound to prove that the loan secured by the mortgage was taken to satisfy an antecedent debt or was justified by family necessity, or at least that he had made reasonable inquiries that the loan was required for such purposes. The learned Judges of this Court relied on the Full Bench decision in *Chandra Deo Singh* v. *Mata Prasad* (6) which dealt with the case of a creditor coming into Court to enforce a mortgage. Here the plaintiffs, sons of Lachmi Narain, who entered into the mortgages in dispute, have failed to prove that the loans were taken for any illegal or immoral purpose; but it is argued on their behalf that the mortgagee not having substantiated any antecedent debt or family necessity, they are, in virtue of the above ruling of this Court, entitled to a decree. The facts of that case are not, however, on all fours with those of the present case. In that case a mortgage was executed and the mortgagee assumed possession under the mortgage; and it was that partial alienation of the family property which the grandson was, after the death of his father, seeking to have set aside. In this present case Lachmi Narain had executed a mortgage, binding the joint family property; a suit had been brought against him in his life-time, when all his sons were minors; a decree was obtained against him; and the mortgagee was given possession under that decree. The case is governed by an extension of the principle laid dawn by their Lordships of the Privy Council in *Bhagbut Pershad Singh* v. *Girja Koer* (7) and in *Mahabir Pershad* v. *Moheswar Nath Sahai* (8). The principle has been similarly extended in *Beni Madho* v. *Basdeo Patak* (9) and *Murtazai Bibi* v. *Jumna Bibi* (10) and it was followed *inter alia* in a Full Bench decision reported as *Debi Singh* v. *Jia Ram* (11). And in *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh* (12) the learned Judges emphasized the distinction between the position of a son in a suit in which a mortgage by his father is sought to be enforced against his share, and his position after the alienation has been completed by a decree of Court. The case in *Bhagbut Pershad Singh* v. *Girja Koer* (7), no doubt referring to the well-known case of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (13), dealt with an alienation by sale or by a decree for sale upon a mortgage; and it is argued that the principle will not apply here, where the mortgage is still a mortgage, and where a decree for foreclosure has yet to be passed before the mortgagee can acquire a complete title and where the mortgagor can still perhaps redeem. But we are of opinion that while in accordance with the latest ruling of this Court which we should feel ourselves bound to follow, a son attacking an existing mortgage executed by his father is entitled to put the defendant creditor to proof of a justification for the loan for which the mortgage was executed, the position is altered where the sons seek not to attack an existing mortgage, but to have it declared that a decree in which that mortgage has been judicially affirmed as against the mortgagor, a managing member of the family, does not bind them, and is the more to be differentiated where those sons were all minors at the time the decree was passed upon the mortgage. The cases to which we have referred in *Beni Madho* v. *Basdeo Patak* (9) and *Murtazai Bibi* v. *Jumna Bibi* (10) were both cases in which the sons attacked a mortgage in execution of a decree in which the family property had been attached, and not yet sold. Ghose, J., in *Lala Suraja Prosad* v. *Golab Chand* (14), while recognising that most of the precedents referred to cases in which the family property had been sold, finds that if a son, after a decree had been obtained against the father upon a mortgage executed

(5) 12 Ind. Cas. 347; 14 O. C. 299.
(6) 1 Ind. Cas. 479; 31 A. 176 (F B.); 6 A. L. J. 263.
(7) 15 C. 717; 15 I. A. 99 (P. C.); 12 Ind. Jur. 289; 5 Sar. P. C. J. 186.
(8) 17 C. 584 (P. C.); 17 I. A. 11; 5 Sar. P. C. J. 489.
(9) 12 A. 99; A. W. N. (1890) 17.
(10) 13 A. 261; A. W. N. (1891) 13.
(11) 25 A. 214; A. W. N. (1902) 21.
(12) 34 C. 735 (F.B.); 11 C. W. N. 613; 5 C.L.J. 569.
(13) 5 C. 148 (P. C.); 4 C. L. R. 226; 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth P. C. J. 580; 2 Shom's L. R. 242.
(14) 27 C. 724 at p. 743; 4 C. W. N. 701.

by the latter, sues to have it declared that his share is not liable to satisfy the decree or, after a sale in execution of such a decree, sues to recover possession of his share, he cannot succeed unless he proves that the debt was contracted for an immoral or illegal purpose or that the debt was of an illusory nature. And he also lays down, following the principle quoted and followed by their Lordships in *Suraj Bunsi Koer* v. *Sheo Persad Singh* (13), that in the case of a joint *Mitakshara* family, consisting of a father and minor sons, the father is naturally and necessarily the manager of the joint family and, as such, is for all purposes the representative of the family. With this view of the law we agree, and we hold that in all cases where a decree has been obtained against the father, whose children are minors, upon a mortgage executed by him of joint family property, whether or not there has been a sale of the joint family property in execution of that decree, it is for the sons who come into Court to escape liability thereunder to prove that the debt was contracted for an immoral or illegal purpose or that the debt was of an illusory character.

For the above reasons we dismiss this appeal with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

CIVIL REVISION PETITION NO. 7 OF 1913-14 OF FYZABAD DISTRICT.

April 21, 1914.

Present:—Sir Duncan Colvin Baillie, S. M., and Mr. Tweedy, J. M.

Mahant MANGAL DAS AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Babu MAHENDRA DATTA SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Decree fairly and properly obtained against widow—Reversioners bound by decree—Confession of judgment—Rights of reversioners not in question—Widow, bona fides *of.*

A decree fairly and properly obtained against a Hindu widow binds the reversioners.

A Hindu widow's confession of judgment binds the reversioners where their rights to the estate are not in question and she believes the claim to be just and acts *bona fide.*

Sant Kumar v. *Deo Saran*, 8 A. 365 at p. 366; A. W. N. (1886) 129, *Gobind Krishna Narain* v. *Khunni Lal*, 29 A. 487; 4 A. L. J. 365; A. W. N. (1907) 151, distinguished from.

Appeal from the decree of the Commissioner, Fyzabad, dated 12th August 1913, upholding that of the Deputy Commissioner, Fyzabad, dated 10th May 1913, reversing that of the Assistant Commissioner, Fyzabad, dated 27th February 1913.

Mr. *H. C. Dutt*, for the Appellants.

Mr. *Niamat Ullah*, for the Respondents.

JUDGMENT.

BAILLIE, S. M.—(*April 9th*, 1914).—The question for decision in this case is, whether the appellant holds the *muafi* which is the subject of dispute under a judicial decision as referred to in section 107B of the Oudh Rent Act. The decision on which he relies was one obtained by the predecessor-in-interest of the appellant in 1879 against *Musammat* Hansraj Kuar, a Hindu widow, who was then in possession of the estate. The Commissioner holds that as the widow had only a life-interest the reversioners were not bound by her acts. This is not a complete or a correct statement of the law on the subject, which is stated at page 866 of Mayne's Hindu Law. It is there on the authority of a Privy Council decision laid down that for the time being the property is vested in the widow and that succeeding heirs are bound by a decree fairly and properly obtained against her.

It is urged for the respondent in the first place that *Musammat* Hansraj Kuar did not hold as a Hindu widow, but had simply a life-interest under a Will of her husband. There appears to me to be no distinction. The principles on which it was held that a widow represents the estate for the time being, apply equally whether the widow has succeeded to a life-interest under Hindu Law or to a life-interest under her husband's Will.

The next argument adduced for the respondent is that as the decree against the widow was the result of a confession of judgment by her, it cannot be held binding on her reversioners. In support of this proposition I am referred to *Sant Kumar* v. *Deo Saran* (1) and *Gobind Krishna Narain* v. *Khunni Lal* (2). It was held in both of these cases that reversioners

(1) 8 A. 365 at p. 366; A. W. N. (1886) 129.

(2) 29 A. 487; 4 A. L. J. 365; A. W. N. (1907) 151.

could not be considered to be bound except by the result of a contested and *bona fide* litigation. The cases in question appear to me to be clearly distinguishable from that now in question. They were cases in which the succession to the main estate was in dispute and in which the rights of the reversioners to succession to that estate were in question. In the present case the litigation with the widow was merely an episode of current management. A declaration of right was sued for by a person who had been in possession before the widow succeeded and who had only a few years before asserted that right as against the widow's husband. There was not in the present case, as there was in the cases cited for the respondent, anything which could be considered to be in any way tantamount to an alienation by the widow. It seems to me, therefore, that the decision arrived at must, in the words of the Privy Council cited in Mayne's Hindu Law, be decided in favour of the appellant if it is held that the decree was fairly and properly obtained against the widow. It seems to me impossible to hold that the widow was bound to contest a hopeless case, or that if she did not contest a hopeless case, the reversioners would not be bound by her act. There is, in my opinion, not the slightest reason to doubt that the widow acted in good faith. The appellant's claim had only seven years before been made against the widow's husband, and the rights of the appellant have been allowed to remain undisputed during the thirty-four years which have elapsed since the decree was given against *Musammat* Hansraj Kuar. In my opinion it should be held that the appellant has been holding under a judicial decision and that no rent can be assessed on his *muafi*.

TWEEDY, J. M.—It is settled law that a decree "if fairly and properly" obtained against the widow binds the reversioners, but the difficulty lies in determining what is the exact meaning of that phrase in the rulings quoted in *Sant Kumar* v. *Deo Saran* (1) and *Gobind Krishna Narain* v. *Khunni Lal* (2). One Judge went so far as to say that it would be unsafe to treat as binding anything short of a decree contested to the end. That may be the correct view in a case where the rights of the reversioners to the estate are in question, but the present case is of a totally different nature. It seems to me that it is not necessary to rule that the widow must have been convinced that her case was hopeless before she could consent to a judgment which would bind the reversioners.

It has been ruled that even an *ex parte* decree will bind the reversioners in a hopeless case, because the widow is not obliged to incur unnecessary expense in defending such a case.

We do not know in the present instance whether the case was hopeless but there is no reason to believe that the widow acted in bad faith. I think that if the widow believed that a claim like this which has been the subject of religious sanctions was a just one, her confession of judgment would bind the reversioners. There is no evidence of any collusion or fraud, and I agree to the proposed order.

Appeal allowed.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPLICATIONS NOS. 7 AND 8 OF 1913.

June 23, 1913.

Present:—Sir Henry Hartnoll, Offg. Chief Judge, and Mr. Justice Young.

THEIN NOO—PETITIONER

versus

RAMASAWMY CHETTY—RESPONDENT.

Appeal to King in Council—Grounds for concurrent findings—Substantial question of law—Civil Procedure Code (Act V of 1908), s. 110.

In the face of concurrent findings of fact in a case leave to appeal to the King in Council can only be granted if a substantial question of law is involved.

A question of law cannot be said to be "involved" if it would arise only in the event of the Privy Council reversing those findings.

Mr. *J. R. Das*, for the Petitioner.

Mr. *N. N. Burjorji*, for the Respondent.

JUDGMENT.

YOUNG, J.—These are two applications for leave to appeal to His Majesty in Council. As the grounds of the application are the same in each case and the cases are closely connected and the applications were argued as one by the same Counsel, I propose to deal with both in the same order.

In the one application which arises out of Civil Appeal No. 129 of 1910 and Civil Regular No. 225 of 1909, the Appellate Court stated as follows :—"We cannot shut our eyes to the fact that in one of the other suits the basis of her claim, which was also the basis of her claim in the suit out of which this appeal arises, was entirely disproved." The basis thus referred to was that in October 1907 she had entrusted her brother-in-law, Po Nwe, with certain jewelry to be deposited for safe custody in the Bank of Bengal, each suit being to recover portions of the said jewelry from persons to whom the said Po Nwe had pawned it.

The suit in reference to which the above quoted remarks of the Appellate Court were made was heard by the Court of first instance before the suit in reference to which the Appellate Court held that the basis of the plaintiff's case was disproved, and most of the evidence in it was made evidence in the other suit, Civil Regular No. 131 of 1909, which was heard later, but the evidence in Civil Regular No. 131 of 1909 was not made evidence in Civil Regular No. 225 of 1910, which was dertermined by the Court of first instance solely on its own evidence. This Court in its judgment in Civil Regular No. 225 observed as follows :—"This being so, the only result is that the pledge was made by Po Nwe with her knowledge and consent, for otherwise he (Po Nwe) would not have been in possession of her jewelry at all. Whether the Appellate Court was, strictly speaking, entitled to have regard to evidence taken in another suit may, in my opinion, be perhaps open to question. It could, of course, have directed this evidence to be re-taken under Order XLI, rule 27, in which case the objection, for what it is under the circumstances of the case worth, would have been removed. So far, however, from taking the objection the applicant, who is represented by the same Counsel in each application which Counsel also represented her in each appeal, has expressly treated the evidence in each suit as having been incorporated in the other, referring in the grounds of each application to the evidence of the witness on whom the Appellate Court chiefly relied for its finding that the basis of the appellant's case was disproved, the grounds in each application being precisely similar so far as this point is concerned. In the later of the two suits, namely, Civil Regular No. 131 of 1909, the learned Judge of first instance stated as follows:—"As to the second issue whether she entrusted the jewelry to Po Nwe for deposit in the Bank of Bengal, the evidence is the same as in the former case and for the same reasons I would come to the same decision, but there is further and stronger evidence on that point in the present case to which I must also refer," and the Appellate Court stated as follows :—"It is evident that she was either interested in her brother-in-law's business or that for family reasons she helped him. The only conclusion that can be come to is that she placed her jewels at his disposal in order that he might raise money by pledging them." There is, therefore, a concurrent finding of fact by each Court in each case that she authorized Po Nwe to pledge her jewels; direct evidence of this authorisation could hardly be expected, but the falsity of her case with regard to the purpose for which she alleges she gave her jewels to Po Nwe, her acknowledged intimacy and close relationship with him and her participation in his business affairs, all of which were proved, were ample evidence on which the conclusion might be arrived at. It is not for this Court to consider whether those findings were correct or not: leave to appeal in the face of their being concurrent can only be granted if a substantial question of law is involved. I am quite unable to hold that the question whether the Courts were entitled to draw this very ordinary presumption involves a substantial question of law. It is true that if the Privy Council entertained the appeal and came to the conclusion that these concurrent findings were wrong, a substantail question of law as to the construction of section 178 of the Contract Act would be involved, but to borrow the language of Sir Arthur Strachey, C. J., in *Banke Lal* v. *Jagat Narain* (1), I think it is impossible to say that a question which only arises if the concurrent findings of fact of the Courts in India are disregarded, a question which never can arise so long as the Privy Council maintains those concurrent findings of fact, is a substantial ques-

(1) 23 A. 94 at p. 98; A. W. N. (1901) 8.

tion of law which the appeal to the Privy Council involves. I would, therefore, reject the applications

HARTNOLL, OFFG. C. J.— I concur.

Applications rejected.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 43 OF 1911.

April 22, 1914.

Present:—Mr. Hayward, J. C., and Mr. Boyd, A. J. C.

BIKHCHAND AND OTHERS—PLAINTIFFS—APPELLANTS

versus

VERHOMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Dekkhan Agriculturists' Relief Act (XVII of 1879), ss. 12, 13—Consideration, proof of—Onus.

The custom throughout the Dekkhan is to put the onus on the creditor in an inquiry under sections 12 and 13 of the Dekkhan Agriculturists' Relief Act, if that course is indicated by the comparative positions in life and mental powers of the parties.

Maloji v. *Vithu*, 9 B. 520, referred to.

Appeal against the decision of the Joint Judge, Sukkur-Larkana.

Mr. *Isardas Oodharam*, for the Appellants.

Mr. *Dharmdas Thanwerdas*, for Respondents Nos. 3-6 and 8.

Mr. *Rupchand Bilaram*, for Respondents Nos. 2, 7, 9-11.

JUDGMENT.—The learned Counsel for plaintiffs urges that the lower Courts erred in placing the burden of proof in the first instance. But it does not seem that this was done. After examining the facts peculiar to this case the learned Sub-Judge was of opinion that the plaintiffs should show their account books before the year 1887. After examining the facts the Judge was quite at liberty, acting under sections 12 and 13 of the Act, to place the onus on the creditors, vide *Maloji* v. *Vithu* (1), which has been followed in many cases. The custom throughout the Dekkhan is to put the onus on the creditor if that course is indicated by the comparative positions in life and mental powers of the parties.

No arguable question of law arises in this case. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

(1) 9 B. 520.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL NO. 21 OF 1912.

July 24, 1913.

Present:—Sir Henry Hartnoll, Offg. Chief Judge, and Mr. Justice Young.

MOOSAJEE AHMED & Co.—DEFENDANTS APPELLANTS

versus

BUN SWEE SOON & Co.—PLAINTIFFS—RESPONDENTS.

Contract of sale—Promise to deliver on certain date—Accident excepted—Accident due to promisor's negligence—Promisor, liability of.

Where a contract of sale of rice provides that in case of accident to machinery, the vendor would be exempt from liability for failure to deliver the rice on the promised date, he cannot take advantage of the saving clause on the happening of an accident if it is caused by his own negligence.

Mr. *Giles*, for the Appellants.

Mr. *N. M. Cowasjee*, for the Respondents.

JUDGMENT.

HARTNOLL, OFFG. C. J.—The appellants sold to the respondents 2,000 bags of rice on the 3rd November 1910 at Rs. 291-8-0 per 100 baskets of 75 pounds each, each bag to weigh 225 pounds net. Delivery was to be taken in November ex-hopper. Section 16 of the contract was, "accidents to machinery, strikes, or sickness of mill hands or coolies always excepted." Delivery of the rice was never tendered to the respondents and they sued in the present suit for damages for breach of contract. The appellants' answer is that there was no breach of contract—that their machinery broke down on the 28th November and was not in order until the 2nd December, and that this breakdown rendered their performance of the contract impossible. The respondents contended that the appellants never intended to perform their contract—that, as a matter of fact, they were unable to deliver the rice by the 30th November as, at the time the alleged breakdown is supposed to have taken place, they had still 3,000 bags of rice to mill under three milling notices which had been issued on the 26th November and which would have kept their mill fully occupied for over three days as its average milling capacity was not more than 800 bags in 24 hours.

The learned Judge on the original side found that the pump of the mill broke down at 4 P. M. on the 28th November and that at that time the appellants had to mill 3,735 bags under four milling notices and also

2,000 bags for the respondents in two days and 8 hours, which meant that the mill would have to turn out considerably more than 2,000 bags a day, which was the maximum output of the mill according to the defence. He found that the evidence showed the mill never turned out more than 1,086 bags when it worked for 19 hours. He decided against the contention of appellants' Counsel that if the pump had not broken down, the appellants might have milled the respondents' rice and postponed milling under the notices which had issued, because the appellants having expressed their intention of milling for their buyers in a certain order by issuing the milling notices, they must be bound by their election unless and until they could show that they had altered it. He accordingly gave a decree for Rs. 4,110 damages with costs.

There is no ground for doubting that the mill did break down entirely on the 28th November and was not in order again until the 2nd December. The evidence also shows that there had been trouble from the 20th November with the pump which reduced the capacity of the mill to mill rice. I do not read the evidence of Suliman Haji Tar Mahomed as meaning that the pump trouble did not interfere with the output. He said: "From the 20th till 28th the output became less and less till no output was made at all... ... . I said the mill gave trouble from the 20th, because that is the date the mill worked irregularly. The mill would not stop except when there was no water in the boiler and then would stop for 5 to 25 minutes, but that would not affect the outturn. When there was stoppage, the output would be abnormal." The general effect of this evidence seems to me to be that the output was affected. The Engineer, Abdul Aziz, said that from the 20th onwards the mill could only work at half pressure with only half the usual outturn in the hour. From the milling notice book this statement would seem to be an exaggeration. The reduction of output up to the 28th November from the 20th does not seem to me to be to any extent in favour of the appellants; for, if it occurred, it behoved them to work day and night to fulfil their contracts, which they did not do. The book shows that they only worked 8 hours on the 21st, 12 hours on the 22nd, 12 hours on the 24th, and so on.

As regards what would be a reasonable output of the mill after the 20th November, I think that it cannot better be decided than considering the output on the 26th when the mill turned out 1,086 bags in 19 hours—say 57 bags an hour. For 24 hours this would make 1,368 bags. The evidence makes the output higher; but I would not take that it could have been more as the pump was out of order, and evidently on the 26th November the mill was being pushed. I am unable to find it proved that there were 3,725 bags to be milled on milling notices issued when the breakdown occurred. As far as I can see, the evidence only proves that there was rice to be delivered on the notices 147, 148 and 149.

On	147	...	...	... 698 bags.
„	148	...	...	... 1,000 „
„	149	...	...	... 1,000 „
			TOTAL	... 2,698 bags.

This with respondents' 2,000 bags would make 4,698 bags to be milled between the afternoon of the 28th and midnight of the 30th. On the maximum possible output I have found it would be impossible for appellants to have carried out all their contracts, but, if the breakdown had not occurred, and no breakdown had occurred between the 28th and 30th, it would have been possible for them to have carried out respondents' contract if they had so desired. There is no ground for thinking that they ever intended to elect to carry out respondents' contract, and there is a reason for thinking that they never intended to do so. This reason was that their rate with respondents was lower than their rates with their other buyers except in one instance. The milling notices, however, did not bind them to those whom they noticed, for they distinctly say that the "millers take no responsibility in case the rice is not milled at the above appointed time." So there was nothing to prevent appellants noticing the respondents on the 28th and if there had been no breakdown between then and the end of the month, they could have carried out respondents' contract. But it seems to me that if appellants wish to escape liability on the ground that it was the breakdown in their machinery that prevented them from carrying out their contract, the burden of proof

lies clearly on them to show that they are free from liability. What do we find from a consideration of the evidence? The pump began to get out of order on the 20th and gave trouble daily according to the Engineer, Abdul Aziz, until the breakdown occurred. No effective measures were taken to get it properly repaired before the breakdown and then, according to the witness Thomas an accident was likely to occur at any moment. It seems to me that there was negligence on the part of appellants or their servants in not causing effective repairs to be done when the pump got out of order—more especially in view of their obligations to fulfil their contracts. Further, not only were no effective measures taken to effect repairs but, as I have already shown, the mill was not worked day and night but only for the much fewer hours daily which I have already pointed out. Seeing that the machinery was in such a state, surely it was incumbent on appellants to exert themselves to the utmost to fulfil their contracts. Again, supposing that on the 28th they had elected to proceed with respondents' contract, it by no means follows that they could have carried it out. Their machinery was in bad order, and as I have pointed out an accident was, according to the evidence, likely to occur at any moment. It is not at all improbable that, if there had not been a breakdown on the 28th, there would have been one on the 29th or 30th before the respondents' contract had been completed. The real cause of their failure appears to have been their neglect to have their machinery attended to when it first became defective and in their laxity at not working day and night from that time so as to perform all their contracts, if possible, seeing that they had trouble with their machinery. On these grounds I do not think that they should be allowed to escape liability on the plea that it was an accident to their machinery that prevented them from performing their obligation.

I would, therefore, dismiss this appeal with costs.

YOUNG, J.—I concur. The clause on which the appellant seeks to rely is very analogous to those clauses in a charter party or bill of lading under which a ship-owner seeks to except himself from liability for a breach of contract caused by certain specified causes. The law on this point is laid down in *Wilson* v. *Xantho* (1) by Lord Macnaghten and by Willes, J., in *Grill* v. *General Iron Screw Collier Coy.* (2): "The ship-owner's obligations are not limited and exhausted by what appears on the face of the instrument. Underlying the contract, implied and involved in it, there is a warranty by the ship-owner that his vessel is seaworthy, and there is also an engagement on his part to use due care and skill in navigating the vessel and carrying the goods. Having regard to the duties thus cast upon the ship-owner, it seems to follow as a necessary consequence, that even in cases within the very terms of the exception in the bill of lading, the ship-owner is not protected if any default or negligence on his part has caused or contributed to the loss." According to the evidence in the case the pump which broke down entirely on the 28th first cracked on the 20th and then kept leaking, with the result that the mill stopped two or three times a day for periods varying from 10 to 25 minutes. All that was done was to repair the crack with rubber and putty, and from that time on the mill could only work at half pressure and only turn out half the usual outturn. Mr. Thomas, Engineer to the Irrawaddy Flotilla Company, said that a new pump could have been put in a day and a half. A new one was eventually put in after the breakdown of the 28th and if it had been put in earlier the contract could easily have been performed. In my opinion the mill-owner was negligent and in default, in that he did not have the pump properly inspected and attended to on the 20th. I think it was his duty to have and to keep his machinery in proper order and that having failed in his duty, he has disabled himself from relying on the terms of the exception. I would dismiss the appeal with costs.

Appeal dismissed.

(1) (1887) 12 A. C. 503; 56 L. J. Adm. 116; 57 L. T. 701; 36 W. R. 353; 6 Asp. M. C. 207.

(2) (1866) 1 C. P. 600 at p. 611; 35 L. J. C. P. 321; 12 Jur. (N. S.) 727; 14 W. R. 893.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 31 OF 1913.

September 22, 1914.

Present:—Mr. Justice Hannay.

ANNAMALAI PATTAR AND ANOTHER—DEFENDANTS—PETITIONERS

versus

P. NATESA IYER—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 21 (2)—Acknowledgment by one of two joint promisors—Implied authority—Conduct of parties.

Where one of two joint promisors made a series of endorsements on a promissory note executed by both of them:

Held, that the conduct of the parties was sufficient to warrant the conclusion that each of the two promisors had implied authority to bind the other.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Mayavaram, dated 20th November 1912, in S. C. No. 1956 of 1912.

Mr. *S. T. Sreenivasagopala Chariar*, for the Petitioners.

Mr. *T. V. Muthukrishna Iyer*, for the Respondent.

JUDGMENT.—In my opinion the lower Court had sufficient evidence of conduct in the series of endorsements to be found on the promissory note to justify it in the conclusion at which it arrived, that the defendants had each authorised the other to make acknowledgments so as to bind both. It is contended that with reference to section 21, clause 2, of the Limitation Act the mere acknowledgments are not themselves sufficient, but that there should be other extraneous evidence of authority, and a number of cases are cited in support of that view: *Narayana Ayyar* v. *Venkataramana Ayyar* (1), *Balasubramania Pillai* v. *S. V. R. R. M. Ramanathan Chettiar* (2), *K. R. V. Firm* v. *Sathyavada Sitharama Swami*(3). The respondent also relies upon the first of these cases (at page 234) as showing that in particular cases conduct coupled with other circumstances would be sufficient to warrant the conclusion that there was authority to acknowledge on behalf of both. The case of *Birjmohun Lal* v. *Rudra Perkash Misser* (4) is also cited as a case where authority was implied from conduct. I think this case on the whole falls under this category and that the lower Court was justified in concluding on the evidence, afforded by the series of endorsements on the suit promissory note as showing the conduct of the defendants, that defendants Nos. 1 and 2 had each implied authority to make acknowledgments so as to bind the other. I am inclined also to accept the contention for the plaintiff (respondent) that this is a case where even if there had been an erroneous decision on a question of law, substantial justice has been done by the lower Court and that, therefore, I should be slow to interfere in revision. As I have said, however, I am of opinion that the conclusion of the lower Court is right.

This petition is dismissed with costs.

Petition dismissed.

(1) 25 M. 220 (F. B.).
(2) 2 Ind. Cas. 309; 32 M. 421; 5 M. L. T. 102.
(3) 21 Ind. Cas. 634; 25 M. L. 501; 37 M. 146.
(4) 17 C. 944 at p. 950.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 76 OF 1910.

August 5, 1913.

Present:—Sir Henry Hartnoll, Offg. Chief Judge, and Mr. Justice Twomey.

V. P. GOVINDASAWMY PILLAY—PLAINTIFF—APPELLANT

versus

K. V. K. KOOLAYAPPA ROWTHER—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 113—Implied warranty—Liability of commission agent.

A commission agent buying goods for his employer is on the same footing as regards him as the vendor and is, therefore, bound by an implied warranty that the goods supplied are of a certain denomination.

Mr. *Lentaigne*, for the Appellant.

Mr. *N. M. Cowasjee*, for the Respondent.

JUDGMENT.

TWOMEY, J.—The case was remanded for further inquiry on the second issue which is as follows:—

"Is delivery of special big mills rice a good delivery under a contract for small mills? And can a commission agent buy special big mills when told to buy small mills?"

The issue ought to have been in the past

tense, for the questions relate to the custom of the trade at the time of the contract—December 1908. The custom is shown to have changed materially since then. But no confusion has been caused by the want of precision in the issue.

Many witnessess have been examined on both sides and the learned Judge on the original side has found on the first question that so far as local dealings between traders in Rangoon are concerned, a delivery of "specials" was not a good delivery under a contract for "small mills." I think the evidence on this part of the issue is altogether in favour of the defendant. A buyer in Rangoon who contracted for "small mills" could insist on getting rice of the milling of one or other of the small mills mentioned in his contract. If the seller wished to supply "specials" instead, he had to get the buyer's express permission for the substitution, and this permission would usually be given only if the "specials" offered by the seller were guaranteed to be equal in quality (*i.e.*, in polish, and in the low percentage of broken rice) to the then prevailing quality of "small mills" rice. It is proved beyond dispute that "big mill specials" and "small mills" were well-known to the trade as distinct denominations of rice, the former being turned out by big mills, such as Steel Brothers, Bulloch Brothers and Mohr Brothers who milled their best grain for the European market, and the latter by small mills that usually milled only for Eastern markets.

On the second part of the issue also the decision is in the defendant's favour. The learned Judge found that Rangoon commission agents like the plaintiff shipped "specials" to Madras ports against orders for "small mills," and he remarked that the evidence on this point is little less than overwhelming. Evidence was produced to show that even the defendant himself had on other occasions accepted shipments of "specials" against orders for "Chinna mills" (or "small mills"). But in the Judge's opinion the plaintiff failed to prove that the defendant and other purchasers in Madras accepted the "specials" knowingly instead of the "small mills" ordered by them. In other words, the Judge found that so far as the evidence shows, the "specials" were accepted on arrival in India in the erroneous belief that they were "small mills" as ordered.

As a matter of fact, the defendant in this case did not refuse to accept on the ground that the rice tendered to him was not what he ordered. He refused because he contended that the plaintiff charged him more than the market rate. But he afterwards discovered that the rice tendered to him was not "small mills" but "specials," and he has, therefore, taken this as the first line of his defence. It is not disputed that he is entitled to do so.

The appellant's case as explained by Mr. Lentaigne depends on the existence of a well-established custom of the trade by which a dealer in Madras Presidency who ordered "small mills" rice through a commission agent in Rangoon was bound to accept "big mill specials" from the commission agent, although, as it now appears most clearly, the commission agent himself was not bound to accept "specials" in fulfilment of his own local orders for "small mills" in Rangoon. This contention rests mainly on the fact, which is certainly strongly supported by evidence, that commission agents in Rangoon, in a large number of cases extending over several years, had shipped "specials" to Madras against orders for "small mills," and that these shipments were accepted by the Madras purchasers without demur.

It has been suggested to us that a commission agent acting for a principal in Madras is not in the same position as an ordinary seller, and that the buyer of the rice in Madars must be taken as allowing the agent in Rangoon a certain latitude in carrying out his orders. The suggestion is that a commission agent is within the scope of his authority if he purchases for his principal rice of a quality approximating to that specified in the order. I think this contention has no force. In a commission agency there is a contract of sale with a contract of employment added to it. The agent undertakes to procure goods of a certain quality according to the terms of the order or as cheaply as he can.* His limited powers as agent do

*(1) See Anson's Law of Contract, Part VI, Chap. 2.

not include authority to vary the subject-matter of the contract of sale between him and his employer. Where he is commissioned to supply goods of a specified quality, the employer cannot be required to accept goods of another quality any more than an ordinary purchaser could be required to accept goods of another quality than that which he contracted to buy. The commission agent differs from the ordinary seller in what he stands to gain by the transaction; instead of getting a profit on the price of the rice he gets a payment by way of commission. But in other respects they are on the same footing as regards the buyer.*

The present case appears to be governed by section 113 of the Indian Contract Act which lays down that when goods are sold as being of a certain denomination, there is an implied warranty that they are such goods as are commercially known by that denomination. The illustration (*b*) to the section is as follows:

"*A* buys, by sample, and after having inspected the bulk, 100 bales of 'Fair Bengal' cotton. The cotton proves not to be such as is known in the market as 'Fair Bengal'. There is breach of warranty."

In the present case the defendant bought unascertained rice under the denomination of "small mills" and if the rice tendered by the plaintiff proves not to have been "small mills," there is a breach of warranty which would entitle the defendant to refuse acceptance under section 118.

Mr. Lentaigne contends that the defendant used the words "small rice" and "Sinna mill" in his telegrams to the plaintiff as abbreviations for "small mills or specials," that the general acceptance of "specials" by Madras purchasers who ordered "small mills" shows the terms to be really convertible, and that the words must be construed accordingly, especially as it is shown that the difference between "small mills" rice and "big mills special" rice was very small. It certainly appears from the evidence that the difference in 1908 was small, whether in price or in actual quality, between the rice milled by "small mills" and the "special" quality milled by the big mills. But the evidence also shows clearly that the two were never treated in Rangoon as convertible terms. They had separate quotations on the market, and the printed forms of contract in use among Rangoon traders recognized the distinction between the two kinds. The contract form, Exhibit 2 N, gives a long list of mills, big and small. The big mills which turn out "specials" are entered twice in the list, the second entry of each name having the firm's special mark ("Pagoda," "Stork," etc.) appended to it. It is explained that if the contract was for "usual S.Q." all entries in the list would be struck out except the first entries of the big mills. If the contract was for "special $\frac{\text{and}}{\text{or}}$ small mills" the first entries of the big mills would be struck out and there would remain the second entries of the big mills (*viz.*, the entries with the distinctive marks added) and the entries of the smaller mills. If the contract was for "small mills" only, the entries of the big mills (both the first entries and the second) would be scored out and there would remain only the entries of the small mills. If a buyer wished to confine his order to any one or more of the small mills, all entries would be struck out except the names of the selected small mills. An order for "special $\frac{\text{and}}{\text{or}}$ small mills" was apparently not uncommon and under such an order the seller could supply either "specials" or "small mills" subject to any limitations made by the buyer scoring out any of the names in the list of mills.

Seeing that the term "small mills" in Rangoon certainly did not include "specials," I think it was incumbent on the plaintiff to prove clearly that the term "small mills" (or "Chinna mills" or "Sinna mills") in orders from Madras had the wider signification which he wished the Court to attribute to it. The fact that "specials" were for long accepted by Madras purchasers is not alone sufficient. The bags in these cases would have the mark of a Stork, Pagoda, etc., which to a Rangoon rice trader would show that they came from one of the big mills and, therefore, that they contained rice

*(2) See *Ireland* v. *Livingstone*, (1871) 5 E. and I. A. 395; 41 L. J. Q. B. 201; 5 H. L. 395; 27 L. T. 79.

of the "big mills special" kind. But this knowledge cannot be imputed to the defendant. In the invoices sent to the defendant the "specials" were described as "small mills" and he would, therefore, have good reason to believe that he was getting "small mills." The quality would be only slightly different from genuine "small mills" and a purchaser in Madras who had no genuine "small mills" to compare with what he received from Rangoon, would not be in a position to detect the difference.

It is urged for the appellant that the Madras purchasers did not mind whether "specials" or "small mills" (properly so called) were sent to them, that it was nothing to them whether the rice was milled in a small or in a big mill. They looked only to the quality of the rice and were satisfied with this test. After all, it is argued, they got rice which suited them; it was up to the standard of quality that they expected and the mere name by which the thing went in Rangoon is immaterial. But, looking to the terms of section 113, I think it was not open to the plaintiff to say: "I contracted to sell you 'small mills' rice, but as 'big mills special' rice is of about the same quality and you do not know one from the other you are bound to take what I sent you." There is a failure of performance when the thing offered is different from the thing contracted for.

I have not overlooked the two telegrams, Exhibits 3L and 3M, put in by the plaintiff's agent. They are orders from traders in India for "Steel's best Chinna mills" and "Bulloch's Chinna mills." What these orders referred to was apparently the "special" quality milled by the two "big" mills mentioned in them. The telegrams show no doubt that in the minds of the traders who sent them the term "Chinna mills" (or "small mills") had the same meaning as "specials" of big mills. But I cannot regard these telegrams as sufficient proof of the general proposition that an order from Madras for "Chinna mills" meant that the sender wanted "specials or small mills." These isolated telegrams are not sufficient to rebut the strong case made out by the defendant showing that "specials" and "small mills" are distinct denominations in the Rangoon market, quoted separately not only in Rangoon but in telegrams to Madras dealers.

On these grounds I would dismiss the appeal with costs.

HARTNOLL, OFFG. C. J.—I concur.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

INSOLVENCY APPLICATION No. 8 OF 1914.

May 6, 1914.

Present:—Mr. Crouch, A. J. C.

In the matter of an application by SHIVJI DHAMJI AND OTHERS TO DECLARE SAMABAI FAKIRA BASRIO—INSOLVENT.

Provincial Insolvency Act (III of 1907), s. 5—Fraudulent alienation of deceased's property by heir—Petition to get heir adjudged insolvent, whether lies.

A petition to get one adjudged insolvent cannot be entertained unless the petitioner and the person against whom the order of adjudication is sought occupy the relative positions of creditor and debtor.

Therefore, an heir of a deceased insolvent cannot be adjudged insolvent at the instance of the creditor of the deceased.

Mr. *Dipchand Chandumal*, for the Petitioning Creditors.

Mr. *Kimatrai Bhojraj*, for the Insolvent.

JUDGMENT.—This is a petition filed by seven several creditors of one Fakira Basrio, now deceased, praying that his widow Samabai, his sole heir and legal representative, be adjudged insolvent.

It is alleged in the petition that Fakira formerly carried on business in gunny bags, fuel, etc., in Karachi, that his debts amounted to over Rs. 6,524 at the time of his decease, that, immediately after his death, Samabai fraudulently and in order to defeat the creditors transferred all fuel, charcoal, etc., of the value of about Rs. 4,500 to one Chaturbhuj Bhawan, a relation, for a sum of about Rs. 2,800 and that later she fraudulently transferred gunny bags of the value of Rs. 3,000 to one Velji Harchand for the nominal sum of Rs. 1,500. It is contended that these fraudulent transfers constituted an act of bankruptcy.

On behalf of the widow Samabai, the objection has been raised that she cannot be adjudicated insolvent in respect of the debts of her deceased husband.

The petition purports to be under section 5 of the Provincial Insolvency Act, and

the Court has jurisdiction to entertain it only if the debtor has committed an act of insolvency. In this case it is alleged that Samabai made transfers of property with intent to defeat the creditors: section 4 (*b*).

Now, a debtor commits an act of insolvency within the meaning of sections 4 and 5 of the Act if (*inter alia*) he makes a transfer of his property, or of any part thereof, with intent to defeat or delay his creditors. And if he makes such transfer, one of his creditors may present a petition against him. It is obvious that the petitioner and the person against whom the order of adjudication is sought must occupy the relative positions of creditor and debtor; it is not sufficient that the petitioner should be the creditor of a third party. And the fraudulent transfer must be made to defeat the creditors of the person who makes the transfer, not of a third party. The question in this case is—Is Samabai a debtor of the petitioners?

Now on the death of Fakira the property devolved on his widow, that is to say she had the legal right to take possession of it. But the whole beneficial interest in such property did not pass to her, for there were creditors who had a right to receive the amount of their debts before any distribution of the estate among the heirs. Samabai, therefore, held the property as constructive trustee for the benefit of the creditors to the extent necessary to satisfy their just demands.

If it be true, as alleged, that Samabi has fraudulently transferred portions of the estate, then she is answerable to the creditors for such portions.

But the Common Law relation of creditor and debtor has never been established, nor does it obtain, as between the petitioners and Samabai; they have nothing more than a right to have the estate of Fakira administered and to call on Samabai as *executor de son tort* to render an account and answer to them for all assets which have come to her hands. The creditors generally or one of them may possibly by proper process eventually establish the relation of creditor and debtor. But to do this it will be necessary to have the estate wound up and ascertain the exact amount by which the available assets fall short of the debts and also the exact amount for which Samabai is personally responsible as *executor de son tort*.

Under section 108 of the Presidency Towns Insolvency Act a creditor of a deceased debtor can file a petition for administration of his debtor's estate, but no similar provision has been introduced into the Provincial Insolvency Act.

The petition is, therefore, dismissed with costs. The attachment is raised.

Application dismissed.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 95 OF 1912.

September 30, 1913.

Present:—Mr. Justice Twomey.

MA SEIN—PLAINTIFF—APPELLANT

versus

M. M. K. A MUTHUCURPAN CHETTY—DEFENDANT—RESPONDENT.

Mortgage—Suit for sale—Non-joinder of necessary party, effect of—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1.

Where a person mortgaged the joint property of himself and his wife and the mortgagee obtained a decree for the sale of the land in a suit brought against the husband alone:

Held, that the wife was a necessary party to the suit and that the decree obtained by the mortgagee was inoperative as against the wife.

Mr. *Hay*, for the Appellant.

Mr. *Villa*, for the Respondent.

JUDGMENT.—The plaintiff-appellant, Ma Sein's husband, Maung Paw, mortgaged the land in suit to the defendant-respondent, a Chetty firm. The defendant-respondent brought a mortgage suit against Maung Paw and having obtained a decree for the sale of the land, bought it with the permission of the Court. Ma Sein then brought the present suit alleging that the land was the joint property of herself and her husband, pleading that her interest in the land was not affected by the mortgage or the subsequent decree against her husband and praying that her title to one half the land should be declared and that the sale should to that extent be annulled.

The lower Courts have found concurrently that Ma Sein consented to the mortgage and

have dismissed her suit. The circumstances of the case give rise to a strong presumption that Ma Sein assented to her husband's action in mortgaging the land. She had been suffering from paralysis for some years and the management of the property was entirely in the hands of Maung Paw, who was living with and supporting his wife and children. There is reason to believe that the loan was contracted for family purposes and that Maung Paw acted on behalf of his wife as well as himself in mortgaging the land. As in the somewhat similar case of *Ma Nyein Thu* v. *P. S. M. L. Murugappa Chetty* (1) it may reasonably be held that the husband's mortgage was effective against his wife's share as well as against his own and to that extent the decision of the lower Courts is, in my opinion, correct.

But the lower Courts went beyond the rulings of this Court in dismissing the plaintiff's suit. They failed to consider the effect of the Chetty's omission to join Ma Sein as a party to the mortgage suit. It is clear that she was a necessary party under Order XXXIV, rule 1, which renders it imperative in a mortgage suit to join as parties "all persons having an interest either in the mortgage-security or in the right of redemption." In this case there was no excuse for the omission, as the land stood in the joint names of the husband and wife and they were living together. The mortgagee does not and cannot now plead that he had no notice of the wife's interest in the land. In his written statement he merely urged that the mortgage-debt was contracted for the benefit of Ma Sein and her family and that Ma Sein was fully aware of it. This is a good plea as against Ma Sein's claim that she was not affected by the mortgage, but it is not a good plea as against her claim that she is not affected by the decree in the mortgage suit to which she was not a party. In the Allahabad case *Bhawani Prasad* v. *Kallu* (2), it was held by a Full Bench that "when a plaintiff mortgagee institutes a suit for sale against his mortgagor, who is the father of sons in an undivided Hindu family, without joining as parties to the suit the sons of the mortgagor, of whose interests he has notice, and obtains a decree and an order absolute for sale against the father only, the sons can successfully sue for a declaration that the mortgagee decree-holder is not entitled to sell in exectuion of his decree for sale the interests of the sons in the property comprised in the mortgage given by the father, although the sole ground of their suit is that they were not parties to the suit by the mortgagee." I have examined the proceedings of the Civil Suit No. 4 of 1910 in which the Chetty sued on the mortgage. There is nothing in that suit to suggest that Maung Paw was being sued in the capacity of a representative of his wife as well as in his personal capacity, and it is only when a defendant is manifestly sued as a representative that a sale in terms of his interests is allowed to convey the interests of others. If Ma Sein had been a joint executant of the mortgage instrument, the necessity of joining her as defendant in the mortgage suit would not have been questioned and there is no reason to hold that the necessity for joining her is any the less because she was an implied and not an express joint mortgagor.

On these grounds I set aside the decrees of the lower Courts and grant Ma Sein a declaration of title in respect of one half the land in suit with costs in all Courts. I note that the holding of Maung Paw and Ma Sein which was mortgaged to the respondent and afterwards bought by him at the auction-sale, was holding No. 29 of 1905-06 of Mwelon Kwin measuring 6·38 acres, and this is the holding as to a moiety of which a decree is now granted.

Decree set aside.

(1) 20 Ind. Cas. 451; 6 Bur. L. T. 113.
(2) 17 A. 537 (F. B.); A. W. N. (1895) 212.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 41 OF 1911.
April 24, 1914.
Present:—Mr. Hayward, J. C., and Mr. Boyd, A. J. C.

HOONDRAJMAL CHATOMAL—PLAINTIFF—APPELLANT
versus
DHANOOMAL CHATOMAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Execution—Award decree—Ordering ejectment after

MAUNG KYAN *v.* MAUN PO.

payment of certain sum within certain time, whether executory or mere declaratory.

An award decree directing plaintiff to pay defendant Rs. 500 within three months and thereupon to eject him from a certain house, is not merely declaratory but is also capable of execution.

Appeal against the order of the District Judge, Sukkur-Larkana.

Mr. *Isardas Oodharam*, for the Appellant.

Mr. *Rupchand Bilaram*, for Respondent No. 1.

JUDGMENT.—The plaintiff was directed by an award decree to pay defendant No. 1 a sum of Rs. 500 odd within three months and thereon to eject the defendant No. 1 from a certain house. The District Judge, Sukkur, on first appeal refused execution of this decree holding that the decree was declaratory and not executory.

We have on second appeal carefully considered paragraphs 17 and 18 of the award decree and find that the plaintiff was directed absolutely to make the payment of Rs. 500 within three months and thereon the defendant No. 1 was absolutely to be ejected from the house. Neither the payment nor the ejectment appear, in our opinion, to have been dependent on any uncertain future events within the meanin of the law as laid down in the cases of *Musammat Lachmibai* v. *Kaniomal* (1) and *Gokaldas* v. *Otaudas* (2).

We have further been asked to hold that under paragraphs 17 and 18 of the award decree neither payment of the money nor ejectment could be enforced after three months. But the plain meaning of those paragraphs would appear to us to be beyond doubt that the payment was permitted to be made voluntarily at any time within three months, but thereafter would be enforceable by execution. Similarly there was to be no forcible ejectment before payment, but after payment ejectment should be enforceable by execution through the Court.

We must, therefore, restore the order of the Sub-Judge and reverse the decree of the District Judge. Costs to be borne by the respondent-defendant No. 1 both of the District Court and this Court.

Decree reversed.

(1) 1 S. L. R. 184.
(2) 2 S. L. R. 33.

LOWER BURMA CHIEF COURT.

CIVIL REVISION No. 188 OF 1912.

November 25, 1913.

Present:—Mr. Justice Ormond.

MAUNG KYAN AND ANOTHER—PLAINTIFFS—APPLICANTS

versus

MAUNG PO AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 20, Sch. I, Art. 97—Taking profits of land in lieu of interest on money lent—Suit to recover money—Limitation.

Where the plaintiff was put in possession of land by the defendants in consideration for a previous money debt on the understanding that no interest was to be charged on the money and no rent for the land and that the land was redeemable at any time, and on the defendant resuming possession of the land the plaintiff sued to recover the debt:

Held, that Article 97 of the Limitation Act applied to the suit.

Held, further, that as the plaintiff was in possession of the land and was to take the profits in lieu of interest under an admitted agreement, such taking of profits amounted to payment of interest within the meaning of section 20 of the Limitation Act.

Mr. *Harvey*, for the Applicants.

Mr. *R. N. Burjorjee*, for the Respondents.

JUDGMENT.—Defendants-respondents in 1906 were indebted to the plaintiffs-appellants: the plaintiffs say for Rs. 400. The defendants admittedly put the plaintiffs in possession of certain land. The defendants allege that they put the plaintiffs into possession as mortgagees reserving the right of redemption. The plaintiffs' case was that the land was sold outright in satisfaction of the debt. The defendants sued for redemption in the Township Court and obtained a decree for possession without any obligation being imposed upon them to pay off the debt. The Township Judge held that as there was no registered document there was neither a sale nor a mortgage. The plaintiffs did not appeal, but instituted the present suit to recover Rs. 400, the amount, they say, that the defendants owed them at the time they were put into possession. In this suit the defendants in their written statement admit that they gave the plaintiffs possession of the land on the understanding that there was no interest to be charged on the money and no rent for the land and that the land was redeemable at any time. The plaintiffs obtained a decree in the Township Court, but on appeal the District Judge dismissed the claim on the ground that the cause of action was on the original loan which was made in 1906 and was, therefore, barred by

limitation.

The plaintiffs then preferred this appeal. For the respondents it is contended that no second appeal lies because, under section 30 of the Lower Burma Courts Act and of section 102 of the Civil Procedure Code, the present claim was one which was cognizable by a Small Cause Court. I think that contention is good. The plaintiffs then ask me to treat this appeal as an application in revision. I have the power to do so, and the question is whether the District Court has acted illegally. From the defendants' admission in their written statement it is clear that if the case were not disposed of on its merits, a gross injustice would be done to the plaintiffs. Article 97 of the Limitation Act applies and there is a very similar case to the present decided in 1888 by the Punjab Chief Court, *Gurmukh Singh* v. *Chandu Shah* (1). The case reported as *Parangodan Nair* v. *Perumtoduka Illot Chata* (2) is also in point. And even if the cause of action were considered to be the old debt, under section 20 of the Limitation Act, I think, the fact that the plaintiff was in possession of the land and under an admitted agreement was to take the profits in lieu of interest, such taking of profits would be a payment by the defendant of interest to the plaintiff so as to preserve the claim from being barred. Considering the palpableness of the error and the plain injustice that would occur if this error is allowed to stand, I think it is a case in which I should interfere in revision.

I, therefore, set aside the decree of the District Judge and remand the case to him to be tried on its merits. The costs of this application will abide the result.

Decree set aside.

(1) 193 P. R. 1888.
(2) 27 M. 380.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 517 OF 1913.

September 17, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

MAIKAL SERVAI—DEFENDANT No. 2—APPELLANT

versus

THAMBUSWAMI SERVAI AND ANOTHER—PLAINTIFF & DEFENDANT No. 1—RESPONDENTS.

Plaint—Cause of action—Suit on title—Title found against—Decree on prior possession—Validity—Practice

Mere possession of property gives an interest which can be enforced in a suit against a trespasser.

Asher v. *Whitlock*, 1 Q. B. J; 35 L. J. Q. B. 17; 11 Jur. (N. S.) 925; 13 L. T. 254; 14 W. R. 26; *Sundar* v. *Parbati*, 12 A. 51 (P. C.); 16 I. A. 186; 5 Sar. P. C. J. 448; *Narayana Row* v. *Dharmachar*, 26 M. 514; 13 M. L. J. 146, followed.

A suit should not be decreed on the basis of a claim not set up in the plaint or raised in the issues or even in the memorandum of first appeal.

Somasundaram Chetty v. *Vadivelu Pillai*, 31 M. 531; 4 M. L. T. 344 and *Shiro Kumari Debi* v. *Govind Shaw Tanti*, 2 C. 418, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Trichinopoly, in Appeal Suit No. 149 of 1912, preferred against that of the District Munsif of Ariyalur, in Original Suit No. 1353 of 1910.

FACTS.—The suit was for partition by metes and bounds and for possession of plaintiff's half share of the suit properties. The plaintiff alleged that he and the 1st defendant were brothers, that the suit property and others originally belonged to their father, that after his death the first defendant and himself were jointly enjoying the same and that they had effected a division between them of all the properties except the one in suit. The 2nd defendant, who was in possession of the suit property at the time of the suit, denied plaintiff's title and claimed both title and possession in himself. The District Munsif held the plaintiff was an illegitimate son and, therefore, had no title by inheritance to the suit properties, as the parties were Christians. He also found against the defendant's title, but dismissed the suit as plaintiff had no title. On appeal the Subordinate Judge, while agreeing with the Munsif on the question of title, gave a decree to the plaintiff on the strength of his prior possession. The 2nd defendant appealed to the High Court.

Mr. *G. S. Ramachandra Iyer*, for the Appellant:—The suit is based on the title of plaintiff as heir to his father and not on the ground of his having a possessory title to the property. The possession spoken to in the plaint is only ancillary to, and not the basis of, his title. Hence plaintiff could not get a decree. Vide *Rajah Haimun Chull Singh* v. *Koomer Gunsheam Singh* (1)

(1) 5 W. R. 69 (P.C.).

Somasundaram Chetty v. *Vadivelu Pillai* (2) and *Shiro Kumari Debi* v. *Govind Shaw Tanti* (3).

Mr. *A. Krishnaswami Iyer*, for Mr. *V. Masilamani Pillay*, for the Respondents :— Possession is itself capable of conferring a right and it is capable of being alienated, partitioned or inherited. See *Sundar* v. *Parbati* (4) *Narayana Row* v. *Dharmachar* (5) and *Asher* v. *Whitlock* (6). The plaintiff has set out in his plaint that he has been in possession and enjoyment of the suit property. The defendant has not shown title in himself. Plaintiff is, therefore, entitled to succeed.

Mr. *G. S. Ramachandra Iyer*, replied.

JUDGMENT.—Plaintiff has based his suit on title by inheritance and as it is found that he and 1st defendant are only illegitimate sons of Arulappa Servai, the original owner, he is no heir at all.

The Subordinate Judge has, however, given him a decree on the strength of the principle laid down in *Asher* v. *Whitlock* (6) and followed in *Sundar* v. *Parbati* (4) and *Narayana Row* v. *Dharmachar* (5) that mere possession of property gives an interest which can be enforced in a suit against a trespasser. No doubt a suit is maintainable on such a basis; but if plaintiff seeks to rely on it, it should be clearly set up so that the contesting defendants may know what they have to meet. There is no indication of such a claim in the plaint, which, as already stated, bases the suit on title by inheritance and nothing else; and the contention appears to have been first set up in the course of the hearing in the lower Appellate Court. We consider, following *Somasundaram Chetty* v. *Vadivelu Pillai* (2) and *Shiro Kumari Debi* v. *Govind Shaw Tanti* (3), that plaintiff should not have been given a decree on the basis of a claim not set up in the plaint or raised in the issues or even set up in the 1st appeal petition.

(2) 31 M. 531; 4 M. L. T. 344.
(3) 2 C. 418.
(4) 12 A. 51 (P. C.); 16 I. A. 186; 5 Sar. P. C. J. 448.
(5) 26 M. 514; 13 M. L. J. 146.
(6) 1 Q. B. 1; 35 L. J. Q. B. 17; 11 Jur. (N. S.) 925; 13 L. T. 254; 14 W. R. 26.

We must set aside the decree of the Subordinate Judge and dismiss the suit with costs throughout.

Appeal allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 33 AND 35 OF 1911.

May 6, 1914.

Present:—Mr. Hayward, J. C., and Mr. Crouch, A. J. C.

Mistri MAHOMED UMAR AND OTHERS— APPELLANTS

versus

Seth CHIMANSING AND OTHERS— RESPONDENTS.

Compromise—Agreement to abide by sums fixed by other side—Acquiescence—Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Pleader, power of, to compromise.

Where the parties to a suit entered into an agreement to abide by sums to be mentioned by the other side in settlement of the litigation, and in accordance therewith made no objection to the sums stated:

Held, that their acquiescence amounted to a lawful adjustment within the meaning of Order XXIII, rule 3, Civil Procedure Code.

A Pleader ordinarily has no power to compromise and this power cannot be given in Sind in the *vakalatnama* in view of Form No. 4 of Sind Courts Civil Circulars.

Appeal from the decree of the District Judge, Sukkur-Larkana.

R. B. Mr. *Teckchand Udhavdas*, for the Appellants.

Mr. *Wadhumal Oodharam*, for Respondents Nos. 1 and 2.

JUDGMENT.—The appellants in these three appeals gave their Pleader power to compromise on their behalf by their *vakalatnama*. Some of the appellants actually signed an agreement to abide by the sums to be mentioned by the other side in settlement of the litigation and the rest of the appellants were present when their Pleader signed this agreement on their behalf. The appellants' Pleader was present when the sums were mentioned by the other side in accordance with this agreement and made no objection to the sums stated. A decree for the sums mentioned was thereupon granted by the Sub-Judge.

SEETHAI AMMAL v. MAHADEVA IYER.

The appellants have contended that this decree is bad for two reasons: (1) because the appellants' Pleader had no authority to compromise and (2) that the transactions did not amount to a lawful compromise. With regard to the first point, it is true that a Pleader ordinarily has no power to compromise and that the power to compromise could not now be given in the *vakalatnama* in view of Form No. 4 prescribed at page 160, Sind Courts Civil Circulars. But the question whether the Pleadar was duly authorized to compromise or not was a question of fact, which has been decided in the affirmative by the lower Appellate Court. That finding of fact must be accepted by us sitting as a Court of second appeal.

With regard to the second point, it is true that the agreements themselves might be argued not to be lawful compromises inasmuch as they did not mention any specific sums in connection with the compromises. But these sums were made specific by the statements made by the other side and those statements appear to have been accepted as a matter of fact by the Pleader on behalf of the appellants. This has not been expressly stated, but it appears to have been the view accepted by the lower Appellate Court and in any case appear to us the proper interpretation of the Pleader's silence on a consideration of the record on second appeal.

The case would, therefore, appear to be exactly on all fours with the case of *Seumal* v. *Pursomal* (1) and the compromises must be held to have been properly accepted as lawful compromises by the lower Courts under Order XXIII, rule 4, of the Schedule of the Civil Procedure Code. We must, therefore, dismiss the appeals with costs.

Appeals dismissed.

(1) 19 Ind. Cas. 450; 6 S. L. R. 166.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1218 OF 1913.

September 30, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

SEETHAI AMMAL—DEFENDANT—APPELLANT

versus

MAHADEVA IYER AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Gift · Paramparyamai, *limitation of—Deed, construction of—Intention—Life-estate.*

The rule of Hindu Law that "a gift to a man and his sons and grandsons or to a man and his son's sons would, in the absence of anything showing contrary intention, pass a general estate of inheritance," does not apply where there are words in the deed expressly or impliedly limiting that right.

Therefore, where different words are used to convey an absolute interest and a partial interest and where the donee is himself 70 years old, the intention is rather to confine the estate to his life and not to grant an estate of inheritance.

Jatindra Mohan Tagore v. *Ganendra Mohan Tagore*, 9 B. L. R 377; 18 W. R. 359 (P. C.); I. A. Sup. 47; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 85; *Ramlal Mookerjee* v. *Secretary of State*, 8 I. A. 46; 7 C. 304; 10 C. L. R. 349 (P. C.); 4 Sar. P. C. J. 225; 5 Ind. Jur. 327; *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy*, 24 C. 834 (P. C.); 24 I. A. 76; 1 C. W. N. 387, distinguished.

Padmanand Singh v. *Hayes*, 28 C. 720; 3 Bom. L. R. 803; 5 C. W. N. 806; 28 I. A. 152 (P. C.), followed.

Second appeal against the decree of the Court of the Subordinate Judge of Kumbakonam, in Appeal Suit No. 881 of 1911, preferred against that of the District Munsif of Kumbakonam, in Original Suit No. 55 of 1911.

Mr. *S. Srinivasa Aiyangar*, for the Appellant.

Mr. *T. Rangachariar*, for Mr. *T. R. Ramachandra Aiyer*, for the Respondents.

JUDGMENT.

OLDFIELD, J.—The question for decision is whether Exhibit B, a settlement by the 1st defendant in favour of the 2nd defendant, his daughter, will be operative beyond the former's life-time. The answer to it depends on whether at its date the 1st defendant was able to make an absolute disposition of the property or, as the plaintiffs contend, had already disposed of all except his life-interest in it by a prior deed, Exhibit A.

Exhibit A is a deed of partition between the first defendant and his son, Nilakantaiyar. It contains, first, dispositions regarding houses and debts, as to which there is no dispute. Next, the lands are divided, Schedule A going to the first defendant and Schedule B to Nilakantaiyar; and the difficulty arises

from the fact that the balance of Schedule A, remaining in the former's hands after any alienations necessary in order to the payment of debts, is, in the words of the document, to "be enjoyed by him, as long as he is alive, without being subjected to any sort of alienation and after his time his grandsons shall receive and enjoy it *paramparyamai.*" There is then a provision for the enjoyment of one item, Survey No. 28D, with all absolute rights of alienation. Lastly, it is provided that the share of Nilakantaiyar "shall be enjoyed by him and his male heirs, though he must not place any kind of alienation on the said land."

Before referring to the actual words by which the first defendant's estate is described, I observe that *three* indications as to their meaning are available in the rest of the document. *Firstly*, the portion relating to Survey No. 28D is in sharp contrast with that relating to other items. It may be that those concerned hoped or expected that the former item would be sufficient for payment of the debts. But it is clear that they knew how to create an absolute title to it and used other words for that purpose than those used in connection with the rest of the first defendant's share.

Secondly, there is again a significant contrast between the expressions used to effect a transfer to the first defendant and those used in the case of his son. It is not disputed that the latter took an absolute estate; and then it is to be supposed that the result in the case of the former was different. *Lastly*, there is no reason for assuming that the intention was to create similar estate for father and son. The former was aged—seventy-five at the time; and it is almost, if not quite, as likely that he combined a future settlement with an immediate partition as that he made the latter alone.

Then as to the words, the interpretation of which is directly in dispute, there is, first, the fact that plaintiffs, the first defendant's grandsons, were in existence at the date of Exhibit A and that the effect of their construction would be to confine to them the gift of the estate in reversion, although it was possible that Nilakantaiyar might have more sons whom the first defendant would not naturally desire to exclude. But to admit this objection is in effect to substitute the settlement, which the first defendant might be supposed likely to have made, for that which on the construction of his language, as it stands, it will be found that he did make.

As regards authority, the plaintiff's interpretation is not open to criticism as an attempt to create a novel course of inheritance. For after the beneficiaries specified and in existence, that is, the 1st defendant and the plaintiffs have taken, no line of devolution is prescribed and the property would follow the ordinary course by inheritance or survivorship. The principle enunciated in *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore*(1) and other similar decisions is, therefore, inapplicable.

It is next contended that the actual words of the first defendant's disposition, in Exhibit A, should be read in the light of the statement in *Jatindra Mohan Tagore's* case (1), that "a gift to a man and his sons and grandsons, or to a man and his son's sons, would, in the absence of anything showing contrary intention, pass a general estate of inheritance according to Hindu Law," a vernacular expression corresponding with that already specified as occurring in Exhibit A, being referred to as entailing the same result; and this is cited with approval in *Ramlal Mookerjee* v. *Secretary of State* (2): *vide* also *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (3). But there is nothing in these cases irreconcilable with the plaintiffs' claim, which is based on the presence in Exhibit A of further words expressly or impliedly limiting the first defendant's estate, the matter on which the inferences already drawn are founded and the express prohibition of alienation by him. It was recognised in the last case cited that if a similar limitation had been expressed in the document then under construction, the Court would have given effect to it. And the Court gave effect to one in the authority relied on by the District Munsif, *Padmanund Singh* v. *Hayes* (4). In accordance with it the decisions in the plaintiffs' favour were

(1) 9 B. L. R. 377; 18 W. R. 359 (P. C.); I. A. Sup. 47; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 85.

(2) 8 I. A. 46; 7 C 304; 10 C. L. R. 349 (P. C.); 4 Sar. P. C. J. 225; 5 Ind. Jur. 327.

(3) 24 C. 834 (P. C.); 24 I. A. 76; 1 C. W. N. 387.

(4) 28 C. 720; 3 Bom. L. R. 803; 5 C. W. N. 806; 28 I. A. 152 (P. C.).

justified. The second appeal fails and is dismissed with costs.

TYABJI, J.—I agree with my learned brother in accepting the constructions put upon Exhibit B by the lower Courts. To the reasons contained in the judgments under appeal and my learned brother's judgment I have nothing to add.

I agree, therefore, that the second appeal should be dismissed with costs.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 45 OF 1911.

April 24, 1914.

Present:—Mr. Hayward, J. C., and Mr. Boyd, A. J. C.

KIMATRAI KASHIRAM AND OTHERS—APPELLANTS

versus

WADERO SHER MAHOMED KHAN AND ANOTHER—RESPONDENTS.

Limitation Act (IX of 1908), Sch, I, Art. 75—Instalment bond, default in payment of—Extension of period of limitation—Waiver, what constitutes.

Where a bond payable by instalments provides that in case of default the obligor would be liable to pay the total amount then due, and default is made:

Held, (1) that the limitation is governed by Article 75, unless it is proved that the creditor waived his right to enforce the default provision;

(2) that though failure to sue may be evidence of waiver, it does not amount to waiver so as to affect limitation.

Appeal against the decree of the Assistant Judge, Sukkur-Larkana.

Mr. *Wadhumal Oodharam*, for the Appellants.

Mr. *Dipchand T. Ojha*, for the Respondents.

JUDGMENT.—This second appeal depends upon the construction of the following words in paragraph 5 of an instalment bond: "If I make any default I will be liable to pay the remaining principal amount at once and even then it will be in the power of the mortgagees to let the money remain with me or not." The appellants contend that the last words, "even then it will be in the power of the mortgagees to let the money remain with me or not," amounted to an independent contract for the recovery of the instalments as previously provided in addition to the optional contract for the payment of the whole amount in default of payment of the instalments. They contend that paragraph 5 of the instalment bond did not amount to an indivisible contract providing that the whole amount should be due in case of default in payment of the instalments within the meaning of Article 75 of the Schedule of the Limitation Act.

We are not prepared to say that such an independent contract would be impossible in an instalment bond, but clear words would be necessary to establish such a contract. The words relied upon in this case are not by any means, in our opinion, such clear words. It was held that there was no such independent contract in the far clearer alternative conditions 1 and 2 in the case of *Navalmal* v. *Dhondiba* (1). We are unable to follow the reasoning of the learned Judges in the case of *Ajudhia* v. *Kunjal* (2) and think that paragraph 5 of the instalment bond in this case amounted to an indivisible contract providing that the whole amount should be due in default of payment of the instalments within the meaning of Article 75 of the Schedule of the Limitation Act—as held in the case of *Jadab Chandra* v. *Bhairab Chandra* (3).

We have, therefore, only to consider whether there has been any waiver of the benefit of the default provision. No actual waiver has been proved and though failure to sue might be evidence of waiver it would not, in our opinion, amount to proof, as pointed out in the cases of *Jadab Chandra* v. *Bhairab Chandra* (3) and of *Girindra Mohun Roy* v. *Bocha Das* (4). We have no doubt that the Article applicable is Article 75. The fact that the bond was registered, merely increased the period of limitation to six years by reason of Article 116 of the Schedule of the Limitation Act.

We have been referred to several cases relating to instalment decrees, but we do not consider it necessary to deal with

(1) 11 B. H. C. R. 155.
(2) 30 A. 123; 5 A. L. J. 72; A. W. N. (1908) 36.
(3) 31 C. 297.
(4) 1 Ind. Cas. 49; 36 C. 394; 9 C. L. J. 226; 13 C. W. N. 1004.

them in detail because though the case of instalment decrees is similar, the language is materially different in Article 182 of the Schedule of the Limitation Act.

We must accordingly hold that the appellants' suit was time-barred and dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 438 OF 1913.

August 27, 1914.

Present:—Mr. Justice Seshagiri Aiyar.

NAGALINGA CHETTIAR—PLAINTIFF—PETITIONER

versus

KAYAROHANA CHETTIAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 151—Bailee, care to be taken by—Ordinary prudence—Point of law.

Where plaintiff entrusted defendant with money, which the latter placed along with his own money in a box which was left unlocked, and on the money being lost the plaintiff sued for recovery:

Held, (1) that the defendant was liable, as he did not take that amount of care as a man of ordinary prudence would have taken of his own money;

(2) that whether the inference that ordinary prudence has been exercised has been drawn from the facts found, is a point of law justifying interference on second appeal.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree and judgment of the Court of Subordinate Judge of Negapatam, in Small Cause Suit No. 2530 of 1912.

Mr. *C. S. Venkatachariar*, for the Petitioner.

Mr. *Jayarama Aiyar*, for Mr. *G. S. Ramachandra Aiyar*, for the Respondents.

JUDGMENT.—This is a very hard case. Mr. Jayarama Aiyar's contention is that his client has taken as much care of the goods entrusted to him as is required by section 151 of the Indian Contract Act. The facts are these:—The plaintiff entrusted the 1st defendant with a sum of Rs. 43. The money was tied up in a bundle: it was placed by the 1st defendant in a box of his own with money belonging to himself; it is admitted that he did not lock the box. After this the plaintiff and the 1st defendant went out for making some other purchase. On return the money was found lost. On these facts the Subordinate Judge holds that the defendant is not liable. It is argued on his behalf that, as the 1st defendant placed his own moneys in the box without locking it, he must be deemed to have taken as much care of the plaintiff's money as he did of his own. But that leaves the question open whether he exercised ordinary prudence. The fact that the place was a shop to which everybody had access and that there were shops on either side, was an additional circumstance why extra precaution should be taken by the person to whom the money had been entrusted. By not locking the box the defendant rendered it possible for some thief to easily appropriate the money. The direction given to the Jury by Lord Denman, C. J., in *Doorman* v. *Jenkins* (1) is in point. I must hold that it has not been proved that the 1st defendant has taken that care which an ordinary prudent man would have taken of money of his own. Mr. Jayarama Aiyar argues that it is a question of fact and I should not interfere. But the inference that ordinary prudence has been exercised has been drawn from the facts found, and that is a question of law. I am not questioning the findings of fact: I am differing from the inference which the lower Court drew from those facts. I am satisfied that upon the facts found the requirements of section 151 have not been complied with. I reverse the decree of the Subordinate Judge and give a decree for the plaintiff for the amount, Rs. 430-7-0. There will be no costs and no interest up to this date. The plaintiff will have interest at 6 per cent. upon the amount decreed from this day.

Petition allowed.

(1) 2 Ad. & E. 256 at p 258; 4 N. M. 170; 4 L. J.K. B. 29; 111 Eng. Rep. 99; 41 R. R. 429.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 941 OF 1913.

May 27, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

MAHADEO SAHU—DEFENDANT—APPELLANT

versus

MAHIPAL RAI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 55, cl. (4)—

MAHADEO SAHU *v.* MAHIPAL RAI.

Unpaid purchase-money—Vendor's lien on purchase-money deposited by pre-emptor—Money withdrawn by vendee—Suit by vendor to recover Defence Pre-emptor's suit to recover from vendee after paying vendor, whether maintainable.

A vendor left a part of the price with the vendee for payment to a creditor of the former, but before the creditor was paid the sale was pre-empted and the whole of the pre-emption money was received by the vendee without the vendor or pre-emptor taking exception to this. Then the vendor's creditor recovered his debt from the vendor by suit and the latter in his turn sued the vendee as well as the pre-emptor for recovery of the unpaid purchase-money under section 55, clause (4), of the Transfer of Property Act. The vendee appeared, but the pre-emptor did not and the Court passed a decree for sale of the pre-empted property to enforce the alleged statutory charge for the unpaid purchase-money. Upon this the pre-emptor paid the amount of the decree in order to save the property and sued the vendee for the amount:

Held, that the pre-emptor's suit ought to fail inasmuch as had he defended the vendor's suit, no decree would have been passed against him.

Second appeal from a decree of the Additional Judge of Gorakhpur.

FACTS.—The plaintiffs - respondents brought a suit for a certain sum of money. On 22nd April 1899, A. P. R. and M. R. hypothecated their 8 pies-share to one M. D. M. for Rs. 299. On July 13th, 1901, they sold their share in another village for Rs. 925 to the defendant. Out of this sum they said that Rs. 425 was to be paid to M. D. M. The present plaintiffs brought a suit to pre-empt this sale. They got a decree and were ordered to pay Rs. 925. They did so and obtained possession. Then M. D. M. brought a suit upon his mortgage and the mortgagors satisfied his decree. The original mortgagors brought a suit against the present plaintiffs and the defendants to recover this amount. In this suit, the present defendants was exempted and a decree was passed against the present plaintiffs on January 2nd, 1908. On August 20th, 1909, and on March 21st, 1910, the present plaintiffs paid up the amount of this decree. They then brought the present suit to recover this amount from the defendant. Both the Courts below decreed the suit. The defendant appealed to the High Court.

Mr. *Baldeo Ram Dave* (with him Mr. *Iswar Saran*), for the Appellant:—The present suit is not maintainable as no cause of action has accrued against the appellant. The suit is in fact barred by limitation. The appellant has realised the money under

Mr. *Peare Lal Banerji* (for Mr. *Gokul Prasad*, with him Mr. *B. E. O'Conor*), for the Respondents:—The defendant undertook to pay off the prior mortgagee and when after the pre-emption suit he took the whole consideration money, his liability to pay off the mortgagee continued and never ceased. If the plaintiffs have had to pay this money for the payment of which the defendant was strictly liable they are entitled to claim the amount from the defendant, under the principle of law laid down in section 69 of the Contract Act. When the original owners of the property brought a suit to enforce their statutory charge, there was no defence open to the suit and the payment by the present plaintiffs was only made when their property was attached and they desired to save it. Under such circumstances, the person making the payment is entitled to call upon the person actually liable to re-pay the amount.

He relied on *Dulichand* v. *Ramkishen Singh* (1).

Mr. *Baldeo Ram Dave* was not heard in reply.

JUDGMENT.—This appeal arises under somewhat peculiar circumstances. Property was sold by Amrit Prasad Rai and Mahadeo Rai to the defendant-appellant, the purchase-money being Rs. 925 out of which Rs. 435 were left in the hands of the vendee for the purpose of discharge of a mortgage on other property of the vendors. The plaintiffs in the present suit brought a suit for pre-emption which resulted in a decree in their favour conditional on their paying into Court the sum of Rs. 925. The vendors apparently took no exception to the terms of this decree, though they were parties to the suit. The consequence was that the vendees-defendants in the pre-emption suit drew out of Court the whole Rs. 925, although they had not, as a matter of fact, paid the mortgagee. The mortgagee then brought a suit against the vendors and obtained a decree, which the vendors satisfied in order to save the property. The vendors then brought a suit purporting to be under the provisions of section 55, clause 4 (*b*), of the Transfer of Property Act, making both the vendee and the pre-emptors parties to the suit. The vendee appeared and defended the suit. The pre-emptors did not appear and the result was that a decree

(1) 7 C. 648: 8 I. A. 93 (P. C.); 4 Sar. P. C. J. 245;

for sale of the pre-empted property was made to enforce the alleged statutory charge for the unpaid purchase-money. The pre-emptors then paid the amount of the decree in order to save the property and instituted the present suit to receive the amount from the vendee in the pre-emption suit.

The question is whether under these circumstances the defendant is liable.

The Court of first instance granted a decree which was affirmed by the lower Appellate Court.

It seems to us that the plaintiffs in the present suit, when they paid the full amount of the purchase-money into Court under the decree in the pre-emption suit, fully discharged all personal liability and also all liability against the property they had pre-empted. The money when paid into Court was there for the persons entitled to it. In any event the vendors had every opportunity of asking the Court to safeguard their interest by directing that the Rs. 435 should be paid to them or to their mortgagee. If the vendors neglected to look after their interest that was their own fault. This being the case, it appears to us that if the plaintiffs in the present suit (the pre-emptors) had defended the suit which the vendors brought, they would have had a complete defence. They could have shown the Court that "the ownership of the property had not passed into their hands" until after they had paid into Court the entire purchase-money, and that, therefore, there was no longer any statutory lien on the pre-empted property in their hands. It comes to this that a decree was made against the present plaintiffs which ought never to have been made and which in all probability would not have been, if they had defended the suit. If it had been, the plaintiffs would still have had their remedy by way of appeal. It is said that at the time the suit was instituted by the vendors to enforce the statutory lien, any personal right they may have had against the vendee was barred by limitation. If this be correct, then the vendors' suit would have failed *in toto*. We cannot see under the circumstances of the present case how the plaintiffs can bring home liability to the defendant.

The result is that we allow the appeal, set aside the decree of both the Courts below and dismiss the plaintiffs' suit. The parties will bear their own costs in all Courts.

Appeal decreed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2600 OF 1912.

August 25, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

C. RAGHUNATHA ROW SAHIB AVERGAL—DEFENDANT—APPELLANT

versus

VELLAMOONJI GOUNDEN—PLAINTIFF—RESPONDENT.

Madras Estates Land Act (I of 1908), s. 53—Distraint for excess amount, if can be sustained.

A distraint ought not to be set aside altogether because it is for an amount in excess of the rent actually due but must be sustained in respect of the amount lawfully recoverable

Second appeal against the decree of the District Court of North Arcot, in Appeal Suit No. 200 of 1912, preferred against that of the Head-quarters Deputy Collector, Vellore, in Summary Suit No. 1 of 1912.

Mr. *L. A. Govindaraghava Iyer*, for the Appellant.

Mr. *T. R. Venkatarama Sastriar*, for the Respondent.

JUDGMENT.

OLDFIELD, J.—The learned Judge confirmed the decree setting aside the distraint on the ground that it was for an excessive amount. It is contended here with reference to section 53 (2), Estates Land Act, that the amount, in respect of which the distraint was excessive, should have been ascertained and that the distraint should have been set aside in respect of that amount only and sustained in respect of the remainder of the demand.

Section 53 (2) is general in its wording. It refers to the *pattah* as enforceable without qualification to the extent to which it is found to be correct. On its merits appellant's contention would appear to be in accordance with convenience and justice.

Contra it is urged first that a *pattah* found incorrect as to the amount of the demand is not partially correct, but totally incorrect, a partially correct *pattah* being for instance one found correct as to some only out of the items of the holding covered by it. No authority has been shown for this contention, and it does not commend itself on its merits.

Next it is urged that section 53 (2) deals only with the procedure by suit on the *pattah* and provides only for the enforceability of the *pattah* by suit. This is supported on the ground that section 53 (1) refers to distraint and sale of moveables and to sale of the holding under Chapter VI and that section 53 (2) must, therefore, have been intended to regulate the remaining method of recovery provided by the Act, than by suit. This does not, in my opinion, follow. As observed above, section 53 (2) contains no restriction of its effects to suits. The use in it of the word "nevertheless" is against the importation of that restriction. And finally such importation is, in my opinion, negatived by the fact that exchange of *pattah* and *muchilika* is not under the Act a necessary preliminary to the institution of a suit, and a provision regarding errors in the former could, therefore, have no effect in connection with one.

We have been referred to the course of decisions under Act VIII of 1865 which contained nothing similar to section 53 (2). Those decisions, therefore, do not seem to be material. I observe, however, that up to 1908, when the Estates Land Act came into force, there was authority for and against claims similar to that of appellant and that those cases, therefore, afford no reason for a decision against him.

In these circumstances the appeal must be allowed. The lower Appellate Court's decision is set aside and it is directed to re-admit the appeal and dispose of it according to law in the light of the foregoing, after deciding what amount was lawfully recoverable by appellant by his distraint and after dealing with respondent's contention that tender of *pattah* was not proved. Costs to date will abide the result of the re-hearing.

SESHAGIRI AIYAR, J.—I entirely agree. Mr. Venkatarama Sastriar for the respondent argues that the word *enforceable* in clause (2) of section 53 of the Estates Land Act deals only with suits for rent and not with proceedings by way of distraint. I am unable to find any justification for the contention. Clause (1) makes no reference to suits. It makes tender of *pattah* a condition precedent to the adoption of distraint proceedings. Clause (2) is by way of exception, the object being to enforce the distraint to the extent to which the *pattah* is correct. If the history of the legislation is looked into, the meaning of the two clauses will be rendered clearer. By section 7 of Act VIII of 1865 the landlord was precluded from suing for rent or from distraining for it unless he had tendered a proper *pattah*. Under that Act even for suits for rent in Civil Courts, *pattah* should have been tendered. The new Act has expressly enacted that in certain classes of cases the landlord must sue for rent only in the Revenue Court: and at the same time it has removed the restriction that there should be a tender of *pattah* prior to suit. The general principle of the legislation is that in suits for rent, the landlord is not bound to tender a *pattah* before he sues to recover it,—but if he wants to adopt the exceptional remedy of distraint in which he takes upon himself the functions of the Court, although he has to conduct the proceedings with the assistance of the Revenue Officials, he must have tendered a *pattah* in order that the Subordinate Revenue Officials may have some tangible proof of the landlord's claim. It would serve no purpose, therefore, to enact in clause (2) of section 53 that the landlord can enforce his claim for rent in a Revenue Court in so far as the *pattah* correctly states it. If the decisions prior to the Estates Land Act can furnish any assistance, I feel no doubt that they would support this conclusion of mine. Prior to the passing of the new Act, the predominant view was that a distraint for an excess amount should not be avoided altogether. See *Ramachandra* v. *Narayanaswami* (1); *Bhupatirazu* v. *Ramaswami* (2);

(1) 10 M. 229.
(2) 23 M. 268.

Pichuvayengar v. *Oliver* (3); *Periakaruppa Pillai* v. *The Manager of the Lessees of the Sivaganga Zemindari* (4). I do not refer to *Bommadevara Venkata Narasimha* v. *Sajja Sattaya* (5), because that was after the Act.

For these reasons, I agree in the conclusion at which my learned colleague has arrived.

Appeal allowed.

(3) 26 M. 260.
(4) 31 M. 22; 3 M. L. T. 29; 17 M. L. J. 479.
(5) 9 Ind. Cas. 738; (1911) 2 M. W. N. 139; 9 M. L. T. 231; 21 M. L. J. 570; 35 M. 139.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 3 OF 1914.

June 8, 1914.

Present:—Mr. Justice Chamier and Mr. Justice Rafique.

THE MUNICIPAL BOARD OF GHAZIPUR—DEFENDANT—APPELLANT

versus

DEOKINANDAN PRASAD—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 2, 62, 120—Refund of money paid on account of octroi, suit for—Limitation.

A suit for the refund of octroi legally taken by a Municipality but wrongfully refused to be returned is governed by Article 120 of the Limitation Act and not by Article 2 or Article 62.

Rajputana Malwa Railway Co-Operative Stores Limited v. *Ajmere Municipal Board*, 6 Ind. Cas. 401; 7 A.L.J. 496, 32 A. 491 *Gurudas Pyne* v. *Ram Narain Sahu*, 10 C. 860; 11 I. A. 59 (P. C.); 8 Ind. Jur. 322, 4 Sar. P.C.J. 548; *Hanuman Kamat* v. *Hanuman Mandur*, 19 C. 123; 18 I. A. 158(P. C.), referred to.

First appeal from an order of the District Judge of Ghazipur.

Mr. *A. E. Ryves*, for the Appellant.

Dr. *Surendranath Sen* and Mr. *Gulzari Lal*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit by the respondent for recovery of Rs. 689-5-3 paid by him to the appellant Board on account of octroi upon some logs of wood imported by him into the Municipality.

The first Court dismissed the suit as barred by limitation under Article 62, Schedule I to the Limitation Act. On appeal the District Judge held that the suit was governed, not by Article 62, but by article 120 and having been brought within six years of the accrual of the cause of action, was within time. Accordingly he remanded the suit for trial on the merits. The Board has appealed, contending that the suit is barred by limitation either under Artricle 2 or under Article 62.

No evidence having been taken the question must be decided for the present on the plaint.

In paragraph 3 of the plaint the respondent says that the Board's officials demanded octroi on the logs, in paragraph 4 that he informed them that the logs were being imported for the use of the Government at the opium godown, and in paragraph 5 that he paid the sum demanded and a few days later produced a certificate from the Public Works Department that the logs had been used for Government, but the Board improperly refused to refund the money.

If the respondent had alleged that the Board was wrong in demanding and taking octroi in the first instance, the suit would have been governed by Article 62, Schedule I to the Limitation Act. See *Rajputana Malwa Railway Co-Operative Stores, Limited* v. *Ajmere Municipal Board* (1). But the appellant does not seem to allege that the Board was wrong in taking octroi in the first instance. He says that the Board was wrong in refusing a refund and in paragraph 6 of the plaint he gives the date of the refusal as the date on which the cause of action arose. The decisions of their Lordships of the Privy Council in *Gurudas Pyne* v. *Ram Narain Sahu* (2) and *Hanuman Kamat* v. *Hanuman Mandur* (3) and other cases decided by Courts in India seem to lay down that Article 62 applies only when the money at the time of receipt can be said to have been received by the defendant for the plaintiff's use. According to the respondent's allegations as we understand them, the sum in question cannot at the time of receipt be said to have been received by the Board for the respondent's use. His learned Vakil says that the respondent takes his stand upon Explanation II to Rule 27 of the Municipal Account Code. That Explanation which is really an entirely distinct Rule is as follows:—

"Goods the property in which is not vested in the Government at the time they pass the barrier but which are imported with a view to the fulfilment of a Government contract, shall, on passing the barrier, be declared in writing as intended for the use of the Government, *e. g.*, in fulfilment of a certain specified contract. The duty on them shall then be paid, and subsequently, if they do become the property of the Government, the duty shall be refunded on a certificate to the

(1) 6 Ind. Cas. 401; 7 A. L. J. 496; 32 A. 491.
(2) 10 C. 860; 11 I. A. 59 (P. C.); 8 Ind. Jur. 322; 4 Sar. P. C. J. 548.
(3) 19 C. 123; 18 I. A. 158 (P. C.).

effect signed by the departmental officer concerned, provided that the application be made within fourteen days of the date of that certificate."

It is doubtful whether the respondent can bring the case within this Rule, for it is nowhere stated that he made the requisite declaration in writing when the logs were at the octroi barrier, but this question is not now before us.

His case being that the demand of octroi was rightful and that the refusal to refund was wrongful, we must hold that Article 62 is not applicable. For the reasons given in the case first above cited we hold that Article 2 also is not applicable. The suit is governed by Article 120 and having been brought within six years of the refusal to refund the money is within time. The appeal is, therefore, dismissed. Costs will be costs in the cause and abide the result.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1041 OF 1913.

October 17, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

ABBAKKA SHETTHI (DIED) AND OTHERS—APPELLANTS

versus

SESHAMMA AND OTHERS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 111—Forfeiture of lease—Denial of landlord's title—Overt act not essential—Setting up third person's title.

Where a tenant merely sets up the title of a third person in a suit to which the landlord is not a party, and does not deny payment of rent to him before suit, there is no such denial of the landlord's title as would entail the forfeiture of the lease.

Korapalu v. *Narayana*, 20 Ind. Cas. 930; 25 M. L. J. 315; (19 3) M. W. N. 655, followed.

A right in the landlord to eject should not be extended in this country further than the extent to which by long established precedents he has become so entitled.

Debiruddee v. *Abdur Rahim*, 17 C. 196, *Dhora Kairi* v. *Ram Jewan Kairi*, 20 C. 101, *Srimati Malika Dassi* v. *Makham LalChowdhry*, 9 C. W. N. 928; 2 C. L. J. 389, followed.

Where a tenant merely disputes the extent of the landlord's interest, it is not a denial of his title and no forfeiture of the lease is thereby incurred.

Srimati Malika Dassi v. *Makham Lal Choudhury*, 2 C. L. J. 389; 9 C. W. N. 928, followed.

Second appeal against the decree of the District Court of South Canara, in Appeal Suit No. 69 of 1913, preferred against that of the District Munsif of Kundapur, in Original Suit No. 835 of 1911.

Mr. *K. Sundara Row*, for the Appellants.

Mr. *K. Yegnanarayana Adiga*, for the Respondents.

JUDGMENT.

NAPIER, J.—It was held by this Court in a case, *Karapalu* v. *Narayana* (1), that as the Transfer of Property Act does not in terms apply to agricultural leases no overt act need be proved by the landlord to entitle him to succeed in a suit to eject based on an alleged forfeiture by denial of title. Assuming this to be so there is in this case no setting up the title of a third person against his landlord such as would entail a forfeiture.

All that the tenants did was, when the 4th defendant in this suit brought a suit against them in respect of items 1 to 8, to compromise the suit after first denying the 4th defendant's title under the mistaken impression that the title was in him. They have never refused to pay the rent due or set up the title of the 4th defendant against the plaintiffs until after the suit was filed. There was, therefore, no cause of action on which the plaintiff could sue and in fact he alleged an entirely different cause of forfeiture, that is non-payment of rent which was found against. In this view the suit was rightly dismissed by the lower Appellate Court.

The second appeal is dismissed with costs.

SADASIVA AIYAR, J.—I entirely concur with the judgment just now pronounced by my learned brother.

In the case of *Korapalu* v. *Narayana* (1) Tyabji, J., and myself followed *Padmanabaya* v. *Ranga* (2) in which it was held that the provision in the Transfer of Property Act, section 111 about a further act being necessary besides the breach of the covenant in the forfeiture clause to give rise to the cause of action in ejectment, was a technical rule brought over from the English Law and need not be followed in India unless the Transfer of Property Act applies to the lease.

As regards the forfeiture of a tenant's rights on account of his denial of the landlord's title, the Indian Common Law is not so strict against the tenant as the English Common Law. It is, no doubt, on this ground among others that both under the Bengal

(1) 20 Ind. Cas 930; 25 M. L. J. 315; (1913) M. W. N. 655.

(2) 6 Ind. Cas. 447; 34 M. 161; 8 M. L. T. 110; (1910) M. W. N. 462; 20 M. L. J. 930.

Tenancy Act and the Madras Estates Land Act mere denial of the landlord's title will not entitle the landlord to eject a *ryot* [*See* sections 9, 151 and 153 of the Madras Estates Land Act; *Debiruddi* v. *Abdur Rahim* (3), *Dhora Kairi* v. *Ram Jewan Kairi*(4) and *Srimati Malika Dassi* v. *Makham Lal Chowdhry* (5)]. Even in cases not coming under the Madras Estates Land Act where the landlord claims to eject on the ground of the denial of his title in the case of an agricultural lease, such a claim should, in my opinion, not be viewed by the Courts in India with much sympathy and the right of the landlord to eject should be recognised only to the extent to which by long established precedents he has become so entitled.

In *Srimati Malika Dossi* v. *Makham Lal Chowdhry* (5) it was held that an assertion by a tenant that the person claiming to be his landlord is not entitled to the whole rent but has co-shares who must join in an action for rent, is not such a disclaimer as would effect a forfeiture of the tenancy. At page 393 the following passages occur. "It has not been suggested, nor do we think could it be successfully suggested, that the *partial denial* of the title of the landlord effected a partial forfeiture of the tenancy and conferred upon the tenant two inconsistent characters, namely, that of a tenant in respect of an undivided share of the land included in the tenancy and of a trespasser in respect of the remainder. To constitute a disclaimer there must be a distinct and unequivocal renunciation of the tenancy and we are not prepared to extend the application of the doctrine to a case in which the tenant does not set up *a title to the whole in himself or a title to the whole* in others, but merely questions *the extent of the interest* of the plaintiff and his title to receive the entire rent." The present case is even stronger for the tenant, as he never denied the landlord's title to receive the entire rent but only admitted in good faith the superior title of a third person to a portion of the lands included in the tenancy.

I, therefore, hold that no forfeiture was incurred. The second appeal will be dismissed with costs.

Appeal dismissed.

(3) 17 C. 196.
(4) 20 C. 101.
(5) 9 C. W. N. 928; 2 C. L. J. 389.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 484 TO 486 OF 1913.

August 11, 1914.

Present:—Mr. Justice Hannay.

M. A. RAJAM AIYANGAR AND OTHERS—PETITIONERS

versus

MUTHUKRISHNA PILLAI AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908), s. 22—Adding new party—Suit by Managing Director of Company in private capacity—Application for amendment of suit as Managing Director—Amendment, effect of—New plaintiff, addition of.

Where a plaintiff originally sued in his private capacity but later on applied for the amendment of the relief, asking that a decree in the alternative might be passed in his favour as the Managing Director of a Company

Held, that the amendment asked for did not amount to adding a new plaintiff within the meaning of section 22 of the Limitation Act.

Held, further, that the amendment had merely the effect of altering the ground on which the plaintiff already on record could recover the amount.

Saminatha v. *Muthayya*, 15 M. 417; 2 M. L. J. 119; *Peary Mohan Mukerjee* v. *Narendra Nath Mukerjee*, 32 C. 582; 9 C. W. N. 421; *Subramania Aiyar* v. *Subbu Naidu*, 21 Ind. Cas. 421; 25 M. L. J. 452; 14 M. L. T. 437, followed.

Petitions, under section 25 of Act IX of 1887, praying the High Court to revise the decrees of the Court of the Subordinate Judge of Trichinopoly, in Small Cause Suits Nos. 1579, 1580 and 1582 of 1912, dated the 31st of March 1913.

Mr. *S. T. Srinivasa Gopalachariar*, for the Petitioners.

Mr. *C. Pattabirama Aiyangar*, for the Respondents.

JUDGMENT.

IN CIVIL REVISION PETITION NO. 484 OF 1913.

The question is whether the lower Court is right in holding that the effect of the application by the plaintiff, dated 28th March 1913, asking that a decree in the alternative may be passed in his favour as Managing Director of the Reliance Company, Limited, (he having sued in his private capacity in the first instance) was to add a new plaintiff after the right to sue had become barred by limitation. I do not think that that view can be supported. The Company was not in fact added as a party, but thereby the capacity in which the plaintiff sued was sought to be altered. This would not, in my opinion, be equivalent to adding a new plaintiff so as to admit of the terms

of Article 22 of the Limitation Act being applied to the case. The principle of the cases cited by the petitioner [*Saminatha* v. *Muthayya* (1), *Peary Mohan Mukerjee* v. *Narendra Nath Mukerjee* (2) and *Subramania Aiyar* v. *Subbu Naidu* (3)] appears to support the view I take. The alteration, if allowed, merely had the effect of altering the ground on which the plaintiff already on record could recover the suit amount.

I, therefore, set aside the decree of the lower Court, direct the amendment prayed to be made and order that the suit be disposed of anew after hearing such evidence as may be adduced on both sides. The respondent will pay the petitioners' costs of this petition.

IN CIVIL REVISIONS PETITIONS NOS. 485 AND 486 OF 1913.

Following the decision in Civil Revision Petition No. 484 of 1913 and for the like reasons recorded in the judgment therein, I set aside the decrees and direct the amendment prayed to be made and order that the suits be disposed of anew after hearing such evidence as may be adduced on both sides. The respondents will pay the petitioners' costs of these petitions.

Petitions allowed.

(1) 15 M. 417; 2 M. L. J. 119.
(2) 32 C. 582; 9 C. W. N 421.
(3) 21 Ind. Cas. 421; 25 M. L. J. 452; 14 M.L T. 437.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 15 OF 1911.
May 6, 1914.

Present:—Mr. Hayward, J. C., and Mr. Crouch, A. J. C.

KHUSHIRAM POHUMAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

GHANSHAMDAS AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Decree, suit to set aside—Fraud - Party, what to prove.

A decree obtained by fraud can be set aside only by showing that the Court which passed the decree was not merely mistaken but misled.

Duchess of Kingston's case, 2 Smith's Leading Cas. 731; 1 Leach P. C. C. 146; 1 East P.C. 468; 34 H. L. Jo. 655; 20 How. St. Tr. 537, referred to.

Appeal from the decree of the Sub-Judge, Sukkur.

Mr. *Dipchand Chandumal*, for the Appellants.

Mr. *Dipchand T. Ojha*, for Respondent No. 1.

JUDGMENT.

CROUCH, A. J. C.—Plaintiff and plaintiff's cousin Mulchand and Khilumal defendant No. 3 were joint owners of a certain property at Shikarpur, the plaintiff being owner of ¼th share, Mulchand of ¼th and defendant No. 3 of one-half. In Suit No. 749 of 1906 defendants Nos. 1 and 2 obtained an *ex parte* decree against the plaintiff for specific performance of an alleged contract to sell his own ¼th share and also the share of Mulchand. The present suit was filed for a declaration that the *ex parte* decree was a nullity inasmuch as the service of summons had not been effected and the decree had been obtained by fraud, and for partition and possession of the plaintiff's 1/4th share. It has been found by both the lower Courts that the plaintiff was not served with the summons and that the *ex parte* decree was obtained by a false representation that a sale had been effected. The relief asked for was granted. Defendants Nos. 1 and 2 have filed this appeal.

It is contended on behalf of the appellants that a decree can be set aside on the ground of fraud, only when the fraud practised is such that the other side was thereby prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage. The principle so enunciated rests on an *obiter dictum* of James, L. J., in *Flower* v. *Lloyd* (1) and cited *obiter* by Petheram, C. J., in *Mahomed Golab* v. *Mahomed Sulliman* (2). But the principle has never been laid down in any decision reported either in the Indian or in the English Law Reports; it was discussed, but not accepted, in *Lakshmi Charan Shaha* v. *Nur Ali* (3).

The leading case on the subject is the *Duchess of Kingston's* case (4), where it was held that a final decree "could not be impeached from within, but was impeachable from without; although it is not permitted to show that the Court was mistaken it may be shown that it was misled. Fraud is an intrinsic collateral

(1) (1878) 10 Ch. D. 327; 39 L. T. 613; 27 W. R. 496.
(2) 21 C. 612 at p. 619.
(3) 11 Ind. Cas. 626; 38 C. 936; 15 C. W. N. 1010.
(4) 2 Smith's Leading Cas. 731; 1 Leach P. C. C. 146; 1 East P. C. 468; 34 H. L. Jo. 655; 20 How. St. Tr. 537.

act which vitiates the most solemn proceedings of the Courts of Justice." The rule so expressed is embodied in section 44 of the Indian Evidence Act, and under this section plaintiff could prove that the decree was obtained by fraud.

As fraud is infinite in its varieties, the Courts of Equity have always refused to define it. Nor has it been defined for the purposes of the Indian Evidence Act. But a sufficient definition was, however, furnished by Lord Cairns in *Patch* v. *Ward* (5), cited in *Mahomed Golab* v. *Mahomed Sulliman* (2), who declared that "the fraud must be actual fraud such that there is on the part of the person chargeable with it the *malus animus*, putting itself in motion in order to take an undue advantage of some other person, for the purpose of actually and knowingly defrauding him."

No suit can be entertained to set aside a decree where the only question submitted is one that could have been, and should have been, dealt with under Order IX, rule 13, *Khagendra Nath Mahata* v. *Pran Nath Roy* (6).

The question, where is litigation to end if any judgment can be set aside by a fresh action and by merely proving by new evidence that perjury had been committed in the first action? is answered by the *Duchess of Kingston's* case (4) and by section 44 of the Evidence Act. The circumstances must be such that the Court was not merely mistaken but misled; the circumstances must be such that it can fairly be said that the decree was actually obtained by fraud. No hard and fast limitations can be set down; but it is certain that a decree can be set aside which has been obtained in a suit which is in its very foundations false, which has been obtained directly by false allegations of fact constituting the very cause of action, deliberately put forward for the purpose of deceiving the Court and defrauding the defendant. On the other hand it is also certain that, when a decree has been obtained by means of evidence challenged by the other side and duly weighed by the Court before acceptance, the decree cannot be set aside merely on the ground that such evidence can be proved to be false. Between these two extremes there must be many cases which come near the border line; the Court must decide in each case whether or not the line has been passed.

The present case comes clearly within the first class. The whole suit was fraudulent: the Court was deliberately and intentionally misled into believing that the suit had a firm and true foundation. The fraudulent statements were the direct and immediate cause of the plaint being entertained, of the case being heard and of the decree being granted.

I would, therefore, dismiss the appeal with costs.

HAYWARD, J. C.—I concur. The question raised is one of considerable difficulty. It has been discussed with commendable ability by the learned Pleaders on either side. It would appear at first sight that the only fraud justifying setting aside a judgment would be fraud which prevented the parties from placing their case properly before the Court, as stated in the case of *Mahomed Golab* v. *Mahomed Sulliman* (2). This decision was, however, not accepted in the case of *Venkattappa Naick* v. *Subba Naick* (7) where it was stated that fraud inherent in the evidence would be sufficient ground for the interference of the Court. It was, however, apparently considered that the fraud must be limited, as stated in the case of *Mahomed Golab* v. *Mahomed Sulliman* (2), in the case of *Tika Ram* v. *Daulat Ram* (8). There it was held that fraudulent non-service of summons was good ground for the interference of the Court. It was, however, not necessary in this case to consider the more general proposition. It was held expressly that the fraud necessary was not so limited in the case of *Lakshmi Charan Shaha* v. *Nur Ali* (3), where it was stated that whatever the nature of the fraud might be it would be sufficient, if established, to justify the re-opening of the whole case by the Court. This difficult matter has recently been fully discussed by Jenkins, C. J. in the case of *Nanda Kumar* v. *Ram Jilan* (9). He stated there that

(5) (1867) 3 Ch. 203; 18 L. T. 134; 16 W. R. 441.
(6) 29 C. 395; 4 Bom. L. 363; 6 C. W. N. 473; 29 I. A. 99 (P. C.).
(7) 29 M. 179; 16 M. L. J. 59.
(8) 4 Ind. Cas. 596; 32 A. 145; 7 A. L. J. 74.
(9) 23 Ind. Cas. 337; 18 C. W. N. 681 at p. 688; 19 C. L. J. 457; 41 C. 990.

the jurisdiction to impugn a previous decree for fraud was beyond question and expressly recognised by section 44 of the Evidence Act and was confirmed by a long line ofa uthorty; but it was a jurisdiction to be exercised with care and reserve and that the fraud must be established by proof before the propriety of the prior decree can be considered by the Court. He then pointed out that there was an important distinction between *ex parte* decrees and contested decrees, and observed that a very heavy burden would lie upon the party endeavouring to set side a contested decree of a Court.

Now the facts established in this case are that there was an *ex parte* decree. No actual notice was given to the other party absent at the time in Afghanistan. It was shown by evidence that there was no agreement of sale whatever between the parties which was the very foundation of the decree. It seems to me that these facts were sufficient to justify the finding of fraud by the lower Court. It is important to notice that the decree was an *ex parte* decree and that, therefore, it was necessary and]... (consider whether there had or had not been an agreement of sale in order to decide whether there had been fraud. It might have been different had the question of agreement of sale been fully litigated between the parties in the contested case. Then the mere fact that perjury had been committed would, no doubt, not have been sufficient to discharge the heavy burden of proving fraud lying upon the party alleging the fraud and to justify the setting aside of the previous decree of the Court.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 556 OF 1913.

September 8, 1914.

Present:—Mr. Justice Hannay.

PALANIAPPA MUDALI AND ANOTHER—VENDEES—PETITIONERS

versus

THE OFFICIAL RECEIVER OF TRICHINOPOLY AND ANOTHER—RESPONDENTS.

Provincial Insolvency Act (III of 1907), ss. 36, 46 (1) Sale to defraud creditors, validity of—Part payment of consideration - Vendor and vendee nearly related Vendor permitted to retain possession Vendee, fraudulent intent of.

Where an insolvent executes a sale-deed in favour of his relations in order to defraud his creditors and retains possession of part of the property sold, an intent to defraud should be imputed to the vendees also.

Gopal v. *Bank of Madras*, 16 M 397; 3 M. L. J. 197, distinguished.

A sale made with intent to defraud creditors is wholly void, even where there has been part payment of consideration.

Chidambaram Chettiar v. *Sami Aiyar*, 30 M. 6; 16 M. L. J. 427; 1 M. L. T. 351, followed.

Petition, under section 46, clause (1), proviso, of the Provincial Insolvency Act and under section 15 of the Indian High Courts Act of 1861, praying the High Court to revise the order of the District Court of Trichinopoly, in Civil Miscellenous Appeal No. 44 of 1912, preferred against that of the District Munsif of Namakkal, in Insolvency Petition No. 1 of 1911.

Messrs. *T. Rangachariar* and *K. S. Ganesa Aiyar*, for the Petitioners.

Mr. *S. T. Srinivasa Gopalachariar*, for the Respondents.

JUDGMENT.—In connection with the insolvency of one Chidambara Mudali, the Official Receiver of Trichinopoly applied to the District Munsif of Namakkal under section 36 of the Provincial Insolvency Act to have two sale-deeds executed by the insolvent and others annulled. The District Munsif, however, refused to annul the sale-deeds holding that they had been effected *bona fide* and for valuable consideration. The sale-deeds were executed by the insolvent, his father and grandfather and covered the whole of the family property, one deed (Exhibit A) relating to the lands and the other (Exhibit B) to the family house.

In appeal the District Judge, while finding that the consideration for the sales

recited in the deeds (*viz.*, Rs. 2,500 in Exhibit A and Rs. 700 in Exhibit B) was adequate, held that it had not been proved that more than Rs. 1,736 had actually been paid in the former case and Rs. 94 in the latter. On a consideration of certain statements made by the insolvent himself as well as on certain other facts found, namely, that the insolvent and the vendees were nearly related, that the insolvent was bankrupt at the time of sale and that the vendors were permitted to retain possession of the family house, the District Judge concluded that the sales were effected to defraud creditors and annulled them.

This petition is brought under section 46 (1), proviso, of the Provincial Insolvency Act to revise the District Judge's order. The vendees are the petitioners and they contend that the District Judge has erred in law in failing to consider and decide, with reference to section 36 of the Provincial Insolvency Act, the question whether the vendees under Exhibits A and B were purchasers for valuable consideration and in good faith and, *secondly*, because he annulled the sales as regards the interests of the father and grandfather of the insolvent, though these persons had not been adjudicated insolvent and were not before the Court.

As regards the first point, the case of *Gopal* v. *Bank of Madras* (1) is cited in support of the contention that the mere fraudulent intent of the vendor cannot avoid the sales if the purchasers were free from fraud. The construction sought to be put upon the finding of the District Judge is that he found fraud only on the part of the vendors. I do not think that that is the correct construction of the finding. It seems to me that, although the District Judge has not found in so many words that the purchasers under Exhibits A and B were not purchasers in good faith, that is in fact the plain meaning of his conclusion. His finding is, in effect, that the vendors and vendees being closely related effected the sales in order to defraud creditors, and it necessarily follows from that finding that the vendees no less than the vendors were actuated by fraud.

I see no reason, therefore, to interfere in revision upon the first ground put forward.

As regards the second point, the finding that the sales were effected to defraud creditors renders the sales wholly void, even though there may have been part payment of consideration [*Chidambaram Chettiar* v. *Sami Aiyar* (2)]. The District Judge was, therefore, not in error in annulling the sales as a whole.

The petition is also brought under section 15 of the High Courts Act. There is no question of jurisdiction in the case that I can see.

The petition is dismissed with costs.

Petition dismissed.

(2) 30 M. 6; 16 M. L. J. 427; 1 M. L. T. 351.

(1) 16 M. 397; 3 M. L. J. 197.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 13 OF 1911.

May 6, 1914.

Present:—Mr. Hayward, J. C., and Mr. Crouch, A. J. C.

MIR MAHOMED KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

POHUMAL MOTUMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Arbitration—Reference by person with limited rights of alienation Sind Incumbered Estates Act (XX of 1881), s. 28—Award in excess of delegated authority, whether permissible.

The powers of an arbitrator are strictly limited to the authority which has been duly delegated to him by the parties through the reference; and he cannot, by his award, accomplish a legal act beyond the powers of those from whom he receives his authority.

Mr. *E. Raymond*, for the Appellants.

Mr. *Wadhumal Oodaram*, for Respondent No. 1.

MIR MAHOMED KHAN v. POHUMAL MOTUMAL.

JUDGMENT.

CROUCH, A. J. C.—I concur in the final order passed. When a person is in possession of property in respect of which his rights of alienation are limited under section 28 of Act XX of 1881, he cannot, by a reference to arbitration, confer on the arbitrator an authority to alienate a more extensive interest in the land than he himself has. The powers of an arbitrator are strictly limited to the authority which has been duly delegated to him by the parties through the reference; and he cannot, by his award, accomplish a legal act beyond the powers of those from whom he receives his authority. If the award be made a decree of the Court, it does not thereby acquire a wider operation: the only effect is to strengthen the mode of enforcing it.

Under section 94 of the Indian Trusts Act a person having possession of property, but not having the whole beneficial interest therein, must hold the property as constructive trustee for the benefit of the persons having such interest; and anybody who takes the property with notice of such trust takes subject to it. Even if it be assumed that the Court can, under certain circumstances, alienate the full ownership in property to which section 28 has application, it cannot properly or legally do so if it has had notice of the constructive trust.

As I find it difficult to conceive any case in which an involuntary alienation through the Court could effectively transfer an interest which the judgment-debtor had no power to transfer, I am unable to express concurrence with the view expressed in this Court's preliminary judgment that section 28 does not include an involuntary alienation through the Court.

HAYWARD, J. C.—The appellate order stated that the words "alienation made and granted by such a *zemindar*" in the section appeared to include only voluntary alienation by the parties. But there was the further question to be disposed of, whether the alienation was not really a voluntary alienation collusively clothed, for the purpose of avoiding the section, in the form of an involuntary alienation through the Court. The following issue was sent down for trial:

"Whether the proceedings leading up to the award and decree were collusive and whether Hayatkhan intended thereby to alienate the property in the suit to the defendant Pohumal contrary to the provisions of section 28 of the Incumbered Estates Act of 1881?"

The District Judge has found that there was no collusion nor any intention to defeat the provisions of section 28 of the Act. But it has been contended that this finding was not justified by the facts, and it appears to me that there is a considerable force in the contention. The reference to arbitration was extremely vague, and all that can be gathered from it was that some amount of money was due by Hayatkhan and that it was proposed to give in exchange certain land belonging to Hayatkhan; but there was no specific mention of the nature of the dispute with regard to the amount of money said to be due nor with regard to the land. The witnesses subsequently examined stated that Hayatkhan had no intention of disposing of more than his life-interest in the land. If that were so, it is difficult to understand why no mention of that limitation was made in the award. That document purported merely to settle the amount due namely, Rs. 4,400, and, in its own words, to make the defendant the owner of the land. That award has been signed by the parties and the arbitrators, but no hint has been given in the award, or the proceedings, as to what was the nature of the claim to the land referred for the decision of the arbitrator. The award was then made a decree and possession given through the Court. No scrutiny appears to have been made of the proceedings to ascertain whether there had really been a *bona fide* arbitration, as now required of all Judges by section 37, Chapter V, of the Sind Courts Civil Circulars.

The District Judge's view cannot, in my opinion, be supported on these facts. There is, in my mind, no doubt whatever that the alienation was to all intents and purposes an alienation by Hayatkhan and that the matter was practically settled before the pretended arbitration. The

proceedings were merely a collusive endeavour to avoid the limitation imposed by law on Hayatkhan's ownership. The alienation, therefore, being an alienation by the *zemindar* and not an involuntary alienation through the Court, could have no effect on the land after Hayatkhan's death, in view of the provisions of section 28 of the Incumbered Estates Act, 1881.

It has been contended, on the other side, that, if that is so, at all events they are entitled to compensation for their Rs. 4,400 under section 65 of the Contract Act. That section, however, does not appear to be applicable, as held in the similar case of *Mir Mahomed* walad *Hayat Khan* v. *Khubomal* walad *Dinomal* (1).

It seems to me, therefore, that the decree of the District Court must be reversed and a decree granted for possession of the land and an inquiry directed into the mesne profits from the date of suit upto the date of recovery of the possession with costs throughout.

Appeal allowed.

(1) 21 Ind. Cas. 517, 7 S. L. R. 58.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 918 OF 1912.

August 26, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

RAMA KAVUNDEN AND OTHERS—DEFENDANTS—APPELLANTS

versus

KURUTHASAWMY NAICK AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law Alienation by widow of whole or part of husband's estate—Reversioner's consent, nature *of*—Bona fide.

The consent of the next reversioner to an alienation made by a Hindu widow should be *bona fide* whether the alienation is of the entire estate of her husband or only a part of it.

Rangappa Naik v. *Kamti Naik*, 31 M. 366; 3 M. L. T. 355; 18 M. L. J. 309 (F. B), followed.

Second appeal against the decree of the District Court of Madura, in Appeal Suit No. 428 of 1910, preferred against that of the Court of the Additional District Munsif of Madura, in Original Suit No. 210 of 1910.

Mr. *K. Balamukunda Aiyar*, for the Appellants.

Mr. *T. Arumainatham Pillai*, for the Respondents.

JUDGMENT.—In this case the consent of the next reversioner to the alienation has been found not to have been given in good faith. It is argued that as the alienation covered the entire property which the widow succeeded to after the death of her husband, the question of *bona fides* has no bearing upon the matter. No authority has been quoted for the proposition that where the widow alienates her entire property, the question that the consent of the reversioner to this alienation was obtained *mala fide* is not an element to be considered. We are unable to see on what principle a distinction between partial and total alienation can be sustained in this respect. We agree with the statement of the law contained in Mayne's Hindu Law, pargraph 639, that the consent should have been given *bona fide* in either case. See also *Rangappa Naik* v. *Kamti Naik* (1). This is the only point argued before us. The District Judge is right in rejecting this contention. We dismiss the second appeal with costs.

Appeal dismissed.

(1) 31 M. 366; 3 M. L. T. 355; 18 M.L.J. 309 (F.B.).

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION APPLICATION.

May 28, 1914.

Present:—Mr. Justice Chaudhuri.

In the matter of THE INDIAN ARBITRATION ACT.

In the matter of ARBITRATION BETWEEN NABIN CHANDRA SAHA—PLAINTIFF

versus

SINCLAIR MURRAY & CO.—DEFENDANTS.

Arbitration—Award—Submission by contract—Parth

NABIN CHANDRA SAHA v. SINCLAIR MURRAY & CO.

refusing to do anything, right of—Award in excess of claim - Remission of award.

In the contracts entered into between the parties it was provided that all disputes arising out of those contracts shall be referred to the arbitration of the Bengal Chamber of Commerce, whose award shall be considered binding. When a dispute arose and was referred to the Chamber by one party, the other party, although repeatedly written to, deliberately refused to do anything:

Held, that the arbitrators were not bound to further give him an opportunity to be heard.

Ganges Manufacturing Co, v. *Indra Chand*, 33 C. 1169, referred to.

Where the award is in excess of the claim, the Arbitrators act beyond their jurisdiction and the award cannot be sustained and should be remitted for re-consideration.

FACTS.—There were two contracts, both dated the 3rd April 1913, by which Nabin Chundra Saha sold and Sinclair Murray and Co. purchased certain bales of jute, 500 under the first contract and 1,000 bales under the second contract, at the rates and on the terms mentioned in the contracts. It was agreed that any dispute arising out of these contracts was to be referred to the arbitration of the Bengal Chamber of Commerce, whose decision would be binding. The plaintiff having failed either to deliver the goods or to pay the difference between the contract rate and the market rate, the defendants referred the matter to the arbitration of the Chamber of Commerce. On the 20th January the Registrar of the arbitration tribunal wrote to the plaintiff asking him for a statement of his case. No reply was received and the Registrar wrote again on the 5th of February informing him that if his statements were not received by the 12th of February, the arbitration would be proceeded with *ex parte*. No reply was sent to that letter and on the 20th of February two awards were made in the two contracts and those were sent to the Registrar of the High Court for notification and for filing. Proceedings were taken by Sinclair Murray and Co. in respect of these awards and notice under Order XXI, rule 37, clause(*i*), was sent in each case to the plaintiff. The plaintiff took objection to the award on the ground that the Rules of the Bengal Chamber of Commerce were *ultra vires* and illegal; that he was not given any notice as to the time and place of hearing by the arbitrators appointed by the Chamber and that the names of such arbitrators were never disclosed to him to ascertain whether they were fit and proper persons to conduct the arbitrations which, plaintiff alleged, were against the public policy.

A Rule was issued on behalf of the plaintiff against the defendants to show cause why the awards of the Bengal Chamber of Commerce should not be set aside on the above grounds.

Messrs. *S. P. Sinha* and *Langford James*, for the Defendants, appeared to show cause.

Messrs. *B. Chakravarti*, *A. N. Chaudhuri* and *B. K. Lahiri* appeared for the Plaintiff in support of the Rule.

Mr. *Sinha*:—As regards the first objection that the rules were *ultra vires* or illegal, the plaintiff does not specify which of the rules were *ultra vires* or illegal and I ask your Lordship to call upon the other side to say which of the rules of the Chamber were *ultra vires* or illegal. Thousands of cases had been decided under those rules and those that had come up before the Court, their Lordships had refused to interfere with. The rules were rules framed under the ordinary principles of justice and unless the party could show that the arbitrators violated any of the elementary rules of justice, they had no complaint.

The case of *Ganges Manufacturing Co.* v. *Indra Chand* (1), decided by Mr. Justice Harington, is on all fours similar to the present case, except with the distinction that in the present suit there was no allegation made that the plaintiff was not bound by the rules in the sense that he did not know of them or that he did not contract on the basis of those rules. What I rely upon is the agreement to refer the dispute to the Chamber and to abide by the decision in accordance with their rules. He may be wise or foolish enough to enter into the agreement. But once he has entered into the agreement he must abide by the rules. No case has been made for want of knowledge of the rules. As a business man he knows that the rules would not be inconsistent with common sense and the principles of justice.

As to the next objection that no notice was given to the parties of the time and place of meeting, the petitioner absolutely refused

(1) 33 C. 1169.

to have anything to do with the arbitration. He ignored the letters that were written to him. Mr. Justice Woodroffe had held that if a party refused to have anything to do with the arbitration, there was no question of fixing a time or place. The petition did not allege that if there had been any further notice he would have appeared. His intention was to ignore the arbitration of the Chamber, and under those facts and the inferences arising out of those facts could he be held to be damnified by the action of the Chamber? He could not say he has been prejudiced because he ignored the Chamber altogether.

The next objection is that the names of the arbitrators were not notified. But this is only following the Rules of the Chamber. The scheme of the rules was this, that the Registrar drew up a list of persons, either members of a firm or partners, who were willing to act as arbitrators in disputes which were referred to the Chamber. When that list is drawn up of possible arbitrators and a specific dispute is referred to the Chamber, the Registrar chose from that list two or three arbitrators according to the terms of the agreement. He was not bound to disclose those names to the parties, but the Registrar might, in his discretion, on being asked, disclose the names.

I am confident your Lordship will not interfere in this matter. The plaintiff has not made out a case that the award was improperly procured; he has not made out a case that it was bad on the face of it. The only grounds alleged were that it was an irregular procedure and the non-disclosure of names, and I have endeavoured to show that the plaintiff has throughout refused to do anything with the arbitration. There is no substance in the complaint and it was only when the plaintiff was threatened with arrest and imprisonment in execution of the terms of the award that he came forward with those objections.

Mr. *Chakravarti*:—The first point which I take is that the clause in the contract (*viz.*, that 'disputes shall be referred to the arbitration of the Chamber') is bad, seeing that it was directly opposed to the provisions of the Indian Arbitration Act. The Act, he said, did not contemplate submission to the arbitration of a fluctuating body like the Chamber. According to section 6 of the Act, the scheme of the Act was the appointment of one single arbitrator and if there were two, an umpire was to be appointed. My argument is that the reference in the clause in the contract was as to individuals and not to corporate bodies. Assuming the meaning placed on this clause by a process of interpretation to be that the contract intended that the Chamber was to nominate an arbitrator, then they were not to appoint more than one person. There was no indication that they were to appoint more than one person. The Chamber of Commerce were ascribing to themselves powers for ousting the authority of the King's Court. It might be perfectly true that where there was a bargain that bargain had to be respected, but to that bargain a further condition had to be attached and it was this: when a bargain came to be enforced and it appeared that that bargain was unfair and unjust and opposed to natural justice, the Court would refrain from rendering the assistance that was sought for the enforcement of that bargain and for upholding the award by means which did not commend itself to the sense of justice of the Court. That is the principle we have relied upon in Lord Moulton's words that a bargain of this character must be taken with a further unwritten condition that if in point of fact the man comes into Court for the purpose of enforcement of it, the Court will look into the whole matter and decide whether *contra bonos mores* it was opposed to the principles of natural justice: as to whether it was fair and square or it was a travesty of the doctrine of arbitration.

The Rules of the Chamber are against all fairness and justice and are simply oppression practised by one community over another. The rules do not disclose the names of the arbitrators, they do not ask the parties to attend, nor do they inform the parties when and where they are going to sit. The rules do not provide for the parties to be heard or to give evidence. If I desire to give evidence I won't be heard: there is no rule under which I can make an application to be heard. Thus the rules being absolutely opposed to the Arbitration Act and also to the principles of natural justice, when an attempt is made to enforce an award come to

under these rules, the Court has jurisdiction for the purpose of seeing whether the award ought to be enforced or whether it was repugnant to all sense of fairness and natural justice.

Applying the principle of the case of *Jackson* v. *Barry Railway Co.* (2) to this case, the position is this, that I am absolutely untrammelled by the Rules of the Chamber. The Chamber was mentioned in the clause of the contract for the purpose of nominating an arbitrator under the law, the arbitration to be commenced and concluded under the law. The other side came forward and said the plaintiff in point of fact agreed to be guided by the Chamber's Rules. Upon that the plaintiff turns round and says that in point of fact the rules were absolutely bad, because they did not provide for the ordinary principles of natural justice that a man ought to be heard. The arbitrator should be ready to listen to argument after which he should come to a fair decision. But here the whole principle is a principle of secrecy: the arbitration takes place behind a screen and all communications between the arbitrator and the disputants should be carried on through a Registrar and no person allowed to go before the tribunal and be heard.

Mr. *Langford James*, in reply:—The point raised by Mr. Chakravarti that the Chamber was to nominate an arbitrator was not raised in the petition.

Again, Mr. Chakravarti commenced by saying that the Chamber was not 'a person' and, therefore, could not be an arbitrator; but Mr. Chakravarti was wrong.

With regard to the objection taken that the Rules of the Chamber were *ultra vires*, the specific rules to which he referred were not mentioned: he did not state which of the Chamber's Rules were *ultra vires*.

Lastly, there was nothing in the arbitration which was repugnant to all sense of fairness and natural justice The whole community knew that the arbitrators were a body of jute experts who decided these matters and gave their decision very impartially.

JUDGMENT.—This is an application by one Nabin Chandra Saha, a merchant, that the award purported to have been made by the Bengal Chamber of Commerce or arbitrators appointed by them, dated the 25th March 1914, and filed on the 27th March 1914, should be set aside and that Messrs. Sinclair Murray and Co., respondents, should be restrained from enforcing the same. The petition mentions the award in the singular number, although there are two. This was pointed out to the learned Counsel appearing on behalf of Messrs. Sinclair Murray and Co. and the petitioner asked for leave to put in a second petition. Such application has been filed subject to the objection of the other side. There were two contracts entered into between the petitioner and Messrs. Sinclair Murray and Co., dated the 3rd April 1913. The contracts contained an arbitration clause in these terms: "Any dispute arising out of these contracts shall be referred to the arbitration of the Bengal Chamber of Commerce, whose decision should be accepted as final and binding on both the parties." Disputes regarding delivery arose in September 1913. The respondents submitted their difference bills on the 9th September 1913 and the petitioner having refused to pay, the respondent, wrote to the Registrar of the tribunal of the Bengal Chamber of Commerce on the 16th January 1914. In their letter they asked that the Chamber was to fix the market rates of the 31st August and the 30th September and to award the difference due to them for the breach. The Registrar wrote to the petitioner on the 20th January 1914 about the submission made which elicited no reply from the petitioner. The Registrar wrote again informing the petitioner that he had been directed by the Court constituted to adjudicate that unless he (the petitioner) sent in his case before the 12th of February, the arbitration would be proceeded with without any further reference. This also elicited no reply. On the 14th February the Registrar wrote to the petitioner in these terms: "I am directed to state that the arbitration will now proceed."

The petitioner stated that between the 6th and the 14th February he was seeking legal advice and that he had done nothing His objections were: (1) that the names of the arbitrators were not disclosed; (2) that no time or place for the hearing was fixed; (3) that no opportunity was given to him to prove his case; (4) that the arbitrators should

(2) (1893)1 Ch. 238 at p 247, 2 R. 207; 68 L.T. 472.

not have proceeded with the reference *ex parte*; (5) that the rules were *ultra vires* and illegal; and (6) lastly that the award was in excess of the claim, that was to say that the arbitrators had allowed a larger sum and at higher rates than the claim of the respondents, which they submitted in their difference bills. In this application the petitioner did not say that he did not know the rules, but apparently on receipt of the letter from the Registrar he went to his legal advisers and sought their help. He could then, if he chose, if he had sufficient grounds have repudiated the authority of the Bengal Chamber to arbitrate or required the other party to state as to under what rules, if any, or under what manner the Chamber was going to proceed. From paragraph 12 of the petition it can be inferred that he had some knowledge of the rules. Of course, it is difficult to come to any conclusion from that paragraph as to when he came to know of the rules, but it is clear that although he was repeatedly written to, he did nothing in the matter and he allowed the persons or the Court appointed to adjudicate to proceed with the reference. It has been held by Mr. Justice Harington in *Ganges Manufacturing Co.* v. *Indra Chand* (1) that a person who had submitted to an arbitration of this nature, must be deemed to have known the rules under which the Chamber was going to proceed and that he could not be heard to say that he was not bound by the procedure followed by the Chamber. I am not prepared to agree with that judgment in its entirety. There was no allegation at all that the procedure which was followed was not a regular procedure. So far as the proceedings being *ex parte* there is no ground of complaint. The petitioner deliberately refused to do anything and there was no duty cast upon the arbitrators to further give him an opportunity of being heard.

The serious question in this case, however, is as regards the award being in excess of the claim. It is clear that the award exceeds the amount mentioned in the difference bills and that the rates allowed by the arbitrators are in excess of the rates demanded by the respondents. On this point I think that the arbitrators have gone in excess of their jurisdiction. I accordingly remit the award to the arbitrators for re-consideration. With regard to the costs of this application, taking all the circumstances into consideration I think that justice will be met by directing each party to bear his own costs.

Award remitted.

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION APPLICATION.

May 28, 1914.

Present:—Mr. Justice Chaudhuri.

In the matter of THE INDIAN ARBITRATION ACT.

In the matter of ARBITRATION BETWEEN A. H. GHAZNAVI & CO.—PLAINTIFFS

versus

BUDGE-BUDGE JUTE MILLS—DEFENDANTS.

Arbitration—Award made against firm, whether bad—Contention on conjectural grounds, value of—Submission to arbitration—Application to set aside award, grounds of.

An award is not bad for the fact that it was made against the name of a firm without ascertaining who were the parties liable, for the new Civil Procedure Code provides for suits against firms in the firms' names

No value can be attached to a contention based on purely conjectural grounds.

Where a party has submitted to the arbitration of the Chamber of Commerce, he cannot be allowed to see the effect of the award and then come to Court to have it set aside, without showing that the rules of the Chamber have not been complied with.

FACTS.—The plaintiff, A. H. Ghaznavi, had contracted with the defendants, the Budge-Budge Jute Mills, through their agents Messrs. Andrew Yule and Co., to supply to the defendant Company 300 bales of jute rejections, which he failed to do; and the matter, according to the terms of the contract, was referred to the arbitration of the Chamber of Commerce. The Chamber appointed two arbitrators and under their rules they did not give notice to the parties of the time when the hearing would be taken up, nor did they disclose the names of the arbitrators to the parties. It was against these two omissions that the plaintiff appealed to the High Court alleging that it was contrary to the spirit of the Arbitration Act.

A Rule was granted on behalf of the plaintiff against the defendants to show cause

why the decision of the Chamber Arbitration should not be set aside.

Mr. *Avetoom* appeared for the Defendants to show cause.

Mr. *S. R. Das* appeared for the Plaintiffs in support of the Rule.

Mr. *Avetoom*:—It is not incumbent upon the Chamber to mention the names of the arbitrators, nor under the rules is the Chamber bound to mention the time and place of meeting. The plaintiff before going to arbitration was aware of those rules and having contracted to abide by the decision of the Chamber it is futile for him now to come forward and ask for that decision to be set aside. By going to the Chamber and submitting to its arbitration, the plaintiff is bound by its rules. If the plaintiff wanted to know the names of the arbitrators could he not have gone and asked for them? But he never applied to know the names. Again, the Chamber of Commerce has been in existence for a great many years and has been settling disputes for all these years' and very rarely do these cases come up before the Court. The mercantile community have great confidence in the Chamber. And the arbitrators are a body of gentlemen who are selected by the Chamber for their honesty and integrity.

Mr. *Das*.—I am willing to concede that the plaintiff must be taken to be bound by the Arbitration Rules of the Chamber, but it is clear that the Chamber cannot import an agreement to be bound by rules which go contrary to the spirit of the Arbitration Act. The plaintiff is not barred by any rules which take away his right under the Act. Even if he is bound by the rules, he is entitled to get it set aside under the provisions of section 14 of the Arbitration Act. Failure to give notice to the parties of the time of meeting constitutes misconduct. See Halsbury's Laws of England, Vol. 1, page 479. The Rules of the Chamber are against the public policy. The fact that no notice was given of the hearing is sufficient to set aside the award. Also the fact that the Chamber did not give the plaintiff the names of the arbitrators contravenes section 16 of the Arbitration Act.

Mr. *Avetoom*, in reply:—See *In re Montgomery, Jones & Co. and Liebenthal & Co.* (1), in which the Judge makes the following remark:—"I for my part have always understood the general rules to be that the parties took their arbitrators for better or for worse, both as to decisions of fact and decisions of law."

JUDGMENT.—This is an application by Ghaznavi and Co. that an award purporting to have been made by the Bengal Chamber of Commerce, which was filed on the 17th April 1914, be set aside and that the Budge-Budge Jute Mills, respondents, be restrained from enforcing the same. The matter arose upon a contract, dated the 22nd July 1913. The petitioner sold 300 bales of jute rejections as sample lot, shipment at once. There was an option provided in these terms: "The buyers have the option of taking a further lot of 1,700 bales on approval of these lots and at the same rate." The contract had an arbitration clause in these terms: "Any dispute arising in this contract shall be referred to the arbitration of the Bengal Chamber of Commerce, whose decision shall be accepted as final and binding on both the parties." The petitioner did not deliver the jute under the contract. Messrs. Andrew Yule and Co., as agents of the Budge-Budge Jute Mills, wrote to the Registrar of what was known as the tribunal of the Bengal Chamber of Commerce, dated the 10th February 1914, and that letter fully set out their case. It appears from it that repeated letters were written by the Mills to the petitioners to which no reply was sent. Ultimately the petitioners asked for extension of time and it was granted, the last extension being up to the 7th of October. In spite of such extension the delivery was not given. The Mills thereupon presented the difference bills. The payment was refused and the matter was referred to the Bengal Chamber of Commerce. The buyers had tendered to the petitioners Rs. 14,000, which was the value of the two thousand bales, on the 27th of September. One of the disputes between the parties apparently was that the buyers were not entitled to call for delivery of the 1,700 bales. It was suggested by the petitioners that it was conditional upon the approval of the sample lot and the sample lot not having been approved, the Budge-Budge Jute Mills were not entitled to ask for delivery of that lot. The petitioners sent in

(1) 78 L. T. 406.

their case to the registrar of the tribunal on the 8th March 1914. Their contentions were firstly in respect of the 1,700 bales, they asserting that the Budge-Budge Jute Mills had no right to call upon them to deliver the 1,700 bales. They also contended that the market rate ought to be the rate of the 3rd October, namely, the last date of extension. They also said that the evidence ought to be given by the Mills that they had purchased against the petitioners. The award was made and a copy of it was sent to the petitioners and it was filed on the 17th of April 1914.

The application before me was made on the 24th April 1914 when a Rule *nisi* was granted. The petitioners objected to the award on these grounds, namely, (1) that the award was perverse as being beyond the scheme of the reference in respect of the additional lot of the 1,700 bales; (2) that the submission was insufficiently stamped; (3) that the names of the arbitrators were not disclosed and, therefore, the petitioners were unable to ascertain if the arbitrators had acted fraudulently or in collusion with the other side, or if they were otherwise unfit to conduct the arbitration; (4) that no umpire was appointed prior to the arbitrators proceeding with the reference; (5) that no time or place was fixed for the hearing; (6) that no notice of the hearing was given; and lastly (7) that the award was made against the name of the firm, without ascertaining who were the parties liable. On those facts the award was bad. As regards the objections Nos. 2 and 7 I need not deal with them as they were not argued and in fact objection No. 2 was expressly withdrawn. As regards the last objection about the award being against the firm, the Code now provides that suits can be instituted against a firm in the firm's name and decrees may be granted against a firm in the firm's name. The first ground, I think, is untenable. As regards the third ground I am of opinion that it is not of much value. The petitioners had plenty of opportunity of ascertaining as to what the arbitrators did and had opportunity of knowing their names when the award was filed in Court and although the award was filed on the 17th and they made the application on the 24th, they did not in their petition state that there were any grounds for believing that the arbitrators had in any way acted fraudulently, or that they believed that the arbitrators had acted fraudulently or that there were any reasons for suspecting that they had acted improperly. I am not prepared to attach any value to a contention of that character on purely conjectural grounds. The fourth ground does not seem to me to be of much value. As regards the fifth and sixth grounds I have to observe that the petitioners did not state anywhere that they did not know the rules of the Chamber. Further, there is nothing before me to show that the rules of the Chamber have not been complied with. I do not think that a person can be allowed to see the effect of an award and then come to Court to set it aside. An application of this character should not be encouraged.

I accordingly dismiss the application with costs.

Rule discharged.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 427 OF 1913.

August 26, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

MEENAKSHI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MUNIANDI PANIKKAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Prostitutes - Inheritance - Succession to woman living in adultery - Stridhanam—*Legitimate son and illegitimate daughter, contest between Prostitution, effect of - Words, interpretation of - Custom.*

Under the *Mitakshara* Law the illegitimate children have no right of succession except in the case of illegitimate sons of *Sudras*.

According to the Hindu Law as obtaining in the Madras Presidency, the illegitimate daughter of a woman who lived in adultery has no right to inherit her mother's *stridhanam* and a legitimate son is entitled to succeed to it in preference to the illegitimate daughter.

Thakoor Jeebnath Singh v. *The Court of Wards*, 2 I. A. 163 at p. 165; 23 W. R. 409; 15 B. L. R. 190 (P. C.), followed.

Prostitutes are governed by the ordinary Hindu Law. The unchastity of a married woman does not bring her within the class of dancing girls and she is not governed by the law which by custom and precedent applies to them.

Venku v. *Mahalinga*, 11 M. 393 and *Muttukannu* v. *Paramasami*, 12 M. 214, referred to.

Guddati Reddi Obala v. *Ganapati Kandanna*, 17

Ind. Cas. 422; 23 M. L. J. 493; 12 M. L. T. 467; (1912) M. W. N. 1138, followed.

Prostitution does not sever the tie of kindred between a degraded woman and her relations before degradation.

Tara Monee Dossee v. *Motee Benarsee*, 7 Beng. Sud. Diw. Adaw. Rep 273 and *Mayna Bai* v. *Uttaram*, 2 M. H. C. R. 196, distinguished.

Subbaraya Pillai v. *Ramasmi Pillai*, 23 M. 171, *Sivasangu* v. *Minal*, 12 M. 277, *Bhagwan Koer* v. *J. C. Bose*, 31 C. 11 at p. 33; 30 I. A. 249; 7 C. W. N. 895; 5 Bom. L. R. 845; 13 M. L. J. 381; 84 P.R. 1903; 135 P.L. R. 1903 (P.C.), *Kusum Kumari Roy* v. *Satya Ranjan Das*, 30 C. 999; 7 C. W. N. 784, *Hari Lal Sinha* v. *Tripura Charan Roy*, 19 Ind. Cas. 129; 40 C 650; 17 C. L. J. 438; 17 C. W. N. 679, *Sarna Moyee Bewa* v. *Secretary of State for India in Council*, 25 C 254; 2 C. W. N. 97, *Mandaram Nammaiya Chetty* v. *Mandaram Tiruvengadathan Chetty*, 18 Ind. Cas. 601; 13 M. L. T. 88; 24 M. L. J. 223 at p. 227, *Kojiyadu* v. *Lakshmi*, 5 M. 149, *Angammal* v *Venkata Reddi*, 26 M. 509, *Vedammal* v. *Vedanayaga Mudaliar*, 31 M. 100; 2 M. L. T. 533; 18 M L. J. 70, *Narasanna* v. *Gangu*, 13 M. 133, *In the goods of Kamney Money Bewah*, 21 C. 697, *Myna Boyee* v. *Ootaram*, 8 M. I. A. 400 at p. 425; 2 W. R. (P. C.) 4; 1 Suth. P. C. J. 452, 1 Sar P. C. J. 797; 19 E R. 582; *Annayyan* v *Chinnan*, 5 Ind. Cas. 84; 33 M. 366; 7 M. L. T. 140; 20 M. L. J. 355; *Bhika* v. *Babu Vedu Teli*, 32 B. 562; 10 Bom. L. R. 736 and *Jagannath Raghunath* v. *Narayan*, 7 Ind. Cas. 459, 34 B. 553; 12 Bom. L. R. 545, referred to.

It is a well-recognised canon of interpretation, both under the English and the Hindu Law, that words ought to be construed in their primary sense and multiplicity of sense ought not to be attributed to them.

Bhimacharya v. *Ramacharya*, 3 Ind. Cas. 750; 33 B. 45; 11 Bom. L. R. 654; *Reg.* v. *The Poor Law Commissioner for England and Wales, In the matter of the Holborn Union*, 6 A. & E. 56 at p. 68; 3 N. & P. 77; 7 L. J. M. C. 33; 112 E. R. 21 and *In re Kirkstall Brewery Co., Ld.*, 5 Ch. D. 535, 46 L. J. Ch. 424; 37 L. T. 312, referred to.

Per *Seshagiri Iyer, J.*—A custom is not immoral merely because it regulates rights of property among dancing girls

Quære:—Whether the illegitimate children can come in to intercept the escheat to the Crown?

Second appeal against the decree of the District Court of Madura, in Appeal Suit No. 323 of 1911, preferred against that of the Principal District Munsif of Madura, in Original Suit No. 146 of 1910.

FACTS.—The suit was one of disputed succession to the *stridhanam* property of one Mookkayee, a Hindu widow. By her husband *V*, she had a son *M*, the 1st defendant. After her husband's death, she lived with her paramour, the 2nd plaintiff, and had by that union a daughter *M*, the 1st plaintiff. During the time she lived with the 2nd plaintiff she made some savings and these form the subject of the present litigation. On Mookkayee's death her legitimate son and her illegitimate daughter both claimed the exclusive right to succeed to her *stridhanam*. The lower Courts held that the legitimate son was entitled to succeed to the exclusion of the illegitimate daughter. The illegitimate daughter and the paramour appealed to the High Court.

Mr. *P. S. Narayanaswami Iyer*, for Mr. *C. V. Ananthakrishna Iyer*, for the Appellants:—The deceased was not a concubine, she being a married woman. She must, therefore, be treated either as a prostitute or as a dancing girl. In either view the illegitimate daughter is entitled to succeed in preference to the legitimate son. There is no difference between dancing girls and prostitutes as regards the law applicable to them. In both cases the degraded relations succeed, in preference to the undegraded relations.

The following cases were referred to:—

Tripura Charan Banerjee v. *Sreemutty Hari Mati Dasi* (1); Second Appeal No. 1144 of 1912; *Hari Lal Singh* v. *Tripura Charan Roy* (2); *Musammat Maharana* v. *Thakur Pershad* (3); *Annayan* v. *Chinnan* (4); *Chalakonda Alasani* v. *Chalakonda Ratan Chalam* (5); *Subbaraya Pillai* v. *Ramasami Pillai* (6); *Myna Boyee* v. *Ootaram* (7); *Queen-Empress* v. *Vara thappa Chetti* (8); *Mayna Bai* v. *Uttaram* (9); *Narasanna* v. *Gangu* (10) and *Mandaram Nammaiya Chetty* v. *Mandaram Tiruvengadathan Chetty* (11).

Mr. *P. R. Ganapati Aiyar*, for Mr. *K. N. Aiya Aiyar*, for the Respondents:—The question of preference between degraded and undegraded relations of a prostitute does not arise in this case, both the claimants being undegraded relations. At the time of the death of the deceased the appellant was a married woman and so could not be regarded as a degraded rela-

(1) 9 Ind. Cas. 657; 38 C. 493; 15 C. W. N. 807.
(2) 19 Ind. Cas. 129; 40 C. 650; 17 C. W. N. 679; 17 C L. J. 438.
(3) 12 Ind Cas. 778; 14 O. C. 234.
(4) 5 Ind. Cas. 84; 33 M. 366; 7 M. L. T. 140; 20 M. L. J. 355.
(5) 2 M. H. C. R. 56.
(6) 23 M. 171.
(7) 8 M. I. A. 400 at p. 425; 2 W. R. (P. C.) 4; 1 Suth. P. C. J. 452; 1 Sar. P. C. J. 797; 19 E. R. 583.
(8) 12 M. 297.
(9) 2 M. H. C. R. 196.
(10) 13 M. 133.
(11) 18 Ind. Cas. 601; 24 M. L. J. 223 at p. 227; 13 M. L. T. 88.

lation notwithstanding her illegitimacy. If she is regarded as an undegraded relation there is no question, but that she, being illegitimate, will be postponed to the legitimate son.

The law regulating succession to the deceased is Hindu Law and not the law relating to dancing girls. She was a concubine and not a dancing girl or a prostitute. A Hindu male who has lapsed from orthodoxy has been held to be governed by the Hindu Law. *Bhagwan Koer* v. *J. C. Bose* (12). So also a Hindu widow who has lapsed from orthodox habits does not cease to be a Hindu governed by the Hindu Law. By reason of her improper habits the deceased did not become degraded, nor could she be expelled from caste on that account. A Hindu married woman who leads an immoral life is not a dancing girl and the laws and rules applicable to dancing girls do not apply to her. *Guddati Reddi Obala* v. *Ganapati Kandanna* (13). In the Madras Presidency the dancing girls form a special class governed by special rules. Those rules ought not to be appplied to persons not belonging to that special class. In Calcutta there is no class known as dancing girls and there are no special rules governing such a class. Hence the Calcutta view that dancing girls are governed by Hindu Law and that there is no difference in the law governing them and prostitutes. An illegitimate daughter is under no system of law an heir. *Bhikya* v. *Babu Vedu Teli* (14). She may perhaps be regarded as a relation entitled to come in to prevent an escheat to the Crown. *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar* (15). An unchaste woman is not precluded from succeeding to her son born before unchastity. So also conversely her legitimate son is not precluded from succeeding to her.

There is no equity in favour of the illegitimate daughter. The decision in *Subbaraya Pillai* v. *Ramasamy Pillai* (6), in so far as it lays down that there is any such equity, is wrong. There is no dictum in the Calcutta decision such as that relied upon in *Subbaraya Pillai* v. *Ramasami Pillai* (6). The decision in *Mandaram Nammaiya Chetty* v. *Tiruvengadathan Chetty* (11) is no authority for the view that illegitimacy is a ground of preference. If anything, it is an authority for the view that legitimacy is a ground of preference.

JUDGMENT.

OLDFIELD, J.—I have had the advantage of reading the judgment which my learned brother is about to deliver, and concur in it. I shall, therefore, merely state shortly the negative reasons for which I think that the appellants' legal argument must be rejected.

The case, it seems to me, must be decided on the broad ground that it is for the appellants to show that the illegitimate daughter of a woman, who lived in adultery, inherits her *stridhanam*, over which she had full power, in preference to her legitimate son; and that they have neither produced any direct precedent for such succession nor established any principle justifying it. As it is not alleged that direct precedent is available, I turn at once to the principles put forward.

Firstly, the appellants contend for the application of the law of succession applicable to dancing girls to the offspring of a prostitute, such as they allege the 1st appellant's mother to have been. It is not necessary to decide whether she was one, as the appellants contend with reference to *Annayyan* v. *Chinnan* (4) and the fact that her immoral life began after her marriage, or was a permanent concubine as the facts suggest. For the argument must fail even as put forward. On the assumption that she was a prostitute, there is no authority in Madras for applying to her estate the law which has been recognised as applicable to dancing girls solely in virtue of the established custom of their caste. Vide *Venku* v. *Mahalinga* (16) and *Muttukannu* v. *Paramasami* (17). And I observe here, as in connection with the appellants' other contentions, that there is no reason for a

(12) 31 C. 11 at p. 30; 33 I. A. 249; 7 C. W. N. 895; 5 Bom. L. R. 845; 13 M. L J. 381; 84 P. R. 1903; 135 P. L. R. 1903 (P. C.).

(13) 17 Ind. Cas. 422; 23 M. L. J. 493; 12 M. L. T. 467; (1912) M. W. N. 1138.

(14) 10 Bom. L. R. 736; 32 B. 562.

(15) 25 Ind. Cas. 290; 18 C. W. N. 1154; 27 M. L. J. 333; 1 L. W. 831; 10 N. L. R. 112; 16 M. L. T. 447; (1914) M. W. N. 835.

(16) 11 M. 393.

(17) 12 M. 214.

liberal construction, the effect of which would be to disappoint expectations founded on legitimacy.

It was then contended that references to daughters in the *Mitakshara* should be read as including all daughters, both legitimate and illegitimate, and that all alike should be preferred to the legitimate son as heirs to their mother. But, *firstly*, that is not the primary sense of those references and is unauthorised by the rules of interpretation recognised by both English and Hindu Law. Vide *Bhimacharya* v. *Ramacharya* (18). And, next, it has not been shown how such a substitution can be carrried out or logically limited. Should it, for instance, be extended to the law relating to the daughter's right to inherit from the father in spite of the absence of any special provision in her favour, such as is available in the case of illegitimate sons ?

Next, there is the argument based on the alleged severance of the 1st appellant's mother from her legitimate family owing to her unchastity and consequent degradation. It is based, first, on an opinion of the Pandits in *Tara Monee Dossee* v. *Motee Benarsee* (19) that the heirs of an unchaste and outcaste woman are her daughters, born (as the report in the next case cited shows) in prostitution, who lived with her as prostitutes, not the sons of her daughters who had married and lived respectably. The priniciple of severance is statedly relied on and no doubt justified the decision against the legitimate family; but it may be pointed out that it involved nothing affirmative in favour of the prostitute daughters, defendants, and that it was not necessary that it should do so when the disqualification of their opponents was sufficient for the decision of the case. *Mayna Bai* v. *Uttaram* (9) dealt with competition between illegitimate children only, but contains an *obiter dictum* that "in Madras it has never been doubted that the children of the prostitute succeeded to the property of their mother." The law, however, as it now stands in this Presidency, must be taken to have been stated finally in the much more recent case of *Subbaraya Pillai* v. *Ramasami Pillai* (6). It, no doubt, does not appear that there was competition there between legitimate and illegitimate issue; for the report affords no description of the defendants. But the decision is against any severance of the degraded wife from her undegraded relatives and includes an expression of dissent from *Sivasangu* v. *Minal* (20) in which *Tara Monee's* case (19) was relied on. The actual decision in *Mandaram Nammaiya Chetty* v. *Tiruvengadathan Chetty* (11) is in accordance with this view, there being nothing in its reference to the rights of illegitimate children inconsistent with their postponement to all legitimate heirs.

Lastly, reliance has been placed on the observation in *Subbaraya Pillai* v. *Ramasami Pillai* (6) that "in applying so much of the Hindu Law as can, without incongruity, be applied either with reference to those connected with the degraded person after his degradation or, in their absence, to those remaining undegraded, the Courts would, at all events, be administering those rules as rules of equity and good conscience, which are the guides in cases not otherwise provided for." This seems to have been entirely *obiter*. For, as stated, it does not appear that any party to the case was connected with the degraded person after her degradation. And I, therefore, feel at liberty to express my respectful dissent from it. For, firstly, in the absence of any but an expressly limited recognition of the rights of illegitimate children in Hindu Law, it is not, I conceive, possible to apply its rules generally in their interest without incongruity; and next, I cannot understand how the High Court would be following any rule of equity or good conscience in doing so or would be promoting any other result than the mitigation of the disabilities which at present, in some degree at least, deter people from the formation of illicit relations.

The appeal is dismissed with costs.

SESHAGIRI IYER, J.—The suit relates to the property of one Mookkayee. First plaintiff is her daughter by 2nd plaintiff; the 2nd plaintiff is her paramour. First defendant is her son by her deceased husband, Vairava Pannikkan. A feeble attempt was made to contest the finding that she was not the

(18) 3 Ind. Cas. 750; 33 B. 452; 11 Bom. L. R. 654.
(19) 7 Beng. Sud. Diw. Adawl Rep. 327; 8 Ind. Dec. (o. s.) 247.
(20) 12 M. 277.

married wife of the 2nd plaintiff. It was argued that the Courts below have not given sufficient weight to the presumption arising from continuous cohabitation for a long time. This contention is untenable. The Courts have come to a distinct finding upon the evidence on record. The finding that Mookkayee was only a concubine of the 2nd plaintiff and that 1st plaintiff was her illegitimate daughter, is correct.

It has not been disputed that the property in question represents the savings of Mookkayee after she began to live with the 2nd plaintiff. The point for decision is whether 1st plaintiff, the illegitimate daughter, or 1st defendant, the legitimate son, should succeed to this property. Mr. P. R. Ganapathi Aiyar, who argued the case for the legitimate son very ably, contended that the ancient law-givers did not contemplate rights of succession or inheritance in favour of illegitimate children, excepting in a special instance to which I shall refer subsequently. I agree with him. It is true that in Brihat Parasara, Chapter V, the sage says: "The son, begotten by one of equal caste (the illegitimate son), is the offerer of *pinda* of his mother, and is (in every respect) a son to her; but he is nothing to the begotter, as he is born of lust."

"The son by a slave of a *Sudra* is fulfiller of desire and offers the *pinda*. Twelve sons are mentioned by the *Rishis*. They are offerers of the *pinda*, one after another, in the order mentioned."

From this Mr. Ghose draws the inference "that according to the rule of Brihat Parasara, Chapter V, illegitimate as well as legitimate children inherit the estate of a woman, and if it is *stridhana* there is no reason to suppose that the ordinary rule of Hindu Law will not apply (J. C. Ghose's "Principles of Hindu Law," p. 343). I do not think this conclusion follows from the citation. It is well established that under the *Mitakshara* system of inheritance the offering of spiritual benefits is no index to rights of property or to preference. It is different under the *Dayabhaga*. This may account for some of the decisions passed by the Calcutta High Court to which I shall refer later on. I am, therefore, of opinion that this text of Brihat Parasara is not indicative of the Sage's view that illegitimate children inherit the property of their mother. The learned Vakil for the appellants drew our attention to a text from Narada Smrithi in which a *Kamini's* son was mentioned as entitled to succession. The passage in question enumerates the twelve classes of sons to which reference is made by every Smriti writer. After the dictum of the Privy Council in *Thakoor Jeebnath Singh* v. *The Court of Wards* (21), which says that these texts are no longer regarded as binding authorities except in the case of adopted sons, it would be fruitless to discuss the matter further. I entirely agree with what Mr. Ghose says in his book on the subject: "It appears that at the time of the Rig Veda, probably even before that, (twelve kinds) of sons were recognized, but the Rig Veda says that they cannot be accepted' ....." "It is at least fully three thousand years when all these anomalous sons were prohibited, and the extreme purity of Hindu family life established."

The one apparent exception to this position is the rule regulating the rights of illegitimate children among *Sudras*. This deviation from the ordinary rule is traceable more to the theory of marriage among *Sudras* entertained by the *Rishis*, than to a desire to introduce a special law regarding illegitimate children. According to Manu it was permissible for the twice born classes to take *Sudra* wives. The "Nishada", as the offspring of this union was called, had certain rights of inheritance. Brihaspati's text says that such children were only entitled to maintenance. Finally, at the time of most of the Smritis, now recognised as giving us the law, they were not recognised as possessing any legal status. But in the case of *Sudras*, an exception was made. I am of opinion that this treatment was due to the idea that marriage among them was not so strictly formal and ceremonial as in the case of the higher classes. Continuous concubinage was regarded as equivalent to marriage, although the children of this irregular union did not

(21) 2 I. A. 163 at p. 165; 23 W. R. 409; 15 B. L. R. 190 (P. C.).

rank equally with those with whose mother there was a formal marriage. The use of the term *dasiputra* even in the case of *Sudras* is explicable on the ground that it is a relic of the days when the twice-born classes were allowed to take to them *Sudra* women as wives. This, I conceive, is the origin of the rule regarding the shares of illegitimate children among *Sudras*. It is open to question whether, having regard to the advancement of the class known as *Sudras*, the law which owes its conception to these ideas should still be allowed to prevail. The point has never been raised whether they are not obsolete, and the texts have been commented upon by the highest judicial tribunal as still in force. Whatever may have been the basis of the rule, it cannot apply to the present case. I have referred to this part of the case in some detail in order to show that illegitimate children of the class to which 1st plaintiff belongs are not within the pale of Hindu Law.

The main contentions of the appellants were two-fold: (*a*) That the Hindu Law did not cease to govern Mookkayee's property, notwithstanding her unchastity and (*b*) that the special rules relating to the devolution of *stridhanam* applied to the property in dispute, and consequently the daughter ought to be preferred to the son. The first ground is not contested by Mr. Ganapathi Iyer. He argued that the unchastity of Mookkayee did not sever her relation with her legitimate child. He relied upon the analogy of the case in *Bhagwan Koer* v. *J. C. Bose* (12), where the Judicial Committee of the Privy Council held in the case of a Sikh that strict conformity to rules of orthodoxy regarding diet and ceremonials is not a pre-requisite for a person being regarded a Hindu. The same principle has been enunciated regarding *Brahmos*. Vide *Kusum Kumari Roy* v. *Satya Ranjan Das* (22). Apart from analogy, we have a recent pronouncement of the Calcutta High Court in *Hari Lal Singh* v. *Tripura Charan Ray* (2) that a woman who adopts the life of a prostitute does not sever the tie which connects her with her kindred by blood [See also *Sarna Moyee Bewa* v. *Secretary of State for India in Council* (23) and *Mandaram Nammaiya Chetty* v. *Mandaram Tiruvengadathan Chetty* (11)]. This is the natural result of the earlier cases in this Presidency, which have laid down that a fallen mother is entitled to inherit her son's property [See *Kojiyadu* v. *Lakshmi* (24), *Angammal* v. *Venkata Reddi* (25) and *Vedammal* v. *Vedanayaga Mudaliar* (26)]. It must, therefore, be taken as established that Mookkayee's property will devolve according to the Hindu Law.

The second proposition that the 1st plaintiff, being the daughter, should be preferred to the 1st defendant, the son, cannot be supported. In the Mitakshara, Chapter I, sections I and II, dealing with inheritance, the words son, grandson and great-grandson are used in their natural sense. In section XI of the same Chapter, placitum 2, the definition of the legitimate son is given. Then comes the special section XII dealing with the rights of illegitimate sons of *Sudras*. Placitum 2 speaks of the sons by the wedded wife and the sons of a female slave. It is thus clear that the author everywhere uses the term *son* in its natural and ordinary sense of *legitimate son*. The word *daughter* must be similarly understood. It is in Chapter II, section XI, that Vijnaneswara treats of "the separate property of a woman". In this section, the words son and daughter must have the same meaning as they have in the earlier sections. That would be the rule of interpretation according to English Law. See per Lord Denman in *The Reg.* v. *Poor Law Commissioner for England and Wales, In the matter of the Holborn Union* (27) and *In re Kirkstall Brewery Co. Ltd.* (28). There is no difference in this respect between the English Law and the Hindu Law. The rule of interpretation is thus stated in Adhikarana Kaumudi, para. 50 ("Mimansa Rules of Interpretation", page 276): "Multiplicity of the sense to the same word must not be attributed". If the words son and daughter are used in Chapter

(22) 30 C. 999; 7 C. W. N. 784.

(23) 25 C. 254; 2 C. W. N. 97.
(24) 5 M. 149.
(25) 26 M. 509.
(26) 31 M. 100; 2 M. L. T. 533; 18 M. L. J. 70.
(27) 6 A. & E. 56 at p. 68; 3 N. & P. 77; 7 L. J. M. C. 33; 112 Eng. Rep. 21.
(28) 5 Ch. D. 535; 46 L. J. Ch. 424; 37 L. T. 312.

II, section XI, placita 8, 9 and 19 in their ordinary and natural sense, it is clear that there is no foundation for the suggestion that an illegitimate daughter is within those rules. Illegitimate children have no place in Hindu Law, at least under the *Mitakshara* system, except in the special case already referred to.

Another contention of the appellant was that a prostitute is a dancing girl, as that term is understood in Southern India, and that as daughters among this class inherit their mother's property, 1st plaintiff is entitled to the same rights. It has been laid down in a series of decisions by the late Justice Sir T. Muthuswami Aiyer that rights of inheritance among these women are not governed by the precepts of the sages, but by the custom which has grown among them. See *Venku* v. *Mahalinga* (16) and *Muttukannu* v. *Paramasami* (17). It has been held in a recent case, *Guddati Reddi Obala* v. *Ganapati Kandanna* (13), that a married woman taking to bad ways does not become a dancing girl. I do not desire it to be understood that I am in agreement with all the observations of one of the learned Judges who took part in that decision. There is a fundamental difference between rulings which lead to the encouragement of prostitution and those which tend to preserve civil rights to those who are the unfortunate offspring of immoral sexual connection. A custom is not immoral because it regulates rights of property among dancing girls. I need not pursue this topic any further. I am in agreement with the view taken in that case that the unchastity of a married woman will not bring her within the class of dancing girls so as to enable her to exercise all the rights which by custom and precedent have been allowed to them. This contention also fails.

A further argument was based upon an *obiter dictum* in *Subbaraya Pillai* v. *Ramaswami Pillai* (6) which says: "No doubt in *Sivasangu* v. *Minal* (20) *Narasanna* v. *Gangu* (10) and *In the goods of Kaminey Money Bewah* (29), which is more to the point, it was said that prostitution severed the legal relation. But we are unable to agree in this statement, though we think that the decision itself that when there is a competition between a degraded person and an undegraded person to the property of a degraded person, the degraded person has the preferential rights, may be supported on equitable principles referred to above. As regards the proposition that on equitable principles, the illegitimate offspring should be preferred to the legitimate, I must, with great deference, differ from the conclusion. I do not see that any consideration of equity can arise in favour of the illegitimate offspring as against the legitimate. If one were entitled to resort to other systems of jurisprudence regarding the rights of bastards, it would be clear that they have no legal claim upon the estate of their parents. The Hindu Law contains no exception to this principle; and I fail to see how a right which is discountenanced by every civilised community can be regarded as being in consonance with equity, justice and good conscience.

I have come to the conclusion that the claim of the appellant to be preferred to the first respondent is not sustainable on any of the grounds stated by her Vakil. I shall now very briefly refer to the cases cited before us. In many of these cases there was no argument whether illegitimate children are heirs under the Hindu Law. This is notably so with regard to S. A. No. 181 of 1911 to which I was a party. There the conflict was between two illegitimate children, a son and a daughter, and we held that the daughter was to be preferred as the dispute related to *stridhanam* property. The question whether the illegitimate children can come in to intercept the escheat to the Crown is a point of some difficulty which it is not necessary to go into at present.

The earliest case to which our attention has been drawn is that reported in *Tara Monee Dossee* v. *Motee Benarsee* (19). In that case the opinion of the Pandits was that prostitution severed the tie of kinship. Acting upon this

(29) 21 C. 697.

ryarasta, the Sudder Court held that the daughters who were born after the mother's fallen state and "who lived with the outcaste mother and had all things in common with her" should be preferred to the legitimate daughter. This opinion of the Pandits is no longer law and a decision based upon such an opinion cannot be regarded as an authority. In the case reported as *Mayna Bai* v. *Uttaram* (9) there was no competition between legitimate and illegitimate children. Both the contending parties were illegitimate. The learned Judges accepted the dictum of the Pandits in *Tara Monee's* case (19) as good law and decided that in the absence of preferential heirs they inherited the mother's property and to one another. The decision does not affect the present case. It may, however, be pointed out that the opinion of the Judicial Committee in this very case, *Myna Boyee* v. *Ootaram* (7), is more qualified regarding rights of succession to the mother's property than the conclusion of the learned Judges of the High Court. *Subbaraya Pillai* v. *Ramasami Pillai* (6) expressly laid down that prostitution did not sever pre-existing legal relation, and dissenting from the *dicta* contained in the earlier cases decided that a step-son was entitled to succeed. In *Annayyan* v. *Chinnan* (4) the learned Judges held that an illegitimate son by a *Sudra* widow whose *re-marriage* is forbidden had no right of inheritance. This is a distinct pronouncement in favour of the position that Hindu Law does not recognise the rights of illegitimate offspring to succeed to their parents' property. Much reliance was placed on the recent case in *Mandaram Nammaiya Chetty* v. *Tiruvengadathan Chetty* (11) on behalf of the appellant. The actual decision in that case was that the daughter of the daughter of a prostitute born to her in wedlock is to be preferred to the sons she begot after she became a prostitute. That opinion is in entire accordance with the conclusion at which I have arrived in this case The statement that the illegitimate sons are entitled to succeed to their mother may be reconcilable on the ground that in the absence of preferential heirs and if the Crown does not intervene, they would succeed as blood relations. As I said before, the actual decision supports my view. In *Bhikya* v. *Babu* (14) it was held that in regard to ordinary property, the divided brother's son included the illegitimate daughter. I fully agree with the opinion of Chandavarkar, J., in *Jagannath Raghunath* v. *Narayan* (30): "There is no authority whatever in the Hindu Law for the proposition, which is contended for by Mr. Pradhan, that, when the competition is between the husband and a son born of the woman by adulterous intercourse, that son supersedes the husband as heir to the *stridhan*". A Full Bench of the Calcutta High Court reviewed all the earlier authorities on thesubject in *Hari Lal Singh* v. *Tripura Charan Roy* (2) and arrived at the conclusion that prostitution did not sever the tie of blood previously existing. It is true there are cases in that High Court which seem to lay down that illegitimate children have rights of inheritance. This view may be traced to the prevailing theory in Bengal that the offering of oblations has to be taken into account in determining heirship. This principle does not affect those governed by *Mitakshara* and consequently these rulings are not binding on us.

Upon a review of texts bearing on the question and of the decisions based on them, my conclusion is that the illegitimate children of a prostitute have no rights of inheritance under the rule of Hindu Law as obtains in this Presidency, that the 1st defendant is entitled to the property of Mookkayee and that 1st plaintiff's claim must fail.

I would dismiss the second appeal with costs.

Appeal dismissed.

(30) 7 Ind. Cas. 459; 12 Bom. L. R. 545; 34 B. 553 at p. 559.

THIRUVENGADATHA AIYANGAR *v.* PONNAPPAIYANGAR.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2122 OF 1912.

September 15, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

A. THIRUVENGADATHA AIYANGAR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

R. PONNAPPAIYANGAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Religious endowment—Appointment of additional trustees—Temple Committee, power of—Trusts Act (II of 1882), s. 49—Civil Court, jurisdiction of.

A power to appoint an additional trustee, when such appointment is not a variation of the scheme framed for the management of the temple, is necessarily vested in the temple committee as successor to the Board of Revenue. Such a power is properly incidental to the duties and responsibilities of the Committee and is inherent in their power of general superintendence.

Where no person is deprived of his free-hold there is no duty cast on the temple committee to show affirmatively that the appointment was for just and sufficient cause. The only limit to be imposed on the committee in the exercise of their discretion is by an analogy to section 49 of the Trusts Act.

A Civil Court has jurisdiction to decide if this discretionary power has been exercised reasonably and in good faith.

Chinna Rangayangar v. *Subbaraya Mudali*, 3 M. H. C. R. 334; *Seshadri Ayyangar* v. *Nataraja Ayyar*, 21 M. 179 at p. 199; *Sheik Daud Sahib* v. *Hussein Saiba*, 17 M. 212; 4 M. L. J. 48; *Ramaiengar* v. *Gnanasambanda Pandarasannada*, 5 M. H. C. R. 53; *Virasami* v. *Subba*, 6 M. 54, followed.

Venkatachala Pillai v. *Taluq Board, Saidapet*, 10 Ind. Cas. 301; 34 M. 375; (1911) 1 M. W. N. 304; 21 M. L. J. 305; *Nilayathakshi Ammal* v. *The Taluq Board of Mayavaram*, 8 Ind. Cas 488; 20 M. L. J. 885, 8 M. L. T. 341; 34 M. 333, (1911) 1 M. W. N. 12; *Ganapathi Ayyar* v. *Sri Vedavyasa Alasinga Bhattar*. 29 M. 534; 16 M. L. J. 435; 1 M. L. T. 127, distinguished.

Second appeal against the decree of the District Court of Tinnevelly, in Appeal Suit No. 275 of 1911, preferred against that of the Temporary Subordinate Judge of Tuticorin, in Original Suit No. 12 of 1909.

Messrs. *K. Srinivasa Aiyangar* and *N. Raja Gopalachariar*, for the Appellants.

Messrs. *T. Rangachariar*, *K. Parthasarathy Aiyangar* and *V. Venkatachariar*, for the Respondents.

This second appeal coming on for hearing on 28th and 29th July 1914 and having stood over for consideration till the 6th August 1914, the Court delivered the following

JUDGMENT.—This second appeal arises out of a suit by one of five trustees of a temple against the members of the temple committee and the other four trustees, the relief asked for being a declaration that two of the trustees have been appointed unlawfully to the temple committee. The Temporary Subordinate Judge of Tuticorin in whose Court the suit was filed, dismissed the suit. The District Judge of Tinnevelly, on appeal, set aside the decree of the lower Court and granted a declaration that the appointment of the trustees by the temple committee was not legally valid, ordered the cancellation of the appointments and issued an injunction restraining the newly appointed trustees from interfering with the management of the temple.

It is argued before us that the appointment was valid and that the District Judge has misapprehended the powers of a temple committee and wrongly thrown the burden on them of justifying the appointment. For the respondents it was contended, *first*, that the appointment of the two trustees was an addition to the constituted number and thereby amounted to an alteration of the scheme which, it was argued, was entirely beyond the power of the temple committee, and *secondly*, that even if the committee had power to make the appointment, it lay on them to justify it and that the District Judge having found that it was not justified, this Court could not interfere in second appeal.

We can dispose of the first point very shortly. There is nothing in the plaint to indicate that objection was taken on the ground that the appointment was a variation of the scheme, nor was the view ever urged during the course of the protracted proceedings in both the Courts, nor does the District Judge base his judgment on that ground. Further, it appears that there is no record of any scheme ever having been settled and it is clear on the evidence, the admissions of the plaintiff and the findings of the original Court that at one time there were actually five trustees, the number now was constituted by the present appointments, and that at the time of the plaintiff's own appointment, there were actually four. This objection, therefore, fails on two grounds and the appointment could very fairly be justified as one filling up two vacancies which had improperly been allowed to exist for a considerable time.

If these appointments are to be viewed as the filling up of vacancies, they are clearly justified under the provisions of Regulation VI

of 1817 as applied by the Religious Endowments Act XX of 1863. The temple in question was at the date of the passing of Act XX of 1863 one covered by the language of section 3 of that Act and, by section 7 of the Act, a temple committee was constituted to exercise the powers of the Board of Revenue and the local agents vested in them by the Regulation. Turning to Regulation VII of 1817, it is clear that, under sections 12 and 13, the Board of Revenue had power to appoint suitable persons as trustees and to fill up vacancies from time to time. We are of opinion, however, that even if there were not vacancies, the temple committee had power to appoint these trustees if they thought it advisable to do so in the interests of the endowment, the appointments, as we have already pointed out, not being a variation of an existing scheme. Reliance is placed by the respondents on *Venkatachala Pillai* v. *Taluq Board, Saidapet* (1) and it is argued that that case is an authority for the proposition that the only powers of appointments recognised by the Regulation are appointments to fill vacancies. That is, however, not the *ratio decidendi* of the case. What was done in that case was that a trustee, namely, the Taluq Board had been appointed without the existing trustee being dismissed, and the Court held (*vide* page 385) that the Board of Revenue could not ignore the rights of existing trustees and appoint trustees to the prejudice of one who is in possession of the office under the instrument creating the trust. The duty of the Board was, first, to dismiss the trustee which would be done for good cause shown and, then, there being a vacancy, exercise the powers under sections 12 and 13 of filling up the vacancy. That case, therefore, stands on an entirely different footing to the present. But it is to be noted that the power to dismiss a trustee was assumed to exist by virtue of section 2 although no specific power to that effect is to be found in the words of the Regulation. This was an authority of *Chinna Rangaiyangar* v. *Subbaraya Mudali* (2), a case quoted with approval in *Seshadri Ayyangar* v. *Nataraja Ayyar* (3). Further the Courts point out that on the occasion of a vacancy various powers are given to the Board by section 13 in that they need not fill up the vacancy but may make such other provision for the trust, management, or superintendence as may to them seem right and fit. Reliance was also placed on *Nilayathakshi Ammal* v. *The Taluq Board of Mayavaram* (4) for the proposition that there was no power in the Board to appoint trustees except on the occasion of a vacancy. It is true that the Court in that case does doubt whether this power can be found in the Regulation other than in section 13; but the Judges express no decided opinion on the point, which was not necessary for the decision of the case. What was decided there was that when the Taluq Board had taken over the management by virtue of section 51 of the Local Boards Act, it could not divest itself of its duty of management by appointing an independent trustee. That case is, therefore, no authority for the broad proposition contended for and, in our opinion, it is untenable. We have no hesitation in holding that a power to appoint an additional trustee, when such appointment is not a variation of the scheme, is necessarily vested in the temple committee as successors to the Board of Revenue. It was specifically so held in *Sheik Davud Sahib* v. *Hussein Saiba* (5). The Judges there use language which seems to indicate that they base the right on section 13, though it is not clear from the somewhat short judgment that this is so. They certainly lay down, however, that it is competent to the committee where there is no hereditary trustee to add to the number of the existing trustees if, in their opinion, it is advisable to do so in the interests of the trust. We prefer to find this power in section 2 of the Regulation. *Chinna Rangaiyangar* v. *Subbraya Mudali* (2), which decides that the Board of Revenue has power to remove the trustee, lays down that the Regulation does not contain any restriction on the performance of the duties of general superintendence and management and that decision was followed in *Ramaiengar* v. *Gnanasambanda Pandarasannada* (6) and in a later case, *Virasami* v. *Subba* (7), it was assumed that, in cases falling within

(1) 10 Ind. Cas. 301; 34 M. 375; (1911) 1 M. W. N. 304; 21 M. L. J. 305.
(2) 3 M. H. C. R. 3134.
(3) 2 1 M. 179 at p.99.
(4) 8 Ind. Cas. 488; 20 M. L. J. 885; 8 M. L. T. 341; 34 M. 333; (1911) 1 M. W. N. 12.
(5) 17 M. 212; 4 M. L. J. 48.
5 M. H. C. R. 53.
3 M. 54.

section 3 of Act XX of 1863, such a power as this, the power of dismissal, existed. Just as the authority to suspend or remove for just cause was held to be properly incidental to the other duties and responsibilities of the Board of Revenue and to have been impliedly given by the Court in *Chinna Rangaiyangar* v. *Subbaraya Mudali* (2), so the power to add additional trustees for the purposes above mentioned must likewise be held to be properly incidental to the duties and responsibilities of the temple committee and to be inherent in their power of general superintendence.

The last argument addressed to us was that there was a distinction between the exercise of this power for administrative purposes and for punitive purposes. We are unable to accede to the argument that there is anything punitive in appointing fresh trustees where a temple committee are not satisfied that the existing trustees are dealing with the work successfully or properly. This contention is one that found favour with the learned District Judge and is the basis of his judgment. He remanded the case to the lower Court for the trial of an issue whether the appointments were a a reasonable and *bona fide* exercise of the committee's power, and in consequence of certain admissions made by the temple committee's Vakil held that the appointment was punitive. He then required the temple committee to justify the appointment and eventually set it aside on the ground "that no such punishment should have been inflicted," adding, however, that if it was made on purely administrative grounds, "it could not be supported since it did not result and, so far as has been shown, would not necessarily result in any improvement in the submission of accounts." We are unable to find any authority for this distinction between a punitive appointment of additional trustees and an administrative one. The learned District Judge seems to rely on *Ganapathi Ayyar* v. *Sri Vedavyasa Alasinga Bhattar* (8). That, however, was a case where additional trustees were appointed in such a manner as to alter the scheme of management already settled by the Board. As pointed out above, there is no evidence of a scheme of management ever having been settled or what its nature was. We hold that where no person is deprived of his free-hold there is no duty cast on the temple committee to show affirmatively that the appointment was for just and sufficient cause. In our view the only limit to be imposed on the temple committee in the exercise of their discretion is by an analogy to section 49 of the Trusts Act II of 1882: "Where a discretionary power conferred on a trustee is not exercised reasonably and in good faith, such power may be controlled by a principal Civil Court of original jurisdiction." This has been expressly held in *Sheik Davud Sahib* v. *Hussain Saiba* (5) in circumstances resembling the present case. The learned District Judge has cast a higher duty on the temple committee than he should have done and his finding on the issue based on his view of the burden of proof and on his limitation of the materials for justification cannot be supported. We do not think it advisable to send this case back after having carefully considered the case ourselves. We propose, therefore, to exercise the powers conferred on this Court by Order XLI, rule 24, of the Civil Procedure Code of re-settling the issues and finally determining the suit ourselves. The issue will be, whether the temple committee has not exercised its power of appointment in this case "reasonably and in good faith." The case is adjourned for further hearing for three weeks.

This second appeal coming on for final hearing on 15th of September 1914, the Court delivered the following

JUDGMENT.—In the judgment prononuced by us on the 6th August 1914, we expressed our opinion that the real question for decision in this case was whether, when the majority of the members of the temple committee appointed the defendants Nos. 1 and 2 as additional trustees at a meeting of the committee held on the 28th February 1909 (Exhibit A), they did not exercise "reasonably and in good faith" the discretionary power vested in them by law to make such new appointments.

We have heard the learned Vakil who argued for the plaintiff (1st respondent) on this question at some length, but we are not satisfied that the committee members,

(8) 29 M. 534; 16 M. L. J. 435; 1 M. L. T. 127.

who by a majority of four to two passed the resolution, Exhibit A, did not act reasonably or in good faith in making the disputed appointments. Some of the reasons given by the said majority of the committee are that the plaintiff and the 4th defendant (who were two of the then existing three trustees) had been, in the opinion of the said majority of the Committee, "very remiss in the discharge of their duty," and "have allowed the temple accounts to fall into arrears" and "have badly treated" those temple servants who did not belong to their faction. We see no sufficient ground for believing that these four committee members (three of whom were not Sri Vaishnavas and had no interest in either of the two factions raging among the trustees) did not honestly believe in the facts on the truth of which they acted or did not honestly come to the conclusion that the additional appointments of trustees would be conducive to the interests of the temple; even though it is very probable that they knew that the additional trustees belonged to the faction opposed to that of the plaintiff and the 4th defendant.

In this view, the lower Appellate Court's decree is reversed and that of the Subordinate Judge is restored. The plaintiff will pay the costs of defendants Nos. 1 and 2 in the lower Appellate Court, while the other defendants will bear their own costs.

Appeal allowed; Suit dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 89 OF 1911.

August 7, 1914.

Present:—Sir John Edward Power Wallis, Offg. Chief Justice, and Mr. Justice Seshagiri Iyer.

Minor RAJU *alias* AIYARU NAICKEN, REPRESENTED BY HIS NEXT FRIEND, AMMATHAYEE *alias* KANAGAMMAL—PLAINTIFF—APPELLANT

versus

Minor RAMASWAMY NAICKEN BY GUARDIAN, THE RESPONDENT No 2, AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Inheritance, exclusion from—Leprosy, what type of—Tests—"Incurable", what is.

Under the Hindu Law it is only the agonising, sanious or ulcerous type of leprosy that can be regarded as a ground of exclusion from inheritance. It is not safe to adopt the test whether the disease is curable or not. Deformity and unfitness for social intercourse, arising from the virulent and disgusting nature of the disease, are the most satisfactory tests.

Kayarohano Pathan v. *Subbraya Thevan*, 19 Ind. Cas. 690; 13 M. L. T. 460; (1913) M. W. N. 642; 25 M. L. J. 251, followed.

Ananta v. *Rambai*, 1 B. 554; *Sivachidambara Pillai* v. *Parasakty*, (1857) S. D. A. 210, *Muthuvelayuda Pillai* v. *Parasakti*, Mad. Sud. Decns. for 1860 p. 239; *Janardhan Pandurang* v. *Gopal Pandurang*, 5 B. H. C. R. 145, referred to.

In order that leprosy may be considered incurable there must be worms on the body, the ulcer must discharge offensive matter, the nails should drop off and the eyes should be blood-red.

Appeal against the decree of the Subordinate Judge of Mayavaram at Kumbakonam, in Original Suit No. 3 of 1909.

FACTS.—One Aiyaru Naicker, the original owner of the suit properties, died leaving behind him two sons, Venkatasami and Ayyasami. Both of them remained undivided till their death, Ayyasami dying in 1907 leaving a son, the present plaintiff. Venkatasami died in 1908, leaving behind him an adopted son, the 1st defendant. The plaintiff alleged that even during the life-time of Aiyaru Naicker, Venkatasami was suffering from leprosy of a virulent and nasty type, and was in consequence excluded from inheritance under Hindu Law, that, therefore, Ayyasami and after him the plaintiff became solely entitled to the whole of the suit properties, that the 1st defendant was never adopted by Venkatasami and that the alleged adoption, even if true, was invalid. The plaintiff, therefore, sued for recovery of possession of the suit properties. In the alternative he prayed that in case the adoption of the 1st defendant is found valid, that the properties may be partitioned and that he may be given his half share therein. The defendants denied that Venkatasami was suffering from leprosy and alleged that the adoption of 1st defendant was perfectly legal and valid. The Subordinate Judge of Mayavaram who tried the case held that the leprosy of Venkatasami was not of such a type as to exclude him from inheritance and that the adoption of 1st defendant was legal and valid. He, therefore, passed the usual preliminary

decree for partition. The plaintiff thereupon appealed to the High Court.

Messrs. *T. R. Ramachandra Iyer* and *N. A. Krishna Iyer*, for Mr. *Ryru Nambiar*, for the Appellant: - There is ample evidence to prove that the leprosy from which Venkatasami was suffering was of the ulcerous type. He was, therefore, excluded from inheritance. *Ananta* v. *Ramabai*(1); see also *Sivachidambara Pillay* v. *Parasakty* (2). The test laid down by Sundara Aiyar, J., in *Kayarohana Pathan* v. *Subbaraya Thevan* (3), namely, whether the person is fit for *social intercourse*, is not warranted by Hindu Law. The Hindu Law texts speak of "incurable disease." Leprosy is only one such disease. In this case there is ample evidence to show that the disease from which Venkatasami was suffering was incurable. The defence evidence shows that the disease may have been syphilis. As regards the adoption of 1st defendant by Venkatasami, the evidence is conflicting. D. W. No. 12 seems to be anxious to support the adoption. The Government Order which authorises the taking of left hand thumb impression came into force only after the registration of Exhibit I, the deed of adoption. The explanation of D. W. No. 12 for his taking the left hand thumb impression of Venkataswami is clearly false.

Messrs. *T. Rangachariar*, *T. Narasimha Iyengar* and *V. K. Venugopal Naidu*, for the Respondents: The evidence does not establish that the disease in question is leprosy. Leprosy, to be a ground of disinherision, must be of a virulent form according to experts it must be of the leonine form. The *Kayarohana Pathan* v. *Subbaraya Thevan* (3) correctly lays down the test in such cases. See also *Bhagaban Ramanuj Das* v. *Ram Praparna Ramanuj Das* (4) and *Sukumari Bewa* v. *Ananta Malia* (5). The latter case decides the rights of a son adopted by a *Sudra* leper.

Mr. *T. R. Ramachandra Aiyar*, briefly replied.

JUDGMENT.—One Aiyaru Naicker had two sons Venkatasami Naicker and Ayyasami Naicker. The sons remained undivided even after the father's death. The plaintiff in this case is the natural son of Ayyasami Naicker. The first defendant is the adopted son of Venkatasami. Ayyasami died on the 17th December 1907, Venkatasami on the 9th January 1908 The alleged adoption by Venkatasami is said to have taken place on the 20th December 1907.

The plaintiff's case is that even during the life-time of their father "Venkatasami had an attack of leprosy of a virulent and nasty type;" that, consequently, on the death of the father, Ayyasami alone became entitled to the whole property, that Venkatasami made no adoption prior to his death, and that, even if he did, it was invalid.

The defendants Nos. 1 and 2 denied that the adoptive father suffered from leprosy and pleaded that the adoption of the first defendant was true and valid.

The first issue is in these terms:—"Whether the deceased Venkatasami Naicker was, from before the death of his father, suffering from a severe and incurable form of leprosy so as to disqualify him from inheritance or from getting a share in the family properties?"

The learned Vakil for the appellant contended that even apart from the question of leprosy, if it was found on evidence that Venkatasami was suffering from incurable disease, under the text of *Mitakshara* he was disqualified from inheriting and holding property. But the wording of the issue precludes the consideration of any question other than that of leprosy and we hold that the only question to be gone into under this issue is, whether Venkatasami was suffering from an incurable form of leprosy.

Issues Nos. 4 to 8 deal with the factum and validity of the first defendant's adoption. We may deal with these issues before dealing with the first issue in the case. We feel no hesitation in accepting the evidence of the 12th witness for the defendants that Venkatasami was perfectly conscious and in a disposing state of mind when he executed Exhibit I on the 20th December 1907. That was a document in which Venkatasami states that "as he had

(1) 1 B. 554.
(2) (1857) S. D. A. 210.
(3) 19 Ind. Cas. 690; 25 M. L. J. 251; 13 M. L. T 460; (1913) M. W. N. 642.
(4) 22 C. 843 (P. C.); 22 I. A. 94.
(5) 28 C. 168.

no male issue he had taken in adoption Ramasami, son of my daughter." Mr. Ramachandra Iyer argued that the 12th witness, who was the Sub-Registrar of Tiruvadamarudur on the date of Exhibit I, is not to be believed, because he had taken the impression of the left thumb of the executant instead of the right thumb, thereby indicating that he was anxious to conceal the fact that the deceased was suffering from leprosy. The questions as to whether the thumb impression should be taken at all from a man who was suffering from leprosy and whether if it is taken it should be from the right thumb and not from the left, may be relevant in considering the first issue. But they have no bearing upon the question of adoption. We have no reason to doubt that the Sub-Registrar, the defendants' 12th witness, did go to the house of Venkatasami on the 21st December and did register the document Exhibit I. We accept his evidence that Venkatasami was perfectly conscious and knew what he was doing when he signed Exhibit I in the presence of the Sub-Registrar. We also accept the positive evidence of the defendants' witnesses on the question of adoption in preference to the somewhat vague and inconclusive evidence of the witnesses for the plaintiff. The conclusion we have come to is that the adoption of the first defendant did take place as alleged in his written statement on the 20th December 1907.

The principal question now remains to be considered. It may be discussed under two heads, *first*, whether Venkatasami did suffer from leprosy; and *secondly*, whether it was virulent and incurable. On the first point we have come to the conclusion that the deceased was suffering from leprosy. In the year 1897 the then Union Chairman of Tiruvadamarudur, who was himself a medical man, wrote to the President of the Kumbakonam Taluq Board (*Vide* Exhibit A) that Venkatasami, who was a member of the Union Panchayet, "was suffering from a contagious disease—leprosy" and that he should be removed. We see no reason to think that Exhibit A does not correctly state the impression formed by this official on that date. Having regard to the position and influence of the deceased, it is unlikely that unless there was a general repute in the locality that he was suffering from leprosy, the Union Chairman would have written to the President of the Taluq Board in the terms in which he wrote Exhibit A. The next piece of evidence relates to what took place in the year 1905. In that year, when Venkatasami and his brother appeared before the then Sub-Registrar of Tiruvadamarudur to register Exhibit B, his thumb impression was not taken and the Sub-Registrar (plaintiff's 5th witness) says that "as at that time he suffered from leprosy, under the rules in force in his Department he did not take Venkatasami's thumb impression." It is true that this witness is not a medical man, but we see no reason to doubt that he considered that Venkatasami was suffering from leprosy in 1905. In 1907 plaintiff's 2nd witness, a private medical practitioner of Kumbakonam, diagnosed the disease to be leprosy. Just about that time defendants' 18th witness also saw the deceased and the symptoms which he describes show that Venkatasami was suffering from leprosy. It may be said of the other witnesses, who are either relations of the deceased or persons having dealings with him, that they are either interested in the parties or that their opinion of the nature of the disease should not be accepted. We, therefore, do not attach much importance to this class of evidence. On the whole, our conclusion is that the disease from which Venkatasami was suffering was leprosy and not syphilis as is alleged by the 1st defendant.

The next question is whether the disease was of such a virulent and incurable character as to disinherit Venkatasami and those claiming under him. The onus is heavily upon the plaintiff to prove this part of the case. He has examined a large number of witnesses to prove that the disease was incurable at the time of the adoption of the 1st defendant by Venkatasami and at his death. The plaintiff's 17th and 18th witnesses are undoubtedly men of much experience in their profession. They had to diagnose the disease from the photograph of the deceased man taken in the middle of 1907. They

depose to having observed in the photograph the presence of nodules, the thickening of the skin and the disfiguration of the toe in the right leg. Certain hypothetical questions were put to them and their opinion has been given to the effect that, if in addition to the general appearance presented by the photo, the described symptoms were also observable, the disease from which Venkatasami suffered was leprosy of an incurable kind. On the other hand defendants' 19th witness, the District Medical Officer of the Tanjore District, who also examined the photo and to whom also the various symptoms mentioned to plaintiff's witnesses Nos. 17 and 18 were repeated, was of opinion that the deceased was not suffering from an incurable form of leprosy. In this state of evidence we are unable to say that it has been proved beyond doubt that Venkatasami did suffer from incurable leprosy. Sir Patrick Mason in his book on "Tropical Diseases" mentions a few striking symptoms as indicative of the disease being incurable. One of these is that the expression of the face should be leonine. Neither P. W. No. 17 nor P. W. No. 18 can say that this was the facial expression of the deceased. Another test, according to the learned writer, is that there must be anæsthesia of the skin. The only evidence upon this subject is that of the plaintiff's 2nd witness, who says that when he made a hypodermic injection on the deltoid muscle, the patient did not feel it. It was evident from the deposition of this witness that he was not called to treat Venkatasami for leprosy. He was simply administering medicine for fever, and no reason is assigned why he thought it necessary to make this experiment upon Venkatasami by making an injection on the deltoid muscle. We are not prepared to say that anæsthesia of the skin has been proved. Another decisive symptom, according to the authority already referred to, is that the disease must be sanious, in other words, there must be offensive discharges from the ulcers. Here again, plaintiff's 2nd witness says: "there were fœtid discharges from the ulcers when I dressed them. I do not remember the colour of the discharges." Defendants' 18th witness, who says that he examined the deceased at or about the same time, does not refer to any discharges from ulcers. We have to depend entirely upon the memory of plaintiff's 2nd witness to decide whether the ulcers were sanious. This witness admits that he keeps no memoranda regarding the cases he attends. We are not satisfied from the evidence on record that there were discharges of an offensive kind from the ulcers. The evidence of plaintiff's 4th witness cannot be relied upon, having regard to his status in life and to his having been once convicted of theft. It is easy to procure the evidence of such men when the feeling between the parties runs high. The other evidence relating to the nature of the disease is that of laymen and it is not safe to attach any importance to their depositions. Nor do we base our judgment upon the evidence given by the witnesses examined by the defendants. On the whole, we have come to the conclusion that it has not been proved beyond doubt that the deceased was suffering from incurable leprosy.

It is not necessary, in the face of the finding at which we have arrived, to refer at any length to the authorities quoted by the learned Vakil for the appellant. In the case of *Ananta* v. *Ramabai* (1) the learned Judges directed an issue "whether the leprosy of Ananta was of the sanious or ulcerous type generally regarded as incurable" to be tried. From this Mr. Ramachandra Iyer argues that if the disease is of an ulcerous kind, it must be regarded as incurable. There is no reference to medical evidence in this case and from the report we are unable to say whether the learned Judges were satisfied that in all cases where there have been ulcers, the leprosy will be regarded as incurable as *disqualifying the person from inheriting property*. The decision in *Sivachidambara Pillai* v. *Parasakty* (2) simply proceeds upon the opinion of the Pandit that "the moment *A* became a leper, he forfeited his right of inheritance, and his adopted son *C* cannot, therefore claim *A*'s share." No assistance can be derived from this and the cases reported as *Muthuvelayuda Pillay* v. *Parasakti* (6) and *Janardhan Pandurang* v. *Gopal Pandurung* (7) regarding the nature of the disease which would disqualify a leper from

(6) Mad. Sud. Decns. for 1860, p. 239.
(7) 5 B. H. C. R. (A. C. J.) 145.

inheriting. In the case reported as *Kayarohana Pathan* v. *Subbaraya Theran* (3) Benson and Sundara Iyer, JJ., examined the authorities at some length and came to this conclusion: "Both the texts of the Hindu Law and the decided cases fully establish that it is only the agonising, sanious or ulcerous type of leprosy that can be regarded as a ground of exclusion....It is not safe to adopt the test whether the disease is curable or not. That is very much a matter of opinion on which the medical profession itself might be divided.. .Deformity and unfitness for social intercourse, arising from the virulent and disgusting nature of the disease, would appear to be what was to be accepted in both the texts and the decisions as the most satisfactory tests." We think that this statement correctly interprets the texts of Hindu Law and the various cases decided on them. The difference of opinion among medical men manifested in this case inclines us to hold that it is unsafe to act upon such evidence. In the present case it is not proved to our satisfaction that Venkatasami was unfit for social intercourse, that he was either deformed in appearance or was disgusting and as observed by us already, the evidence does not establish that the disease was incurable.

We have also examined books on Medical Science written by ancient Hindu writers. Extracts from these are appended to this judgment. They show that in order that leprosy may be considered incurable there must be worms on the body, the ulcers must discharge offensive matters, the nails should drop off and the eyes should be blood-red. The evidence in this case does not establish the existence of any of these symptoms in Venkatasami. We are, therefore, strengthened in our conclusion that the disease from which he was suffering was not incurable leprosy.

We must, therefore, hold that the plaintiff has failed to establish that the disease of Venkatasami disqualified him from inheriting.

We must, therefore, dismiss the appeal with costs.

Appeal dismissed.

APPENDIX.

Translation.

I.

Ashtangahridaya.—Book entitled Nidana, Chapter XIV, 296th part.

The nature of incurable leprosy.

"Now as to leprosy engendered by the disorderly state of the humours (Humours are three in number, *Vata*, *Pitta* and *Sleshma* or *Kapha*) where the leprosy is caused by the simultaneous disorder of all the three humours of the body, it should be given up (as incurable). Further, what is referred to (later) as *rishta* and what has taken root in the bone, the marrow of the bone and flesh, or semen should also be given up."

Commentary.

The leprosy caused by the combined disorder of the three humours of the body should be given up, that is, incurable. As regards *rishta*, the reference is to the passage "*Kushtam Visirvamanangam*, etc.," occurring in the portion containing the description of the outward symptoms of leprosy, and the cure of such need not be attempted either. Besides these two, the leprosy that takes root in the bone, the marrow, or the semen is also incurable.

The nature of the curable forms of leprosy.

"Where the leprosy is the result of the disorderly state of the two humours *kapha* and *vata*, where it is confined to the skin, and where it results from the disorderly state of one of the humours, it is not incurable."

Commentary.

Where leprosy results from the disorderly state of *kapha* and *vata*, it can be cured; so also that which does not extend beyond the skin, and similarly that which results from the disorder of one only of the humours.

The nature of the leprosy confined to the skin.

"Of the three kinds of leprosy mentioned above as being curable, that which is confined to the skin is characterised by a stinging pain, a (visible) change of colour, and an itching sensation".

"Of the different kinds of leprosy referred to as incurable, that which has taken root in the bone or the marrow of the bone and the flesh is indicated by the crippled nose, red eyes and a low voice."

Commentary.

Low voice means feeble voice.

"Again that, which takes root in the semen is indicated by ulcers full of worms; the wife and children of such a leper would also be affected by this disease."

Commentary.

Wounds would contain worms in this kind of leprosy which adversely affects the wife and children of the leper by causing suffering, for instance, by too much perspiration.

The nature of the rishta *form of leprosy.*

"The form of leprosy indicated by decayed limbs, red eyes, and a feeble voice, whose victim suffers from dyspepsia and dysentery, feels abnormally thirsty and carries (innumerable) germs about him, ends invariably in the death of the leper."

II.

Charakasamhita.—Book entitled Nidana, Chapter V, page 200.

"The form of incurable leprosy known as *kakanaka* is indicated in its first stage by the dual colour of red and black (by which the grain *kakanantika*, called in Tamil Kundumani, is distinguished) afterwards displaying all the symptoms of leprosy,—all these symptoms together being likely to manifest themselves in sinners,—and eventually assuming several colours."

Commentary.

The form of leprosy known as *kakanaka* displays all the symptoms of leprosy and is incurable. The skin and the rest (*viz.*, flesh, blood and lymph) the blood vessels and nerves, the muscles and tendons, and the bones, though sound in themselves, are eaten away by worms. At this stage, the leper is subject to great annoyance, thus, he suffers from the discharge of offensive matter, the splitting up of the body, the decaying and the consequent dropping off of limbs, abnormal thirst, fever, excessive purging, a burning sensation throughout the body, general debility, loss of appetite and lack of digestive power; such is the nature of incurable leprosy."

III.

Madhava.—Nidana, page 227.

The curable form of leprosy.

"That form of leprosy which attaches itself to the skin, or which has struck into the blood or flesh, or which is caused by the disorderly state of the two humours, *Vata* and *Sleshma*, is curable."

The incurable form of leprosy.

"Where leprosy is attended with the corpulence of the leper and where it results from the disorderly state of two of the humours, its cure is next to impossible; where it has taken root in the marrow of the bone or the bone, the case is hopeless; and where it results from the disorderly state of all the three humours of the body and is indicated by worms (in the sores), abnormal thirst, a burning sensation throughout the body and loss of appetite, and further also by the split skin, discharge of offensive matter, red eyes and a feeble voice and is past the five kinds of remedy, it invariably kills the sufferer."

Commentary.

When it is said that the leprosy is past the five kinds of remedy, what is meant is that it is useless to attempt the five kinds of remedy, namely, vomitting, purging, sneezing, injecting medicinal oil through the arms, and injecting other medicines through the same medium.

The term "leprosy" is applied only to an incurable form of it.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1659 OF 1913.

October 2, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

GUDUR RANGA REDDI, DIED, AND OTHERS —DEFENDANTS NOS. 2 TO 8—APPELLANTS

versus

GUNDALA PITCHI REDDI AND ANOTHER—PLAINTIFF AND DEFENDANT No. 1—RESPONDENTS.

Specific Relief Act (I of 1877), s. 27—Specific performance, suit for—Contract of sale to plaintiff—Subsequent sale to defendant—Notice of prior contract after execution of sale-deed and before registration—

GUDUR RANGA REDDI v. GUNDALA PITCHI REDDI.

Consideration for sale, adjustment prior of mortgage-debt 'Paid his money in good faith', meaning of—Decree, proper, form of—Civil Procedure Code (Act V of 1908), O. XLI, r. 33.

The words 'paid his money in good faith' in section 27 of the Specific Relief Act I of 1877 do not cover the case of a person who, after the execution of his conveyance and before its registration, has notice of a prior contract to sell the property to a third person and who does not pay any cash for his sale but takes it in adjustment of a prior outstanding mortgage in his favour.

Himatlal Motilal v. *Vasudeo Ganesh*, 16 Ind. Cas. 680; 36 B. 446; 14 Bom. L. R. 634, followed.

The correct decree to be passed in such a case is to direct both the vendor and the subsequent purchaser to execute a proper sale-deed to the plaintiff.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Nellore, in Appeal Suit No. 1 of 1913, preferred against that of the Additional District Munsif of Nellore, in Original Suit No. 191 of 1912 (Original Suit No. 840 of 1911 on the file of the Court of the Principal District Munsif of Nellore).

FACTS.—The suit was for specific performance of an agreement to sell the suit lands entered into by the 1st defendant. Subsequent to the agreement in favour of the plaintiff, the 2nd defendant obtained a sale-deed in respect of the suit properties from the 1st defendant, the consideration for his sale being the amount due on a mortgage previously executed by the 1st defendant in his favour. His contention was that he was a *bona fide* purchaser for value of the suit properties without notice of the agreement in plaintiff's favour. The Court below found that he had notice of the agreement after the execution, of his sale-deed but before its registration and that there was no endorsement of discharge on the mortgage-bond and no irrevocable adjustment of the price before such notice. It, therefore, overruled his plea, relying on *Himatlal Motilal* v. *Vasudeo Ganesh* (1), and decreed the suit as against him. Against this decree, the 2nd defendant preferred the above second appeal.

Messrs. *K. Srinivasa Iyengar* and *A. Krishnaswami Iyer*, for the Appellants:—The sale to 1st appellant is in discharge of a prior mortgage-debt. The Court below has found that the 1st appellant had notice of the plaintiff's agreement after the execution of his sale-deed, but before its registration. Notice to be effectual must be before the transfer. Absence of endorsement of discharge on the mortgage-bond before the said notice is immaterial. The sale-deed states that Rs. 3,000 of the purchase-money had been received by way of discharging the debt due under the mortgage. Endorsement is only evidence of discharge and not necessary to constitute it. Registration has nothing to do with the matter. First appellant also obtained possession under the sale-deed. The appropriation in the sale-deed must be deemed to be an adjustment on the date of sale and to have the effect of placing the applicant in the position of a person who has paid cash that day. Under section 40 of the Transfer of Property Act there need be no cash payment. Under section 91 of the Trusts Act notice must be at the time of the acquisition of the property. Section 27 of the Specific Relief Act applies only to one class of cases. *Himatlal Motilal* v. *Vasudeo Ganesh* (1) is distinguishable. In that case the sale was for cash and not by adjustment as in the present case. Further, that case proceeds on the English Law which is quite different from the Indian Law. The learned Judges held that if the document had been registered, then the subsequent purchaser would be safe even though there was no payment (see page 450). In India property passes by the mere execution and registration of the sale-deed. Payment of purchase-money is not essential. Not so under the English Law.

Mr. *T. V. Muthukrishna Iye*, for the Respondents, was not called upon.

JUDGMENT.—In this case it is found that the 2nd defendant (appellant) received notice of the plaintiff's contract, Exhibit A, after execution of his own sale-deed (Exhibit II), but before its registration. No cash was to be paid under Exhibit II, but the sale-amount was to be adjusted towards a mortgage (Exhibit V) held by the appellant. We are of opinion that the recital in Exhibit II does not operate as an adjustment so as to put the appellant in the same position as a man who had "paid his money in good faith" within the meaning of section 27 of the Specific Relief Act. In these circumstances we should hold, following *Himatlal Motilal* v. *Vasudeo Ganesh* (1), that the plaintiff was entitled to claim specific performance as against the 2nd defendant.

The decision of the lower Appellate Court is right and the appeal is dismiss-

(1) 16 Ind. Cas. 680; 36 B. 446; 14 Bom. L. R. 634.

ed with costs; but the decree should be amended by directing that the legal representatives of the 2nd defendant as well as the 1st defendant should execute a proper sale-deed to the plaintiff. This is ordered under Order XLI, rule 33, of the Code of Civil Procedure.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 765 OF 1913.

June 24, 1914.

Present:—Mr. Justice Sundar Lal.

NANDAN SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

DEBI DIN—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 177, Sch. Group B—Landlord and tenant—Suit for ejectment—Valuation for jurisdiction and Court-fees Appeal—Court-Fees Act (VII of 1870), s. 7, cl. XI (cc)—Suits Valuation Act (VII of 1887), s. 8.

Under clause XI (*cc*) of section 7, Court Fees Act, as amended by Act VI of 1905, suits between landlords and tenants have to be valued for the purpose of payment of Court-fees upon the rent payable for the year next before the date of presenting the plaint; and the valuation for jurisdiction must be taken to be the same as the valuation for Court-fees.

Therefore, no appeal lies to the Judge from an order of an Assistant Collector in a suit for ejectment valued at less than Rs. 100.

Ram Raj Tewari v. *Girnandan Bhagat*, 15 A. 63; A. W. N. (1892) 240; *Radha Prasad Singh* v. *Pathan Ojha*, 15 A. 363; A. W. N. (1893) 148; *Daryao Singh* v. *Bharat Singh*, 3 Ind. Cas. 562; 6 M. L. T. 311; 32 A. 19; 6 A. L. J. 905 (F. B.), referred to.

Second appeal from a decree of the District Judge of Cawnpore.

Mr. *D. R. Sawhny*, for the Appellants.

Messrs. *M. L. Agarwala* and *Satya Chandra Mukerji*, for the Respondent.

JUDGMENT.—This is a suit for the ejectment of tenants under section 57, clause (*b*), of the Tenancy Act of 1901. The plaintiff is the *zemindar* of the village and the defendants are ex-proprietary tenants, whose holding consists of seven plots of land for which a rent of Rs. 44 per annum is payable. The suit was filed in the Court of the Assistant Collector of the first class who decreed the plaintiff's claim. The defendants preferred an appeal against the decree of the Assistant Collector to the District Judge under section 177 of the Tenancy Act. Under that section an appeal lies from decrees of Assistant Collectors of the first class in suits included in group B of the Schedule attached to the Rent Act, when the amount or value of the subject-matter exceeds Rs. 100. This was a suit falling under group B and if the amount or value of the subject-matter exceeded Rs. 100, the defendants had an appeal under that section to the District Judge. When the appeal came up for hearing before the District Judge, the respondent urged that no appeal lay to him as the value of the subject-matter was below Rs. 100. That objection was overruled by the Court below. The learned Judge proceeded to hear the appeal on the merits and dismissed it. The defendants have appealed against the decree to this Court and on the appeal coming on for hearing, Mr. Agarwala on behalf of the plaintiff-respondent has urged that no appeal lay to the Court below and that the decree of the Court below dismissing an appeal ought to be affirmed on that ground. The question, therefore, is whether an appeal lay to the Court below.

The decision of the question turns upon the question, what is the value of the subject-matter of the suit? The rights of tenants who are ex-proprietary tenants of their holding, are incapable of having a market value as the right itself is untransferable in law. Section 8 of the Suits Valuation Act, however, prescribes how the value of certain suits for the purpose of jurisdiction is to be determined. Under section 8 of that Act it is enacted that in suits other than those referred to in the Court Fees Act of 1870, section 7, paragraphs 5, 6, 9, and 10, clause (*d*), where Court-fee is payable *ad valorem* under the said Act, the value as determined for the computation of Court-fee and the value for the purpose of jurisdiction shall be the same. In other words under this section, the express object of which was to determine the value for the purpose of jurisdiction in cases coming within a certain class, the valuation on which Court-fee is payable under the law shall be the valuation for the purpose of jurisdiction also. The question then is whether this case falls within the class of cases referred to in this section. Under the Court Fees Act as amended by Act VI of 1905 under clause XI (*cc*) of section 7, suits between landlords and tenants for the

recovery of immoveable property from the tenants have to be valued for the purpose of payment of Court-fees upon the rent payable for the year next before the date of presenting the plaint. This was a suit between landlord and tenant. It was a suit for the recovery of immoveable property from the tenant and for the purpose of payment of Court-fee the valuation of the suit was Rs. 44, which was the rent payable for the year next before the date of presenting the plaint. Court-fee was paid by the plaintiff upon that valuation and according to paragraph 4 of the plaint this was the value of the suit, and the defendants also have paid Court-fee on the same valuation both in this Court and in the Court below. Under section 8 of the Suits Valuation Act, therefore, the same must be taken to be the valuation for the purpose of jurisdiction and this suit, therefore, being valued at less than Rs. 100, no appeal lay to the Court below.

Mr. Sawhny, however, has relied upon certain cases to show that the valuation really exceeded Rs. 100 and that the case fell under sub-clause V of section 7 of the Court Fees Act. The first of these cases is the case of *Ram Raj Tewari* v. *Girnandan Bhagat* (1). That was a case before the amendment of the Court Fees Act by Act VI of 1905. Under the Court Fees Act as it then stood, there was no clause expressly dealing with cases of this class except perhaps paragraph 5 of sub-section 7. In the absence of any other clause the Court was of opinion that the case fell within the purview of sub-clause 5. It held that the Court-fee, therefore, was payable on the value of the tenant's right and the jurisdiction of the Court depended upon the valuation of the tenancy. If the Act had not been amended by giving suits of this class a special place in clause XI (*cc*) of section 7, that ruling would have been exactly in point and I would have followed the rule laid down in that case; but since the amendment, it must be held that case does not fall under sub-clause V, but under sub-clause XI of section 7 of the Act.

The next case is that of *Radha Prasad Singh* v. *Pathan Ojha* (2). That case has been relied upon by Mr. Agarwala. He has urged that the valuation put in the plaint, *viz.*, Rs. 44, was final and governed the question of valuation for the purposes of the appeal. The case is quite in point as far as it goes, but it is unnecessary to rely upon it as the valuation for the purpose of jurisdiction is now to be the same as that for the purpose of Court-fees.

The third case relied on is the ruling of the Full Bench in *Daryao Singh* v. *Bharat Singh* (3). The question in that case was about the Court-fee payable in a suit for pre-emption of the kind referred to in that case. The question now before the Court did not arise. It is true that the ruling in the case of *Ram Raj Tewari* v. *Girnandan Bhagat* (1) is referred to there. That ruling, as I have already pointed out, was perfectly correct under the law as it then stood, and under the law as it now stands after 1905, the case has no bearing. I regret I am constrained to come to the conclusion that no appeal lay to the Court below. The Act of 1905, which was intended to relieve the landlords of the necessity of paying Court-fees under clause 5 of section 7 and of thus relieving a tenant who may be ultimately liable of paying it as portion of the costs in the case if the suit be decreed, has now the result of taking away a valuable right of appeal which the law before the amendment was believed to give to the landlord and the tenant whenever the real valuation of those rights exceeded Rs. 100. In making the amendment, it may be that the provisions of section 8 of the Suits Valuation Act were not before the mind of the Legislature, but I have to apply the law as it is. I must take the valuation for jurisdiction to be the same as the valuation for Court-fees, and must hold that this suit being below Rs. 100 in valuation, no appeal lay to the Judge and that he ought to have dismissed the appeal on that ground. The Tenancy Act, I understand, is now before the Legislature for re-enactment and amendment. The matter is one for the Legislature to consider. I, however, have no option but to affirm the decree of the Court below, dismissing the appeal on the sole ground that no appeal lay to that Court. I make no order as to costs.

Appeal dismissed.

(1) 15 A. 63; A. W. N. (1892) 240.
(2) 15 A. 363; A. W. N. (1893) 148.
(3) 3 Ind. Cas. 562; 6 A. L. J. 905 (F. B.); 6 M. L. T. 311; 32 A. 19.

MUSO *v.* EMPEROR.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 11 OF 1914.

March 19, 1914.

Present:—Mr. Hayward, J. C., and Mr. Crouch, A. J. C.

MUSO AND OTHERS—APPLICANTS

versus

EMPEROR—PROSECUTOR.

Criminal Procedure Code (Act V of 1898), ss. 195, 200 556—Complaint by public officer—Sanction by superior, whether necessary—Failure to examine complainant, effect of—Conviction by officer concerned in his public capacity.

Where a Cantonment Magistrate convicted the accused for obstructing the bailiff of the Cantonment Small Cause Court in the execution of a warrant issued by the Magistrate in his capacity of the Small Cause Court Judge and no sanction for prosecution was obtained nor was the complainant examined:

Held, (1) that failure to examine the complainant was not a sufficient reason for setting aside the proceedings;

(2) that it was open to the bailiff, a public officer, to file a complaint without any sanction;

(3) that in issuing the warrant as a Small Cause Court Judge the Magistrate was concerned in the matter only in his public capacity and was, therefore, neither a party nor "personally interested" in the case within the meaning of section 556, Criminal Procedure Code.

Mr. *Partabrai D. Punwani*, for the Applicant.

Mr. *E. Raymond*, Public Prosecutor, for the Crown.

JUDGMENT.—The applicants seek revision of the decision of the Cantonment Magistrate, Karachi, convicting them of obstructing a bailiff of the Cantonment Small Cause Court, under section 186, Indian Penal Code.

The applicants have pointed out in the first instance that the complainant, bailiff, was not examined and that his report only was brought on the record by means of the *Nazir*. That, however, does not appear to us sufficient reason for setting aside the proceedings, because there were other witnesses who gave a full account of the matter and who were believed by the learned Cantonment Magistrate.

It has next been argued on behalf of the applicants that the proceedings were illegal in default of sanction under section 195 of the Criminal Procedure Code. That, however, does not appear to us to be the case. It was open to the bailiff, a public officer, to file a complaint without any sanction, though it would, no doubt, have been open to his superior, the Cantonment Small Cause Court Judge, to direct a complaint to be filed. But there is nothing on record to show that any such direction was passed by the Cantonment Small Cause Court Judge.

The applicants have lastly contended that the proceedings were irregular, inasmuch as the Cantonment Magistrate was personally interested in the matter within the meaning of section 556 of the Criminal Procedure Code. This has been alleged in the first place on the ground that the Cantonment Magistrate issued the warrant, in respect of which the obstruction occurred, in his capacity as Cantonment Small Cause Court Judge. That, however, would not, in our opinion, make him "personally interested." That phrase appears to us to be contrasted with the following phrase, "concerned therein in a public capacity," in the explanation to the section. The Cantonment Small Couse Court Judge in issuing the warrant appears to us to have been concerned in the matter in his public capacity within the meaning of the section. It has been alleged in the second place on the ground that the Cantonment Magistrate was a party to the criminal proceedings inasmuch as he directed the prosecution. No doubt if as Cantonment Small Cause Court Judge he had directed the prosecution, the case would have been similar to that mentioned in the illustration to the section. But as already remarked, there is nothing on the record to show that any such direction was given. If it had been, the fact could have been elicited in cross-examination of the *Nazir*. It cannot be assumed in default of anything on the record that such direction was nevertheless given by the Cantonment Magistrate in his capacity of Cantonment Small Cause Court Judge.

We, therefore, find that no irregularity has been disclosed which would justify our interference with the conviction. With regard to the sentence it is not clear why applicants Nos. 1 to 4 should have received double the amount of punishment awarded to the person chiefly concerned, applicant No. 5. But there would appear no good reason for

interfering with the nature of the punishment, rigorous imprisonment. People must learn not to obstruct bailiffs. We, accordingly, decline to interfere with the conviction, but alter the sentence passed on the applicants Nos. 1 to 4 to one of one month's rigorous imprisonment, *i.e.*, similar to the sentence passed on applicant No. 5.

Conviction confirmed; Sentences reduced.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 913 OF 1914.

June 6, 1914.

Present:—Mr. Justice Shadi Lal.

MANGU AND OTHERS—CONVICTS—PETITIONERS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 182—False information to Police Officer—Statements made by persons to corroborate informant during investigation—Criminal Procedure Code (Act V of 1898), ss. 161, 162.

A statement made under section 161, Criminal Procedure Code, 1898, in answer to questions put by the Police Officer investigating the case does not amount to giving information within the meaning of section 182, Indian Penal Code.

The expression "give information" in the latter section means to volunteer information and is not intended to apply to a statement made in answer to questions put by a public servant.

Chinna Ramana Gowd v. *Emperor*, 31 M. 506; 18 M. L. J. 573; 9 Cr. L. J. 77; and *Emperor* v. *Nga Aung Po*, U. B. R. (1905), Penal Code, 13; 2 Cr. L. J. 474, referred to.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the District Magistrate, Sialkot, dated the 14th April 1914, affirming that of the Magistrate, 2nd Class, Sialkot, dated the 24th February 1914, convicting the petitioners.

FACTS.—The facts of the case appear clearly from the following extracts from the judgment of the District Magistrate:—

"Mr. Lincoln has written a clear and well-reasoned decision in this case. Briefly stated accused Mangu gave information at the Police Station that his house had been broken into and certain property stolen also and that he suspected four persons on the ground of enmity. It has to be noted that Mangu is a young man of 15 and that accused Nihali is his mother and accused Mangal his step-father whose marriage with Nihali, a widow, had given rise to much dissension in the village. All seven persons referred to are Brahmins. In consequence of the report the Thanedar visited the spot and Mangal and Nihali corroborated the story, the latter giving a detail of articles stolen."

"With regard to Nihali and Mangal the case is that when the Thanedar came to the village, they corroborated Mangu's story and added details. It is proved that this corroboration was false and in the case of Mangu was known by the two informants to be false. The argument that as only Mangu went to the *Thana* Nihali and Mangal did not give information to the Police for the purposes of section 182, Indian Penal Code, is defeated by the answer that if they had told the truth the Thanedar would have taken no further action. Thus it was in consequence of the information given by them that he continued the inquiry. Clearly the statements made by Nihali and Mangal contained information given to a public servant. They knew that information to be false and intended to cause their enemies annoyance. A clear case under section 182, Indian Penal Code, is thus made out against both."

Mr. *Nand Lal*, for the Petitioners.

JUDGMENT.—After hearing Counsel for the petitioners, I have no doubt that Mangu is guilty of the offence under section 182, Indian Penal Code, and the only question in his case is that of punishment. Now the maximum punishment provided by law is imprisonment of either description for a period of six months and Mangu has already suffered imprisonment for nearly $2\frac{1}{2}$ months. In view of the fact that he is a young boy of 15 years of age and that this is his first offence, I think the period already undergone is sufficient.

The case against *Musammat* Nihali and Mangal, however, stands on a different footing. It is alleged that when the Thanedar came to the village, they made statements corroborating Mangu's story and gave details. These statements were evidently made under section 161, Criminal Procedure Code, in answer to questions put to the accused by the investigating officer, and the question for determination is whether the making of a statement under section 161, Criminal Procedure Code, in answer to

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questions put to the accused by the investigating officer, amounts to giving information within the meaning of section 182, Indian Penal Code. Now it is clear that a person making a false statement to the Police is not liable to be prosecuted for perjury and section 162, Criminal Procedure Code, lays down in clear terms that the statement, if taken down in writing, shall not be used as evidence. It, therefore, seems to me to be an evasion of law if that statement could be made the basis of a charge under section 182, Indian Penal Code. The expression "give information" in the latter section means to volunteer information and was not, in my opinion, intended to apply to a statement made in answer to questions put by a public servant. The judgment of the Judicial Commissioner, Upper Burma, reported as *Emperor* v. *Nga Aung Po*(1) takes the same view, and I think the reasoning receives support from the ruling of the Madras High Court in *Chinna Ramana Gowd* v. *Emperor* (2), which is to the effect that a statement made under section 162 Criminal Procedure Code, in answer to questions put by a Police Officer making an investigation under section 161, Criminal Procedure Code, does not amount to a false charge within section 211, Indian Penal Code.

I am, therefore, of opinion that *Musammat* Nihali and Mangal are not guilty of the offence under section 182, Indian Penal Code, and I accept their revision and acquit them. The conviction of Mangu is maintained, but the sentence passed upon him is reduced to the period already undergone. His revision is accepted to this extent only. All the petitioners are discharged from their obligation under the bail-bond.

Petition allowed.

(1) U. B. R. (1905) Penal Code, 13; 2 Cr. L. J. 474.
(2) 31 M. 506; 18 M. L. J. 573; 9 Cr. L. J. 77.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 167 OF 1914.
REFERRED CASE No. 20 OF 1914.
August 10, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

In re MAMU BEARI—ACCUSED.

Workmen's Breach of Contract Act (XIII of 1859), s. 1, scope of—'Artificer, workman or labourer'—'Work'—Contract to convey clay in complainant's boat by means of accused's own labour and that of another hired and paid for by him—Daily wages—Jurisdiction—Criminal Revision.

Where, for a daily wage of twelve annas, *M* agreed to convey clay from a certain riverside to the factory of the complainant in the latter's boat by means of his own labour and that of another person to be employed and paid for by him and received a sum of money as advance therefor, but afterwards neglected to do the work:

Held, that he came within the purview of the terms 'workman, artificer, or labourer' in section 1 of Act XIII of 1859 and that the mere fact that the work was to be done with the assistance of another person to be employed and paid for by him, did not take away the jurisdiction of the Court to proceed under the Act.

Gilby v. *Sabbu Pillai*, 7 M. 100; 1 Weir 690, referred to.

Caluram v. *Chengappa*, 13 M. 351; 1 Weir 691, distinguished.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate of South Canara in his letter, Dis. No. $\frac{222}{M.\ 14}$D, dated 24th February 1914.

FACTS.—One Mamu Beari agreed with the complainant, undertaking to convey clay in the latter's boat from a certain riverside lying within the ambit of six villages and deliver nine boxfuls every day at the tile factory of the complainant. It was also agreed that Mamu Beari was to be paid a wage of 12 annas a day for the above work, which he was to do with the assistance of a third person to be employed and paid for by him. In pursuance of the above contract, Mamu Beari received a sum of Rs. 47-4-0 from the complainant. Mamu Beari having neglected the work, the complainant filed a criminal complaint under the Workmen's Breach of Contract Act, XIII of 1859, against Mamu Beari before the Stationary Sub-Magistrate, who ordered the accused to work in accordance with the contract between him and the complainant. The District Magistrate of South Canara, feeling a doubt as to the propriety of the order, referred the matter to

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the High Court under section 438, Criminal Procedure Code.

The *Public Prosecutor*, for the Government in supporting the order, referred to *Gilby* v. *Sabbu Pillai* (1) and distinguished the case in *Caluram* v. *Chengappa* (2) as containing no covenant to render personal labour.

ORDER.

AYLING, J.—The question whether an advance was received in cash as recited in the *karar* is purely one of appreciation of evidence and is not a point on which this Court is accustomed to interfere in revision.

The District Magistrate solicits a ruling as to whether a contract to convey clay can be regarded as falling within the scope of Act XIII of 1859. It is difficult to see why the conveyance of clay should not be "work" within the meaning of that Act—provided that the personal labour of the person who undertakes the conveyance is to be utilized: *Vide* the judgment of Turner, C.J., in *Gilby* v. *Sabbu Pillai* (1) which clearly lays down the distinction to be drawn between a workman or labourer under the Act and a mere non-working contractor.

In the present case the defendant undertook to convey clay for the complainant in his (complainant's) boat by means of his own (defendant's) labour and that of another man who was to be provided free of charge by him (defendant). He was to convey nine boxfuls a day and to receive wages at the rate of 12 annas a day. I consider that this agreement comes within the scope of the Act. The mere fact that another man was also to work does not exclude it. *Vide* the wording of section 1 of the Act and the ruling above quoted.

The case reported in *Caluram* v. *Chengappa* (2) to which the District Magistrate refers is easily distinguishable. There the contract was to convey salt by boat, but the defendant did not bind himself to render personal labour but to convey the salt in his (defendant's) own boat. As the learned Judges say: "It was an agreement for the carriage of salt, but we do not think complainant can be termed an employer of labour, or defendant a labourer."

(1) 7 M. 100; 1 Weir 690.
(2) 13 M. 351; 1 Weir 691.

There is, in my opinion, no ground for interference.

TYABJI, J.—The District Magistrate of South Canara, under section 438 of the Criminal Procedure Code, has reported for our orders certain proceedings in which the accused was ordered under the Workmen's Breach of Contract Act, XIII of 1859, to work in accordance with the contract between him and the complainant (Exhibit A). The District Magistrate is not satisfied as to the correctness of the order. Four requirements are necessary for making the Act applicable, *viz.*, (1) that a contract has been entered into between (*a*) a master or employer (the preamble mentions "manufacturers, tradesmen, and others," but section 1 refers to "a master or employer," who in the subsequent sections is referred to as "the complainant") and (*b*) an artificer, workman, or labourer; (2) that the artificer, workman, or labourer has received from the master or employer or some one acting on his behalf an advance of money for the work; (3) that the advance is on account of any work which the artificer, workman, or labourer has (*a*) contracted to perform, or (*b*) to get performed by any other artificers, workmen, or labourers, and (4) that the artificer, workman, or labourer has wilfully and without lawful or reasonable excuse neglected or refused to perform the work, or get it performed according to the terms of the contract. (In the preamble this is referred to as fraudulent breach of contract for which the remedy by suit in Civil Courts for the recovery of damages is wholly insufficient and which, it is just and proper, should be subject to punishment).

The District Magistrate refers, in the *first* place, to the evidence on which it has been held that the accused was paid the sum of Rs. 47-4-0 by the complainant under the contract. The District Magistrate expresses the opinion that the "defence story that no money was received by accused is credible." If so, then the second requirement mentioned above would not be satisfied. There was, however, evidence on which the Magistrate who tried the case and heard and saw the witnessess, was justified in holding that the accused received the advance, and I agree with my learned brother that this is not a case in which we can interfere in revision with this finding of fact.

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Secondly, the District Magistrate "solicits a ruling on the point whether a contract to convey clay can be regarded as falling within the scope of the Act."

It seems to me that this question is too general to permit of its being answered satisfactorily as it stands. Some contracts to convey clay would fall within the scope of the Act, others would not; whether any particular contract would or would not fall within the scope of the Act must depend upon whether the contract fulfils the requirements of the Act as above stated.

There are two rulings of this Court to which I must refer in this connection. In *Gilby* v. *Sabbu Pallai* (1) the accused was described as a contractor by the complainant himself. The contract was for "earthwork—the cutting of a race-course; there was a plan and estimate." The accused was not to labour on the race-course. It was held that "he was not a workman within the meaning of the Act with reference to the contract for earthwork." In *Caluram* v. *Chengappa* (2) the contract was for conveyance of salt; the accused was not to render personal labour. It was held that on the one hand the complainant was not a master or employer, and on the other hand the accused was not a labourer.

These two cases illustrate the difficulty that may arise in giving full effect to both the requirements of the Act, which are numbered (1) and (3) by me. For, though the contracting party must be an artificer, workman, or labourer under (1) his contract may be to get the work performed by other artificers, workmen and labourers under (3). The decisions establish that (by reason of the first requirement) it is necessary that the work which the accused has agreed actually to do for his employer should be work of such a nature that one doing it may be described as an artificer, workman, or labourer, notwithstanding that under sections 1 and 2 that work may consist of getting something performed by other artificers, workmen, or labourers. When the work agreed to be done consists of providing labour and supervising the cutting of a race-course or the conveyance of salt in boats without labouring in the race-course or on the boats, then such work has been held not to be that of an artificer, workman, or labourer.

Coming now to the contract with which we have to deal, the accused undertook to convey the clay, which is referred to in the contract, by the complainant's boat, with the assistance of another person, "at my (*i.e.*, the accused's) own expense." Nine boxfuls were to be daily conveyed in this manner and delivered at a tile factory. Twelve annas per day were to be the "wages" of the accused.

With reference to this contract, it is not denied that the complainant is a "master or employer" [see the requirements of the Act numbered (1) above]. The question that is raised, however, is whether the accused is "an artificer, workman, or labourer," and whether the work agreed to be performed by him was such as would be performed by "an artificer, workman, or labourer." [See the clauses numbered (1) and (2) above.]

I agree with my learned brother's interpretation of the contract, that under it the accused was to convey the clay by his own labour assisted by the labour of another person. The work agreed to be done involved the carrying of the clay from the riverside in the six villages referred to in the contract and taking the boat down to the factory. A person doing this kind of work under the circumstances referred to in the contract may, it seems to me, be described not inaptly as a labourer. Then does the fact that he is to get the assistance of another person to do this work, and to pay for that other work, remove the accused from the category of a labourer? That question must be answered with reference to the particular work agreed to be done in the particular contract. A contractor supplying labour and materials and supervising the labourers, but not himself labouring, is not himself a labourer, as held in the cases above cited; but when a person is both a supplier of labour and a labourer himself, it must depend upon the terms of the contract whether the character of work as a whole is or is not that of work done by a workman or labourer.

In the case before us it seems to me that the trying Magistrate was justified in holding that the accused was a workman or labourer within the meaning of the Act, with reference to the contract in question. I would answer the reference accordingly.

Reference disposed of.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 392 OF 1914.

May 8, 1914.

Present:—Mr. Justice Johnstone.

ALLU—CONVICT—PETITIONER

versus

EMPEROR THROUGH CHET SINGH—COMPLAINANT—RESPONDENT.

Penal Code (Act XLV of 1860), s. 411—Receiving and disposing of stolen property—Guilty knowledge necessary—Concurrent findings—Revision—Criminal Procedure Code (Act V of 1898), s. 439.

The mere fact that a person was in possession of a stolen animal and he sold it to another, is not in itself sufficient for his conviction under section 411 of the Penal Code. His denial of having any connection with the animal does not prove his guilty knowledge specially when there is some enmity between the alleged vendor and the vendee.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Sessions Judge of the Lahore Division, dated the 5th January 1914, affirming that of the Additional District Magistrate, Lahore, dated the 29th of November 1913, convicting the petitioner.

FACTS.—The facts of the case appear fully from the following judgment of the Sessions Judge:—

"Appellant has been convicted under section 411, Indian Penal Code, and has been sentenced to undergo two years' rigorous imprisonment. I see no force in the grounds of this appeal.

According to the prosecution, complainant Chet Singh's horse was stolen and no report was made at the *Thana*, but not long afterwards, it was identified at a cattle fair by P. W. Hardit Singh, who immediately had the horse seized and sent word to Chet Singh. The horse was traced back through the hands of several persons who have been produced as witnesses, until it was found to have been got by P. W. Sheru from the present appellant Allu in exchange for a mare and Rs. 24 cash. P. W. Ishar Singh and Phula Singh have been produced as witnesses to this exchange. We have also evidence that appellant at once disposed of the mare, which he got in exchange from Sheru. There is ample evidence identifying the recovered animal, which was found in the actual possession of P. W. Jhandu, as one lost by complainant; and I see no reason to doubt the prosecution evidence. P. W. Sheru was not cross-examined as to any enmity either before or after the charge.

"Appellant could only assert that Sheru was at enmity with him, because the former's sister had been abducted by "a Sikh." His defence witnesses have tried to support this story and have asserted that Sheru's sister was abducted by one Kundan Singh, who afterwards became a Musalman. They also allege that P. W. Ishar Singh was on bad terms with the appellant about cattle-trespass. On this point nothing was said by the appellant himself in his statement.

"I agree with the Magistrate that the guilt of the appellant has been sufficiently proved; and on the evidence, I do not see that there should be a conviction under section 403, Indian Penal Code.

"From the evidence it appears that the appellant was a bad character and I see no reason for reducing the sentence. I affirm the conviction and sentence and reject the appeal."

Mr. *Nand Lal*, for the Petitioner.

JUDGMENT.—Both Courts have believed that the horse was transferred by petitioner to Sheru, and good reasons are given for this view. This being so it is much against petitioner that he should deny all connection with the animal. At the same time even this is by no means conclusive of guilt; and in favour of petitioner is the evidence, in which there is probably some truth, that Sheru and petitioner are enemies.

On the whole I am disposed to hold that petitioner really did pass on the horse to Sheru; but this is not sufficient to warrant his conviction.

I allow the revision and acquit Allu.

Revision allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 169 OF 1913.

April 17, 1914.

Present:—Mr. Crouch, A. J. C., and Mr. Boyd, A. J. C.

JIWATRAM JHAMANDAS—APPLICANT

versus

EMPEROR—PROSECUTOR.

Criminal Procedure Code (Act V of 1898), s. 195(6)—

JIWATRAM JHAMANDAS v. EMPEROR.

Application, whether by way of appeal—Limitation —Application by Government after one year.

An application under section 195 (6) of the Criminal Procedure Code is not by way of appeal and is not governed by the second Schedule of the Limitation Act. But it should be made without unnecessary delay. [An application under section 195 (6) made by Government after the lapse of a year was disallowed in this case.]

Application against the order of the District Judge, Larkana.

Mr. *Wadhumal Oodharam*, for the Applicant.

Mr. *E. Raymond*, Public Prosecutor, for the Crown.

JUDGMENT.

CROUCH, A. J. C.—This is an application purporting to be under section 439, Criminal Procedure Code, or in the alternative, under section 195, asking the revocation of an order of the District Judge, Larkana, directing the prosecution of applicant for an offence under section 210, Indian Penal Code.

As stated in the order of the lower Court, the facts are extremely complicated. Briefly Dhanidino and his deceased brother Rabdino, were owners of a certain estate. By an award of 1899 and a sale-deed of 1905, Rabdino had purported to transfer the whole of his interest and Dhanidino the major portion of his interst to one Khanumal. Tilumal, Thaumal and Jhangimal were partners of Khanumal, and, as such, claim a share in the property. Khanumal is dead and his interest is vested in his nephew Udhavdas. During his lifetime Khanumal and after his death Udhavdas and the three partners endeavoured, by means of civil and criminal proceedings, to obtain possession or, at any rate, enjoyment of the property, but apparently without success or with only partial success. The history of the litigation suggests that the Courts were used more for the purpose of harassing Dhanidino than of obtaining a decision, for one criminal complaint and two civil suits were withdrawn.

In December 1911 Udhavdas and the three partners permitted an arbitration award to be passed in favour of the present applicant, Jiwatram, a relation of theirs. This award purported to give Jiwatram a mortgage on the whole estate, the debt thus secured being re-payable by instalments. Dhanidino's outstanding interest was ignored. A consent decree, embodying this award, was obtained and execution was immediately levied on the property for the recovery of the first instalment. Dhanidino was, at the time, in physical possession of the estate and was compelled to pay up the whole amount of the first instalment under threat of seizure. The money so paid was handed over to Jiwatram by the bailiff without any authority from the Court. Dhanidino applied for a refund of the money under Order XXI, rule 58, but his application was dismissed with costs and no inquiry as to Dhanidino's interest was held. We find ourselves unable to follow the learned Judge in his order dismissing this application.

An application for sanction to prosecute Jiwatram and his four assignors was rejected by the Sub-Judge by order, dated 22nd April 1912.

In June 1913 Dhanidino compromised with his opponents, receiving a two-annas share and a lump sum in cash.

On the 12th April 1913 the Public Prosecutor, under instructions from the District Magistrate, applied to the District Judge to sanction the prosecution, and it is against the order passed on that application that the present application has been filed. The learned Judge suspected that no debt was really due to Jiwatram; and he attached much importance to the failure to exclude Dhanidino's outstanding interest from the mortgage. Mr. Wadhumal urges that the admission by Udhavdas and the three partners that the debt was due is conclusive—the mere passing of the award and decree would create the debt even if it did not exist before—and also contends that the inclusion of Dhanidino's outstanding interest in the mortgage was not a point emphasised in either of the lower Courts and was one for which he was confident that a perfectly innocent explanation could be produced were he to be given the opportunity to obtain special instructions.

Mr. Wadhumal contends also, on technical and other grounds, that the sanction should be revoked. It is urged that the application was bad as being a substantive application and not by way of appeal; that, if it be treated as an appeal, it

was barred by the Law of Limitation, and, if as an application for revision, it should be brought within the 60 days' rule observed by this Court; that, any way, the application was stale, and, on general grounds, should not have been entertained. Further, the parties having compromised, there is no injustice left to remedy.

Now, the order of the Sub-Judge refusing sanction was an order made by a Civil Court acting under the special authority conferred by section 195, Criminal Procedure Code. No appeal lies from such orders; for the Court of the Sub-Judge not being a Criminal Court, no appeal lies under Chapter XXXI of the Criminal Procedure Code; nor is the order included in those against which an appeal lies under the Civil Procedure Code. The difficulty has been met by conferring special, original and substantive powers to grant or revoke a sanction on Appellate Courts, both civil and criminal. But though Appellate Courts exercise the jurisdiction they do not exercise it by way of appeal. The High Court can call for the proceedings of any subordinate Civil Court under section 115, Civil Procedure Code, but having done so, will grant or revoke a sanction under section 195, Criminal Procedure Code, by virtue of the powers conferred by section 439 (1), Criminal Procedure Code. The distinction between granting or revoking a sanction under section 195 (6) and reversing an order on appeal may seem one of words only, but the distinction clearly exists and must be recognized; the application to the District Judge was not an appeal either under the Civil Procedure Code, or under the Criminal Procedure Code, to which the 2nd division of the first Schedule to the Limitation Act applies. Nor can reliance be placed on rule 2 of Chapter V of the Rules of this Court; that rule applies only to applications made to this Court in its High Court jurisdiction.

But, as stated in *Tindoomal Naraindas* v. *Sadhuram Amboomal* (1), the object of rule 2, Chapter V, "is to prevent stale applications being made and to obviate the hardship that would ensue to accused persons if the finality of a criminal order were left in doubt for a long time." Interference by revision in criminal cases is purely discretionary and the rule indicates that this Court will, in the exercise of that discretion, refuse to interfere in the case of a belated application. The Articles of the Limitation Act which strictly limit the period within which appeals in criminal cases can be made indicate that the Legislature likewise desires to secure finality.

The close analogy which an application under section 195 (6) bears to an appeal has been recognized in some of the cases cited by Mr. Wadhumal. In *Polaniappa Chetti* v. *Annamalai Chetti* (2) the learned Judges speak of such an application as "a petition by way of appeal." In *Aiyakannu Pillai* v. *Emperor* (3) Pinhey, J., expressed the opinion "that sections 195 and 476 should be read together, and that it was the intention of the Legislature to restrict the power of Courts as complainants and to only suffer it when promptly exercised." In *Hardeo Singh* v. *Hanuman Dat Narain* (4) the learned Judges of the Full Bench observed that "sub-section 6 of section 195 gives a right of appeal in very clear terms. Whether it is called an appeal or a right to make a substantive application to have an order refusing or giving sanction set aside appears to be immaterial."

Had the application to the District Judge been made by Dhanidino himself, we should have had no hesitation in declaring that it was stale and should have been rejected. Should it have been granted merely because the applicant was the District Magistrate? It was the old theory that no negligence or laches could be imputed to the Crown, but this theory, even if now accepted, must be accepted with reasonable limitations. In the case of an appeal against acquittal under section 417, Criminal Procedure Code, where an actual reference to, and action by, the Local Government is necessary, the Legislature has considered six months to afford full time for the cumbrous machinery of Government to be put in motion. I consider that a

(1) 15 Ind. Cas. 803; 13 Cr. L. J. 531; 5 S. L. R. 265.

(2) 27 M. 223; 14 M. L. J. 74; 1 Cr. L. J. 321; 2 Weir 208.

(3) 1 Ind. Cas. 597; 32 M. 49; 9 Cr. L. J. 41; 19 M. L. J. 42; 4 M. L. T. 404.

(4) 26 A. 244 at p. 247; A. W. N. (1904) 10; 1 Cr. L. J. 7.

year is an unreasonably long time after which to present an application under section 195 (6), Criminal Procedure Code, and that, when so presented, it should be entertained only under special circumstances.

Had it been clear that a serious criminal offence had been committed such that, in the opinion of the Court, should not in the public interest be permitted to go unpunished, the Court might condone this delay, but on the facts before us it is not fair to say that anything more than a case of suspicion, which seems to call for judicial inquiry, has been made out.

Again, the fact that the parties have now settled their disputes is one that cannot be ignored. The Public Prosecutor will be helpless unless he receive detailed instructions and genuine, zealous and continuous support from Dhanidino. Before it can be evident that a criminal offence has been committed, it will be necessary to ascertain, beyond doubt, what exactly were the civil relations of the parties in December 1911. Dhanidino has no longer any personal interest in proving a case against the applicant, and it is improbable that he will go to the expense and trouble of conducting long and complicated litigation. It is undesirable to initiate a prosecution the success of which seems so doubtful and the result of which depends to which side an individual, over whom the Public Prosecutor can exercise no control, chooses to give his support. I would, therefore, revoke the sanction.

BOYD, A. J. C.—I concur.

Sanction revoked.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATIONS NOS. 12 TO 19 OF 1914.

April 30, 1914.

Present:—Mr. Hayward, J. C., and Mr. Boyd, A. J. C.

HOTU, SON OF PESSUMAL, AND OTHERS—APPLICANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 4, 190 (1) (c)—Statement that certain person keeps common gaming house, whether amounts to "complaint"—Bombay Prevention of Gambling Act (IV of 1887), s. 6—Warrant, issue of.

A statement made before a Magistrate, with the object of inducing him to take action under the Bombay Prevention of Gambling Act, that a certain person keeps a common gaming house, does not amount to a "complaint" within the meaning of section 4, Criminal Procedure Code.

A Magistrate not empowered to take action under section 190 (1) (*c*), Criminal Procedure Code, cannot be said, by merely issuing a warrant under section 6 of the Bombay Prevention of Gambling Act, to have taken cognizance of a case till it is brought up before him for trial.

Applications against the order of the Resident Magistrate, Tando Adam.

Mr. *Wadhumal Oodharam*, for the Applicants.

Mr. *E. Raymond*, Public Prosecutor, for the Crown.

JUDGMENT.—The accused, 8 in number, have been convicted under section 5 of the Bombay Gambling Act, IV of 1887. And one of them, by name Hotu, has been convicted under section 4 of the same Act. The necessary facts are as follows:—

One Motu took a complaint to the Magistrate on 10th December 1913 saying that Hotu kept a common gaming house in which many persons used to gamble. In consequence of this the Magistrate issued a warrant under section 6 of the Gambling Act, directing the search of Hotu's house and the arrest of all persons found therein. The warrant was executed; and all the accused were arrested in Hotu's house. Later they were brought up by the Police before the same Magistrate who tried and convicted them.

It is urged for the accused that the Magistrate took cognizance of the offence under section 190 (1) (*c*) of the Criminal Procedure Code and so he could not legally try them without going through the procedure enjoined by section 191. The Magistrate admittedly did not go through this procedure; so it is argued that the whole trial was illegal.

Now the first question, is whether the Magistrate did take cognizance of the offence under section 190, Criminal Procedure Code. We are of opinion that he did not act under clause (*a*) of the section. He received no "complaint" within the meaning of the term as defined in section 4 of the Code. The definition is as follows:—

"Complaint" means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown,

has committed an offence, but it does not include the report of a Police Officer.

Now as regards the seven accused, not including Hotu, they were not mentioned by Motu in his deposition: so it cannot be said that he stated that they had committed any offence. The definition, moreover, clearly refers to some offence committed before the complaint is made. And in this case that was not what Motu meant. The suggestion was that the house should be searched and that those in it at the time of the search should be arrested. Moreover, as regards the accused Hotu also we do not think that Motu's deposition amounts to a "complaint" within the meaning of the Code; for it was not made in order to induce the Magistrate to take any action under the Code, but in order to induce him to proceed under section 6 of the Gambling Act.

It is also clear that on the 10th December, there was no Police report before the Magistrate. With regard to clause (*c*) of section 190 the Magistrate was not empowered by Government to take any action under that clause and accordingly the presumption is that he did not take action under the clause. Mr. Wadhumal for the accused argues that the recording of the complaint of Motu was done by the Magistrate (wrongly) in exercise of powers which can only be exercised under clause (*c*) of section 190, although the Magistrate himself actually did not possess those powers. So he contends that the Magistrate virtually applied section 190 (*c*). This argument might be good if the action, which the Magistrate took, was not within any other powers which he possessed. But as a matter of fact section 6 of the Gambling Act gave him full power to do all that he did; and, therefore, it would be unreasonable to suppose that, while acting quite legally under one rule of law, he thought that he was acting under another rule under which he has no power.

It, therefore, seems clear that on 10th December the Magistrate did not take cognizance of the case at all. What he did was done by virtue of the peculiar powers conferred by section 6 of the Gambling Act on Magistrates and certain Police Officers alike. As section 190 of the Code was not used, it follows that section 191 could not apply.

The Magistrate first took cognizance of the case when it was brought up before him for trial. It is pointed out that on that occasion he made certain errors of procedure, but that fact is not relevant to the point in question. The errors were immaterial and did not prejudice the accused.

We, therefore, think that the trial of the accused by this Magistrate was quite legal and we ought not to disturb the conviction. The applications of accused Hotu, Taro and Ladho are dismissed. There remain five other accused, Mengho, Dharmu, Isar, son of Jethanand, Isar, son of Tarachand, and Nando, son of Sambhumal. With regard to them we think that the sentence of one week's rigorous imprisonment which the Magistrate inflicted, was too severe. We set aside that sentence and substitute a fine of Rs. 10 each and in default rigorous imprisonment for ten days each.

Convictions confirmed; Sentences reduced.

ALLAHABAD HIGH COURT.
FULL BENCH.

CRIMINAL MISCELLANEOUS APPEAL NO. 600 OF 1914.

August 3, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, Justice Sir George KNOX, KT., and Justice Sir P. C. Banerji, KT.

CHIRANJI LAL—APPELLANT

versus

EMPEROR—RESPONDENT.

Provincial Insolvency Act (III of 1907), ss. 3, 43, 46 (1)—Court of Additional Judge, whether subordinate to District Court—Order under s. 43—Appeal, whether lies to High Court—Nature of appeal—Jurisdiction.

Held, by *Richards, C. J.*, and *Banerji, J.*, (*Knox, J.*, dissenting) that the Court of an Additional Judge is not subordinate to a District Court within the meaning of section 46 (1) of the Provincial Insolvency Act and that, therefore, when the Additional Judge in exercise of the jurisdiction conferred by section 43 of the Act convicts and sentences a debtor for having fraudulently or vexatiously concealed his books of account, an appeal from the order of conviction lies to the High Court.

Per *Banerji, J.*—The Court subordinate to the District Court, referred to in section 46 (1), is the subordinate Court mentioned in section 3 of the Act.

Held, by the *Full Bench*, that an appeal from an order under section 43 is a civil appeal.

Appeal from an order passed by the Second Additional Judge of Aligarh, dated 1st July 1914.

CHIRANJI LAL *v.* EMPEROR.

Mr. *G. W. Dillon* (with him Mr. *Jawaharlal Nehru*), for the Appellant.

Mr. *L. M. Banerji*, Government Advocate, for the Crown.

JUDGMENT.

RICHARDS, C. J.—Chiranji Lal applied to be declared an insolvent. The case came before the Second Additional Judge of Aligarh, and he, in exercise of the jurisdiction conferred upon the Court by section 43 of the Provincial Insolvency Act of 1907, ordered the debtor to be imprisoned for a term of two months for having fraudulently or vexatiously concealed books of account. The debtor, Chiranji Lal, appealed to this Court against the order of the Second Additional Judge.

A preliminary objection was taken against the hearing of the appeal to the effect that an appeal did not lie to the High Court, but lay to the District Court. Section 8 of the Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887) provides for the appointment by Government of Additional Judges. Clause (2) of the same section provides that the Additional Judges so appointed shall discharge *any of the functions of the District Judge* which the District Judge may assign to them, and in discharge of those functions shall exercise the *same powers as a District Judge*. There is no doubt that the Second Additional Judge was duly appointed under section 8 and there can be no doubt that the District Judge assigned to the Second Additional Judge the disposal of this particular insolvency application. It seems to me that there can be also no doubt that under clause (2) of section 8 the District Judge had authority to assign the petition in question to the Second Additional Judge. Section 20 provides: "Save as otherwise provided by any enactment for the time being in force, an appeal from a decree or order of a District Judge or Additional Judge shall lie to the High Court." In my opinion these provisions make it quite clear that the appeal in the present case lay to the High Court.

The Additional Judge dealt with the matter as a District Judge. It was contended by the objector that under the provisions of section 46 of the Provincial Insolvency Act of 1907 an appeal from an order of a Court subordinate to the District Judge lies to the District Judge and it is argued that the Second Additional Judge was a Court subordinate to the District Court within the meaning of section 46 clause (1). In support of this contention section 39 of the Bengal, N.-W. P. and Assam Civil Courts Act is cited. This section provides as follows: "For the purposes of the last foregoing section the presiding officer of a Court subject to the administrative control of the District Judge shall be deemed to be immediately subordinate to the Court of the District Judge, and, for the purposes of the Code of Civil Procedure, the Court of such an officer shall be deemed to be of a grade inferior to that of the Court of the District Judge." It seems to me that this is a clause providing that for the specified purposes mentioned in section 39, and for this purpose only, a Court is to be deemed subordinate or of a lower grade to the Court of the District Judge. It cannot override the other clear provisions to which I have referred. A Bench of this Court has already considered this question in the case of *Makhan Lal* v. *Sri Lal* (1). The view taken by the learned Judges in that case was that the appeal from an order of the Additional Judge lay to the High Court and not to the District Judge. I entirely agree with the view taken by the learned Judges in that case and I would overrule the preliminary objection.

KNOX, J.—I regret finding myself unable to follow the view taken by my brother Judges in this matter. So far as I am aware when the Legislature intends that an appeal from an Additional Judge shall lie to the High Court, it makes special provision for the purpose; as for instance in section 20 of Act XII of 1887. It seems to me that the Provincial Insolvency Act, III of 1907, intended that the Court having jurisdiction under the Act should be the District Court and Courts which were authorised by the Local Government with the previous sanction of the Governor-General in Council to exercise such jurisdiction. If it had been intended that an appeal from an Additional

(1) 14 Ind. Cas. 162; 9 A. L. J. 371; 34 A. 382.

Judge should lie direct to this Court, it would have been very simple for the Legislature to have said in section 46 (2): "Any person aggrieved by an order made by the District Court or the Additional Judge under section * * * * * * " In the absence of special words conferring a right of appeal from an Additional Judge to the High Court I am not prepared to hold that an appeal would so lie. I can quite understand that the Legislature may have intended that matters of this kind, which called for speedy decision, should, if there was an Additional Judge in the first instance, be referred to and at once decided by the District Court on the spot.

BANERJI, J.—The question to be determined in this case is whether an appeal from the order of the Second Additional Judge in this case lay to this Court or to the Court of the District Judge. In support of the contention that the appeal lay to the District Judge reference is made to section 46 of the Provincial Insolvency Act, which is to the effect that a person aggrieved by an order made in the exercise of an insolvency jurisdiction by a Court subordinate to the District Court may appeal to the District Court. It is urged that the Court of the Additional Judge is subordinate to the District Court within the meaning of the section and that, therefore, no appeal lies to this Court. I am unable to agree with this contention. I am clearly of opinion that the Court subordinate to the District Court, referred to in section 46, subsection (1), is the subordinate Court mentioned in section 3 of the Act, that is to say, a Court subordinate to the District Court which has been invested by the Local Government with the previous sanction of the Governor-General in Council by notification in the Local Official Gazette with jurisdiction in insolvency matters. Had it been intended that the Court of an Additional Judge should be deemed to be a subordinate Court within the meaning of the section, it would have been distinctly provided in the section in the case of Additional Judges that they shall be deemed to be subordinate to the District Court in the same way as Courts of Small Causes have been declared to be subordinate to the District Court.

It is next urged that an Additional Judge is under the Civil Courts Act, XII of 1887, subordinate to the District Court. This contention also is, in my opinion, untenable. Section 3 of the Civil Courts Act defines the different classes of Civil Courts, but except for the purposes of administrative control and for the purposes mentioned in section 39 of the Act, the Court of an Additional Judge is not declared in the Act to be subordinate to the Court of the District Judge. Section 8 of the Act provides that an Additional Judge appointed by the Government is competent to discharge any of the functions of a District Judge which the District Judge may assign to him, and in the discharge of those functions he shall exercise the same powers as the District Judge. One of the functions of the District Judge is to try insolvency matters, and under the provisions of this section the District Judge is competent to assign that function to the Additional Judge in any particular case or in any class of cases. In the discharge of those functions the Additional Judge exercises the powers of the District Judge as such, and it cannot be said that an appeal from an order made by him in the exercise of those functions lies to the District Judge, who himself can exercise no higher functions in regard to those matters. By section 20 of the Civil Courts Act an appeal from an order of an Additional Judge lies to the High Court. Therefore in the present case the appeal, in my opinion, lay to this Court and the preliminary objection has no force. I may add that there can be no more inconvenience in allowing an appeal to this Court from the order of an Additional Judge than from the order of the District Judge.

BY THE COURT.—We are all unanimously of opinion (assuming that an appeal did lie to this Court in the case) that it comes before this Court as a First Appeal from Order on the Civil Side. We, therefore, treat the case as such. Mr. Dillon has addressed us on the merits of the case and has argued that there was no proper charge of having committed any offence under section 43 of the Provincial Insolvency Act, and has called our attention to the case of *Amiruddi Karikar* v. *Jadab Karikar* (2) and also to the case of *Nathumal* v. *District Judge of Benares* (3). In our opinion, having regard

(2) 19 Ind. Cas. 920; 19 C. L. J. 430.
(3) 6 Ind. Cas. 870; 32 A. 547; 7 A. L. J. 602.

to the facts of the present case, the debtor had every opportunity of knowing that an inquiry was being made as to whether he had not concealed and was not concealing his books of account. He got every opportunity of showing to the Court that he had not done this. Under these circumstances we see no reason to interfere with the order of the Court below and we accordingly dismiss the appeal. The appellant must now surrender to his bail and serve out the remainder of the sentence.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION NO. 154 OF 1913.

January 29, 1914.

Present:—Mr. Crouch, A. J. C., and Mr. Boyd, A. J. C.

MATHRADAS DHARAMDAS—APPLICANT

versus

EMPEROR—PROSECUTOR.

Penal Code (Act XLV of 1860), s. 193, stay of proceedings under, pending disposal of civil proceedings—Discretion.

Criminal proceedings under section 193, Penal Code, for statements made in a civil suit pending appeal, should not ordinarily be ordered to be stayed till the disposal of the appeal, but that is a matter entirely within the discretion of the Magistrate.

Application to review an order passed by the City Magistrate, Sukkur, refusing to stay proceedings against the applicant.

Mr. *E. Raymond*, Government Pleader, for the Crown.

Mr. *Hirdaram Mewaram*, for the Applicant.

JUDGMENT.—This is an application to revise an order of the City Magistrate of Sukkur refusing to stay proceedings until the civil appeal pending before this Court has been disposed of. The Public Prosecutor cites the judgment *In re Bal Gangadhar Tilak* (1) wherein are carefully summed up all the arguments that can be adduced against the stay of magisterial proceedings by the Appellate Court: to these arguments we consider that full weight should be given, and we are not prepared to issue to the Magistrate such order as is prayed for. We are of opinion, however, that in this particular case it would be desirable that the criminal proceedings should be adjourned until the appeal pending before us has been disposed of, unless it be found that for special reasons, such as the probability of a witness not being available at a later date, it is desirable to hasten the hearing. The papers should be returned with these remarks to the Magistrate, who will exercise his discretion in the light of them. Arrangements are being made to expedite the hearing of the civil appeal.

Application rejected.

(1) 26 B. 785; 4 Bom. L. R. 618.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 290 OF 1914.

CRIMINAL REVISION PETITION NO. 248 OF 1914.

September 10, 1914.

Present:—Mr. Justice Sadasiva Aiyar.

In re V. DESIKACHARI AND OTHERS—ACCUSED NOS. 1 TO 6—PETITIONERS.

Criminal Procedure Code (Act V of 1898), s. 107—Security to keep the peace—Breach apprehended from opposite party if one party exerises his right, whether ground for demanding security.

No security to keep the peace can be demanded from a party, simply because the opposite party would commit such breach if the former party would exercise his right.

Feroze Ali Mullick v. *Emperor*, 12 C. W. N. 703; 7 Cr. L. J. 504. followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Sub-Divisional Magistrate of Cuddalore, in Miscellaneous Case No. 31 of 1913.

Messrs. *T. Rangachariar* and *C. Padmanabha Aiyangar*, for the Petitioners.

Mr. *P. R. Grant*, for the Government.

ORDER.—The members of the Vedaparayanam party, to which the petitioners belong, have a *prima facie* right as worshippers to join in the recital of the Prabandham (after the Thodakkam is pronounced by the office-holder) and I see nothing substantial on the records which negatives that right.

There is also no evidence worth the name

that the petitioners are likely to commit a breach of the peace. That the opposite party is likely to commit acts of rowdyism if the petitioners' party insists on their rights, is no sufficient ground to call upon the petitioners to execute bonds to keep the peace under section 107 [See *Feroze Ali Mullick* v. *Emperor* (1)].

I set aside the order of the learned Sub-Divisional Magistrate *so far as the petitioners are concerned.*

Order set aside.

(1) 7 Cr. L. J. 504; 12 C. W. N. 703.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFENENCE NO. 6 OF 1914.

February 12, 1914.

Present:—Mr. Hayward, J. C., and Mr. Boyd, A. J. C.

EMPEROR—PROSECUTOR

versus

NATHU *walad* MEHAR—APPLICANT.

Criminal Procedure Code (Act V of 1898), ss. 195, 439, 476 - Sanction to prosecute without application — Procedure—Practice—Revision.

Sanction to prosecute should not be given under section 195 without an application.

In the absence of an application for sanction the Court may order prosecution under section 476.

When, however, sanction is given and the aggrieved party does not prefer an appeal against the order, the Court will not interfere in revision on a reference made at a late stage of the proceedings.

Criminal reference made under section 438, Criminal Procedure Code, by the Sessions Judge, Sukkur.

Mr. *E. Raymond*, Public Prosecutor, for the Crown.

JUDGMENT.—The applicant made a criminal complaint to the District Magistrate. That complaint might have been transferred *without* examining the complainant to another Magistrate, or it might have been sent for inquiry *after* examining the complainant to such other Magistrate. It appears, however, to have been sent for inquiry *without* examining the complainant to the Sub-Divisional Magistrate. This was an irregularity contrary to the provisions of section 202, Criminal Procedure Code. But this irregularity has not been shown to have prejudiced the applicant, as there can be no reason to doubt that he was examined in the inquiry by the Sub-Divisional Magistrate.

The complaint was, on consideration of the proceedings of the Sub-Divisional Magistrate, found to be false by the District Magistrate. It was open to him to proceed thereupon, either on application under section 195 or on his own motion under section 476, Criminal Procedure Code. There does not appear to have been any application before him and it is, therefore, questionable whether his order could strictly be upheld which purported to proceed under section 195. In any case the proper course would, in our opinion, have been to have proceeded under section 476, Criminal Procedure Code (in the manner indicated by section 18 of Chapter VI, Sind Courts Criminal Circulars). It has not, however, been shown to us that applicant has actually been prejudiced by these irregularities, for there is no reason to suppose that the proceedings of the Sub-Divisional Magistrate were not fully considered by the District Magistrate. Moreover, the applicant, though he might have done so, did not appeal against the order purporting to have been passed under section 195, Criminal Procedure Code, and the trial appears to have advanced to a late stage. It may be open to applicant to raise the question of prejudice by way of appeal in case of conviction, but we are not prepared at this stage to interfere with the order as one under section 476 by way of revision under section 439, Criminal Procedure Code.

The record should, therefore, be returned with these remarks to the Sessions Judge.

Record returned.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 88 OF 1914.

June 9, 1914.

Present:—Sir G. W. Shaw, KT., J. C.

JUGARAM—APPLICANT

versus

NGA TUN BAW—RESPONDENT.

Workmen's Breach of Contract Act (XIII of 1859), s. 2—Workman told not to do any more work — Settlement to repay balance advanced—Failure to pay —Workman, liability of.

If an employer tells his workman not to do any more work and arrives at a settlement with him for the re-payment of the balance due, the case is taken out of the Workmen's Breach of Contract Act, the liability of the workman becomes purely a civil liability and his failure to act on the settlement cannot bring the case back under the Act.

Subramanian Chetty v. *Gangaya*, 4 L. B. R. 365, distinguished.

Mr. *L. K. Mitter*, for the Applicant.

JUDGMENT.—The District Magistrate has submitted the proceedings in this case for orders in revision, being of opinion that the Sub-Divisional Magistrate misunderstood the Workmen's Breach of Contract Act and the Contract Act.

After perusing the record I agree with the learned District Magistrate.

The complainant called no witnesses. On the other hand there was evidence, which the Magistrate believed, on the side of the respondent, Tun Baw, to the effect that complainant told respondent not to do any more work but to repay the balance, and that a settlement was arrived at by which complainant accepted a pony and other things in part payment and agreed to waive Rs. 60, leaving a balance of Rs. 100 for which respondent mortgaged and promised to make delivery of a piece of land worth Rs. 60 and to pay Rs. 40 in *Nayon* 1276.

Respondent would seem to have failed to deliver the land as promised. But I do not think that failure brings the case back under the Workmen's Breach of Contract Act. By his own act complainant, in my opinion, took it out of the Act when he told respondent to do no more work, and after that and after the settlement the respondent's liability was purely a civil liability. [*Cf. In the matter of Anusoori Sanyasi* (1)].

The Sub-Divisional Magistrate relied upon the Lower Burma case of *A. L. M. S. Subramanien Chetty* v. *Gangaya* (2). But that was not a case under the Workmen's Breach of Contract Act and, therefore, cannot be taken as an authority for applying the Workmen's Breach of Contract Act in the circumstances of the present case.

The order of the Sub-Divisional Magistrate is set aside and the complaint is dismissed. If the complainant wishes to take proceedings for the recovery of the balance due to him, he must go to the Civil Court.

Order set aside.

(1) 28 M. 37; 1 Weir 671; 2 Cr. L. J. 149.
(2) 4 L. B. R. 365.

MADRAS HIGH COURT.

CRIMINAL REVISION CASES NOS. 271 AND 434 OF 1914.

CRIMINAL REVISION PETITIONS NOS. 231 AND 364 OF 1914.

October 9, 1914.

Present:—Mr. Justice Sadasiva Aiyar.

IN CRIMINAL REVISION CASE NO. 271 OF 1914.

ANNASAWMY AIYANGAR—PETITIONER

versus

MUTHUKUMARA PILLAI AND ANOTHER—RESPONDENTS

AND

IN CRIMINAL REVISION CASE NO. 434 OF 1914.

MUTHUKUMARA PILLAI—PETITIONER

versus

ANNASAWMY AIYANGAR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 145—Finding as to possession essential—Civil Court's view, whether conclusive.

The decision of a Civil Court on the question of possession is not conclusive in proceedings under section 145, Criminal Procedure Code. The Magistrate must arrive at his own finding.

Petitions, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the 1st Class Sub-Divisional Magistrate of Negapatam, in Miscellaneous Case No. 16 of 1914, dated the 16th of March 1914.

Mr. *K. Srinivasa Aiyangar*, for the Petitioner in Criminal Revision Case No. 271 of 1914 and for Respondent in Criminal Revision Case No. 434 of 1914.

Mr. *G. S. Rama Chandra Aiyar*, for the Respondents in Criminal Revision Case No. 271 of 1914 and for Petitioner in Criminal Revision Case No. 434 of 1914.

ORDER.—The Sub-Divisional Magistrate ought to arrive at his own finding as to which of the parties was in possession under clause (4) of section 145 of the Code of Criminal Procedure. The Subordinate Judge's order gives a charge in favour of the petitioner in Criminal Revision Case No. 271 of 1914 and finds that his sale-deed did not pass title to him as owner. The question of *possession* as between the present two parties was not fought out between them in the civil proceedings and if there is any finding about possession in those proceedings, the Magistrate might take it into considera-

tion in arriving at his own conclusion on the question of possession. The Magistrate's order of attachment is set aside and he is requested to pass fresh orders according to law with reference to the above remarks.

Order set aside.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 32 OF 1914.

February 24, 1914.

Present:—Mr. Crouch, A. J. C.

DIWANICHAND—APPLICANT

versus

EMPEROR—PROSECUTOR.

Criminal Procedure Code (Act V of 1898), ss. 215, 264—Commitment to Sessions for offence triable by Magistrate.

A Magistrate competent to try and pass sentence in a case, has no discretion to commit it to the Court of Session.

Queen-Empress v. *Kayemullah, Mandal* 24 C. 429; 14 C. W. N. 414 and *Emperor* v. *Dharam Singh*, 3 Cr. L. J. 94; 3 A. L. J. 14; A. W. N. (1906) 28; 1 M. L. T. 61, referred to.

Mr. *T. G. Elphinston*, for the Applicant.

Mr. *E. Raymond*, Public Prosecutor, for the Crown.

JUDGMENT.—This is an application under section 215, Criminal Procedure Code, to quash the commitment of applicant for trial by the Court of Sessions.

Applicant is a Sub-Inspector of Khanpur. Under orders of the District Superintendent of Police he went to Kambar, a *taluka* outside his jurisdiction, to investigate a case of cattle-theft. He was accompanied by Sabzul, the owner of the stolen cattle. At Kambar *Thana* he obtained the assistance of Police constable Ramzan. Two buffaloes, which Sabzul alleged to be his, were traced to the house of one Taj Mahomed. Mashirs were sent for, one of them being Kando Khan who is said to be on terms of hostility with Taj Mahomed. As Taj Mahomed refused to surrender, Ramzan obtained access to the house by climbing a wall and opened the door to the Sub-Inspector and his party. A fight then took place between the investigating party on the one hand and Taj Mahomed and his men on the other.

The Sub-Divisional Magistrate, Larkana, who conducted the inquiry, has come to the conclusion that there is a *prima facie* case against Kando Khan, Sabzul and ten others of having formed an unlawful assembly with the intent to commit house-trespass, and has framed charges under sections 147, 149, 326, 323 and 452, Indian Penal Code. As regards applicant, the Magistrate was of opinion that he had been the tool of the other accused and framed a charge under section 166, Indian Penal Code, only.

Now a case relating to an offence under section 166, Indian Penal Code, is a warrant case within the definition given in section 4 (*v*) and (*w*), Criminal Procedure Code, the offence being punishable with imprisonment for one year or fine, or both. Though, under section 28, any offence under the Penal Code may be tried by a Court of Session, the procedure laid down in Chapter XVIII, under which the commitment was made, is applicable only to cases triable exclusively by a Court of Session or which, in the opinion of the Magistrate, ought to be tried by such Court (section 207). Chapter XXI describes the procedure to be observed in the trial of the warrant-cases. Section 254, in mandatory terms, imposes on the Magistrate the duty of trying any warrant-case which he is competent to try and which, in his opinion, can be adequately punished by him. Reading this section with section 207, it would seem that the Legislature has given to a Magistrate discretion to commit to a Court of Session only such of those cases which he is competent to try as, in his opinion, ought to be tried by such Court because the offence cannot be adequately punished by himself. If a case be one which a Magistrate is both competent to try and can adequately punish, then apparently he has no discretion to commit it. This is the view of the law taken by the Calcutta High Court in *Queen-Empress* v. *Kayemullah Mandal* (1) and also by the Allahabad Court in *Emperor* v. *Dharm*

(1) 24 C. 420; 1 C. W. N. 414.

Singh (2) and is, in my opinion, in accordance with the intention of the Legislature so far as it can be gathered from Chapters XVIII and XX to XXI.

Though the fine which can be imposed under section 166 is not limited, the Magistrate has not suggested that a year's imprisonment and such fine as he has power to impose, would not be adequate punishment. There has been no attempt by the Magistrate to comply with the provisions of rule 26 of Chapter VI of the Criminal Circulars and to state why the case was not disposed of by himself.

The Public Prosecutor has suggested that applicant should properly have been charged with the rest of the accused under sections 147 and 149, Indian Penal Code, that possibly the Sessions Court might hold that view and amend the charge, but I have no application to draw such charges before me, nor does it appear to me necessary in the ends of justice to do so. It would be obviously unfair and improper to uphold an irregular commitment on the bare chance of the Sessions Court taking a different and more serious view of the accused's conduct.

I, accordingly, quash the commitment and direct the Sub-Divisional Magistrate to try the case.

Commitment quashed: Trial directed.

(2) 3 Cr. L. J. 94; 3 A. L. J. 14; A. W. N. (1906) 28; 1 M. L. T. 61.

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 344 OF 1914.

August 27, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Tyabji.

In re THE SESSIONS JUDGE OF COIMBATORE—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 215—No evidence to justify commitment—Accused entitled to acquittal—High Court will not quash such commitment.

When there is no evidence to justify a commitment, it is not open to the High Court to quash it.

Empress v. *Narotam Das*, 6 A. 98, not followed.

Emperor v. *Suleman Ibrahim*, 10 Ind. Cas. 802; 12 Cr. L. J. 256; 13 Bom. L. R. 201, followed.

The accused is entitled to be acquitted even if the case is one for further inquiry.

Emperor v. *Chandra Kumar Misser*, 2 C. L. J. 46; 2 Cr. L. J. 383, rererred to.

Petition praying that in the circumstances stated therein the High Court will be pleased to quash the commitment of the accused in Sessions Case No. 61 of 1914, on the file of the Sessions Court of Coimbatore, (P. R. C. No. V of 1914) on the file of the 3rd Class Stationary Magistrate of Erode.

Mr. *J. C. Adam*, for the Government.

ORDER.—The Sessions Judge has referred the case to this Court, to quash the commitment under section 215, Criminal Procedure Code. Under that section the commitment can be quashed only on a point of law.

The accused was charged with having committed the offence of murder, riot, grievous hurt, hurt and house trespass. The Judge says that there is no evidence that Sinna Gounden who is alleged to have been murdered, is dead; and there is also no evidence that any grievous hurt was caused. The other offences are triable by the Magistrate. If the commitment is allowed to stand, the accused will have to be acquitted on the charge of murder, but the Sessions Judge is of opinion that the case is one for further inquiry and the acquittal might preclude the Police from making such inquiry. He, therefore, asks us to quash the commitment on the ground that there is no evidence to justify the commitment. We are of opinion that on this ground it is not open to the High Court to quash a commitment. The accused is entitled to be acquitted if there is no evidence against him to support a conviction. The result of quashing the commitment will be that he may be charged again with the offence. The Public Prosecutor has drawn our attention to the cases reported as *Emperor* v. *Suleman Ibrahim* (1), *Empress* v. *Narotam Das* (2), and *Emperor* v. *Chandra Kumar Misser* (3).

We are unable to follow the Allahabad decision. The Bombay judgment supports our view.

(1) 10 Ind. Cas. 802; 12 Cr. L. J. 256; 13 Bom. L. R. 201.

(2) 6 A. 98.

(3) 2 C. L. J. 46; 2 Cr. L. J. 383.

MINHOMAL v. EMPEROR.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION NO. 179 OF 1913.

February 24, 1914.

Present:—Mr. Hayward, J. C., and Mr. Boyd, A. J. C.

MINHOMAL LILARAM—APPLICANT

versus

EMPEROR—PROSECUTOR.

Compensation, award of—Acquittal of accused in summary trial—Failure to record objection of complainant—Criminal Procedure Code (Act V of 1898), ss. 250, 263 (g) – *Interference in revision.*

Where on acquitting the accused in a summary trial the Magistrate awarded compensation to the accused without recording the complainant's objections, the Judicial Commissioner's Court, holding that it was imperative on the Magistrate to record the objections of the complainant, set aside his order and directed him to proceed according to law.

Per *Boyd, A. J. C.*—The power of interference in revision is discretionary and the Court is not bound to move even in cases of legal mistake. Still less should it move in the case of a technical mistake of adjective law, inasmuch as the object of the powers is to do justice and a technical mistake cannot be presumed to cause injustice.

Mr. *Mulchand Thawardas*, for the applicant.

Mr. *E. Raymond*, Public Prosecutor for the Crown.

JUDGMENT.

HAYWARD, J. C.—The learned Magistrate has fined the complainant, but has not recorded the objections of the complainant as required by the proviso to section 250, Criminal Procedure Code. It was, in my opinion, imperative on him to do so even in a summary trial on the analogy of section 263 (*g*), Criminal Procedure Code. I would, therefore, set aside his order and direct him to record and consider the objection of the complainant as required by law, and pass such final order as may be proper, following the case of *Imperator* v. *Achar* (1) and *Emperor* v. *Jetho* (2).

BOYD, A. J. C.—After trying the case summarily, the Magistrate acquitted the accused and ordered complainant to pay Rs. 30 compensation to accused. He omitted to record any statement of complainant after acquittal and before the award of compensation. Reading section 250 with section 263 (*g*), Criminal Procedure Code, I agree with the learned Judicial Commissioner that the Magistrate was bound to record what complainant said. But, from his omission to record anything, I would not infer the further mistake that he omitted to ask complainant to show cause and to consider the reply given by complainant. I believe he did ask him, as the law provides that he should, and received the usual reply that complainant had nothing to add to the evidence given and adduced by him. The only mistake he made was to omit to record what complainant said; and that seems to me, with the greatest deference, to be a small irregularity. In *Emperor* v. *Jetho* (2) the learned Judges found that the Magistrate had omitted to give complainant an opportunity of objecting and had failed to record and consider his objections. In the present case I would find that the Magistrate gave an opportunity and heard and considered objections, though he did not record them. Therefore, the illegality held to have taken place in *Emperor* v. *Jetho* (2) has not occurred here.

But even in case of an illegality, I think, with the greatest deference, that the High Court ought not to interfere in revision unless some one has been prejudiced *i. e.*, unless there is some reasonable chance of there having been a failure of justice. I see no reason why an order should be upset because of a technical mistake of adjective law, if it is a purely technical mistake as in this case. The case of *Subramania Ayyar* v. *King-Emperor* (3) was different, as there the whole trial was illegal and the accused was prejudiced. According to the *dictum* of Sir Lawrence Jenkins in *Emperor* v. *Bankatram* (4) the power of interference in revision is discretionary. It follows that the Court is not bound to move even in cases of legal mistake. The object of the powers is to do justice; and I would not presume that a technical mistake causes injustice, one's experience being that it generally has no such effect.

(1) 2 S. L. R. 4 (Cr.); 10 Cr. L. J. 220.
(2) 2 S. L. R. 14 (Cr.); 10 Cr. L. J. 229.
(3) 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 5 C. W. N. 866; 28 I. A. 257 (P. C.); 2 Weir 271.
(4) 28 B. 533 at p. 566; 1 Cr. L. J. 390; 6 Bom. L. R. 379.

Having always felt strongly on the point, I have recorded these remarks after some hesitation.

But the learned Judicial Commissioner proposes not to reverse the order of compensation, as in *Emperor* v. *Jetho* (2), but only to send back the case for proper compliance with the provisos of section 250, Criminal Procedure Code. This being so, I would agree to the order proposed.

Order set aside.

LOWER BURMA CHIEF COURT.
CRIMINAL REFERENCE No. 52 OF 1913.
August 5, 1913.
Present:—Mr. Justice Twomey.
EMPEROR—PROSECUTOR
versus
SULAIMAN—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 423, 438—Reference to High Court.

When an Appellate Court does not dismiss an appeal summarily, it must dispose of it in the manner provided by section 423, Criminal Procedure Code. It has no power to refer to the High Court for decision a question of law arising in an appeal.

JUDGMENT.—In a criminal appeal now pending before the Sessions Judge, Tenasserim Division, a question of law has arisen as to the proper construction of section 57, Excise Act. The learned Judge considers that it is an important question on which there should be an authoritative ruling and he has, therefore, referred it to this Court for decision.

When an Appellate Court does not dismiss an appeal summarily, it is bound by the provisions of section 423 of the Code of Criminal Procedure which define its powers —these powers do not authorize the Court to refer to the High Court for decision a question of law arising in the appeal. Nor does section 438 confer any such authority; that section permits the Sessions Judge to report for orders the result of his examination of any proceeding before an inferior Criminal Court, but does not apply to appellate proceedings pending before the Sessions Judge himself. It is clearly the intention of the law that all questions arising in a criminal appeal should be determined by the Appellate Court itself.

Since the question referred by the Sessions Judge is not properly before the Court no decision can be given on it. The learned Judge will have to decide it according to his own judgment. If either party should be aggrieved at the Sessions Court's orders in appeal, it will be open to that party to move this Court in revision if he thinks fit.

MADRAS HIGH COURT.
CRIMINAL REVISION CASE No. 131 OF 1914.
CRIMINAL REVISION PETITION No. 113 OF 1914.
September 7, 1914.
Present:—Mr. Justice Ayling and Mr. Justice Hannay.
In re P. VENKATACHALLAM CHETTI—ACCUSED—PETITIONER.

Opium Act (I of 1878), s. 9—Mere contemplction of violating a rule, whether punishable.

A person can be convicted for a breach of the rules framed under section 9 of the Opium Act only when he does some act in contravention of such rule and not merely for contemplating such violation.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Head Quarters Deputy Magistrate of Nellore, in Criminal Appeal No. 17 of 1913, against that of the Stationary 2nd Class Magistrate of Nellore, in Calendar Case No. 425 of 1913.

Dr. *Swaminadhan*, for the Petitioner.

Mr. *P. R. Grant*, for the Government.

JUDGMENT.—The petitioner has been convicted of an offence under section 9 of the Opium Act for possessing one seer of opium in contravention of the Opium Rules. The possession of the opium is admitted: in fact the petitioner himself took it to the Tahsildar's house at Nellore and produced it. It is further proved, and not denied, that a license, Exhibit A, had been issued authorising him to transport this identical opium from Nellore to his (petitioner's) shop at Allur. The petitioner's story of how Exhibit A got out of his possession may or may not be true and there may be ground for suspecting that he contemplated a breach of the Opium Rules, as surmised by the lower Courts. But it cannot be said that up to the time he handed the drug over to the Tahsildar, he had contravened any rule.

The conviction must be set aside and the fine, if paid, refunded. We also set aside the order of confiscation of the opium.

Order set aside.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION NO. 8 OF 1914.

February 19, 1914.

Present:—Mr. Lindsay, J. C.

Musammat GAUHAR AND OTHERS—APPLICANTS

versus

EMPEROR THROUGH THE RAMANAND, PRESIDENT OF THE ARYA SAMAJ OF THOMPSONGANJ, SITAPUR—OPPOSITE PARTY.

Practice—Order passed by District Magistrate in absence of statutory authority, effect of—Power of Magistrate to do an act, where to be derived from.

An order passed by a District Magistrate cannot be supported as an executive order in the absence of any statutory authority which would justify the making of it.

The authority of every Magistrate to do an act as Magistrate or as Collector, if such authority exists, must ultimately be found in the powers conferred by Parliament. The immediate power may be an executive order of the local administration, but the power of the local administration to make an order must be derived, either directly or indirectly, from Parliament, and it is a mistake to assume that because an officer is an Executive Officer or a Judicial Officer, he has any power to interfere with private or public persons which cannot be derived from a lawful origin.

Criminal appeal against the order of the Sessions Judge of Sitapur, dated 5th January 1914, upholding that of the District Magistrate, Sitapur, dated 26th April 1913.

Mr. *Mumtaz Husain*, for the Applicants.

The *Government Pleader*, for the Crown.

JUDGMENT.—This is an application for revision of an order passed by the District Magistrate of Sitapur on the 26th of November 1913. The order purports to be one under section 147 of the Code of Criminal Procedure and the facts which led up to the issue of it appear to be as follows. On the 19th of November a report was made to the District Magistrate by Sub-Inspector Sanathan Lal in which he described various disputes between the Mahomedans and members of the Arya Samaj which had taken place during the time of *Moharram* in the year 1912. The report set out that since 1912 the leading men of both parties had been attempting to come to some friendly understanding but without success. The Sub-Inspector referred to various meetings which had taken place between the leaders of the parties, and he concludes his report by saying that he anticipated a disturbance at the ensuing *Moharram* unless steps were taken to bind over certain persons to keep the peace. A list of such persons was given in the report. On the 23rd of November 1913 the District Magistrate appears to have met representatives of both parties in an informal way at the Sitapur town hall. The matters in dispute between them appear to have been discussed and certain promises appear to have been given which, however, do not seem to have entirely satisfied the Magistrate so as to remove his apprehension of a breach of the peace. Accordingly he drew up the order now complained of, an order which, as already said, purports to be one under section 147 of the Code of Criminal Procedure. In terms this order does not purport to be even an order of a temporary nature passed with reference to any special occasion. It is general in its language and seems to lay down a line of conduct for both parties which they are to observe on the occasion of future *Moharram* processions. Some of the Mahomedan party who were interested in the matter applied for revision in the Court of the Sessions Judge. The Sessions Judge, although he held that the order was not one under section 147, nevertheless dismissed the application, being of opinion that the order might be deemed an executive order with which he had no jurisdiction to interfere.

The order is clearly not one under section 147, for there was no inquiry such as is contemplated by section 147 read with section 145. Consequently it cannot be argued that it is not liable to revision as being an order passed under Chapter XII of the Code. There only remains to notice the ground upon which the Sessions Judge dismissed the application for revision, that is to say, on the ground that the order was an executive order. In this connection I might refer usefully to two well-known decisions of the Allahabad High Court. One of these is reported as *In the matter of the petition of Rahmat-Ullah* (1), the other as *Muhammad Bakar Ali* v. *Hanwant Singh* (2). In the former case a certain order which had been passed by a District Magistrate was sought to be supported by him on the ground that it was an executive order. The case

(1) 17 A. 485; A. W. N. (1895) 96.

(2) A. W. N. (1897) 59.

was heard by a Full Bench and in the judgment we have the following observations by their Lordships on the question of the authority of Magistrates to issue orders of this kind: "The authority of every Magistrate to do any act as Magistrate or as Collector, if such authority exists, must ultimately be found in the powers conferred by Parliament. The immediate power may be an executive order of the local administration, but the power of the local administration to make an order must be derived either directly or indirectly from Parliament, and it is a mistake to assume that, because an officer is an Executive Officer or a Judicial Officer, he has any power to interfere with private or public persons which cannot be derived from a lawful origin, namely, the Acts of Parliament."

The order in that particular case was set aside on the ground that it was *ultra vires* and the Magistrate had no power or jurisdiction to make it. The second of the cases mentioned above was also decided upon similar grounds. It was observed in the judgment in this latter case that Collectors or Magistrates must act according to law, and they must not assume from the fact that they are either Magistrates or Collectors that they have a jurisdiction which the law has not given them. In my opinion the view of the Sessions Judge was erroneous and it is impossible to contend that the order passed by the District Magistrate can be supported as an executive order in the absence of any statutory authority which would justify the making of it. The learned Government Pleader who appeared to show cause, referred to certain section of the Police Act (V of 1861) and in particular to sections 30 and 30 A. I can, however, find nothing in those sections which would confer upon the District Magistrate any authority to make an order such as the one now complained of. I must hold, therefore, that the order passed by the District Magistrate was *ultra vires* and must be discharged. I order accordingly.

Order discharged.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 212 OF 1914.
CRIMINAL REVISION PETITION No. 180 OF 1914.
August 28, 1914.

Present:—Mr. Justice Spencer.

VAIDYANATHA IYER AND OTHERS—1ST PARTY—PETITIONERS

versus

SUPPALU AMMAL AND ANOTHER—2ND PARTY—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 145—Order on merits—Revision.

In a case under section 145, Criminal Procedure Code, when the Magistrate has, on perusal of the written statements of the parties, decided that the possession of the first party was of an agent and that the 2nd party, the principal, was entitled to possession:

Held, that the decision being on the merits the High Court will not interfere in revision.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Sub-Divisional First Class Magistrate of Kumbakonam in his Case No. 3 of 1914.

Mr. *T. Rangachariar*, for the Petitioners.

Mr. *K. Sreenivasa Iyengar*, for the Respondents.

ORDER.—A preliminary objection has been taken that this Court will not interfere with an order passed under section 145 of the Code of Criminal Procedure unless it is apparent that the Magistrate acted without jurisdiction, and *Kamal Kutty* v. *Udayavarma Raja Valia Raja of Chirakal* (1) is quoted in support of that proposition.

The Magistrate in this case has on perusal of the written statements of their respective claims put in by parties in accordance with the requirements of the section decided that the 1st party's possession was the possession of an agent and that the 2nd party, his principal, is the person entitled to possession.

It is argued that in refusing to recognise the possession, of the 1st party which he alleges to be actual possession the Magistrate declined a jurisdiction which he ought to have assumed. But the Magistrate concluded by passing an order in the usual form in favour of the second party, so that it cannot be said that he declined jurisdiction by

(1) 17 Ind. Cas. 65; 36 M. 275; (1912) M. W. N. 1154; 12 M. L. T. 439; 23 M. L. J. 499; 13 Cr. L. J. 753.

deciding that the first party had no *locus standi*. Such a decision may have been right or wrong, but it was a decision on the merits upon the materials before the Magistrate, and it is not necessary to go so far as the learned Judges have gone in *Meenatchi Achi* v. *Ananthanarayana Ayyar* (2) to hold that it was not intended by the Legislature that the High Court should interfere in revision in this class of cases.

Petition dismissed.

(2) 26 M. 224: 12 M. L. J. 380.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 178 OF 1913.

March 18, 1914.

Present:—Mr. Hayward, J. C., and Mr. Boyd, A. J. C.

Messrs. NARUMAL KHEMCHAND—APPLICANTS

versus

THE BOMBAY COMPANY, LTD.—OPPOSITE PARTY.

Merchandise Marks Act (IV of 1889), ss. 2 (2), 4, 7—Pattern or design covering whole body of goods, whether trade mark—Penal Code (Act XLV of 1860), ss. 478, 486—Indian Patents and Designs Act (II of 1911), s. 2 (5)—Design—Pattern—Trade mark—Trade description.

Where a design or pattern covers the whole body of goods and is part and parcel of the goods themselves, it falls within the definition of "design" given in section 2 (5) of the Indian Patents and Designs Act II of 1911, and does not satisfy the ordinary conception of a trade mark. Nor is such a design or pattern a "trade description" within the meaning of section 2 (2) of the Merchandise Marks Act IV of 1889.

Mr. *T. G. Elphinston*, for the Applicants.

Mr. *E. Raymond*, Public Prosecutor, for the Crown.

JUDGMENT.—The complainant firm have alleged that they have, for a long time, imported chintz printed with a particular design or pattern; that the accused firm has recently imported similar chintz printed with a similar design or pattern, with a view to deceive purchasers as to the real importers. It has not, however, been alleged that any purchasers have actually been deceived and that the accused firm is guilty of cheating under section 415, Indian Penal Code, nor has it been denied that the accused firm would ordinarily have the right to copy the design or pattern, as such, in default of protection under the Indian Patents and Designs Act, 1911. But it has been alleged that the design or pattern amounted to a trade mark and that if it did not amount to a trade mark, at all events it amounted to a trade description, and that copying the design or pattern amounted to an offence either under section 486, Indian Penal Code, or under section 7 of the Merchandise Marks Act.

Now, the design or pattern covers the whole body of the goods and appears to us to be part and parcel of the goods and to fall within the definition of "design" given in section 2 (5) of the Indian Patents and Designs Act, 1911. It does not appear to us to satisfy the ordinary conception of a trade mark. It is not a mark apart and different from the goods, applied to them for denoting the goods to be the manufacture or merchandise of a particular person within the meaning of section 478 of the Indian Penal Code. The copying of the design or pattern could not, therefore, be treated as a counterfeiting of a trade mark within the meaning of section 486, Indian Penal Code.

Nor do we think that the design or pattern can properly be brought within the definition of "trade description" contained in section 2 (2) of the Merchandise Marks Act. That definition includes, it is true, any indication, direct or indirect, but only as to certain definite and specified matters such as the number, measurement or weight of the goods; the place or country of origin; the mode of manufacture of the material of which any goods are composed; or the existence of some privilege attached to the goods, that is, to some special protection afforded by law. None of these matters, however, has here any application. Nor do we think that recourse can properly be had to the supplementary provisions of section 4 of the Marchandise Marks Act. The design or pattern makes the chintz attractive for sale and is part and parcel of the goods themselves. Whereas what appears to us to be contemplated by the section is the application of some independent marks calculated to lead persons to believe the goods to be the merchandise of some other person. The design or pattern could not, therefore, be treated as a false trade de-

scription under section 7 of the Merchandise Marks Act.

We are, therefore, of opinion that no offence has been disclosed by the allegations and that process ought not to have issued. We must accordingly quash the proceedings of the learned Additional City Magistrate.

Proceedings quashed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 295 OF 1914.
CRIMINAL REVISION PETITION NO. 253 OF 1914.
October 12, 1914.

Present:—Mr. Justice Kumaraswami Sastri.

A. CHIDAMBARA GURUKKAL—COMPLAINANT—PETITIONER

versus

SENGODA GOUNDEN AND ANOTHER—ACCUSED—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 147—Right to enter temple to perform kumbabhishekam *ceremony, whether right to immoveable property—Danger of breach of peace, finding as to, whether necessary.*

A right to enter a temple and officiate at the *kumbabhishekam* ceremony; whenever it is necessary to perform it, is a right "to immoveable property" within the meaning of section 147 of the Code of Criminal Procedure.

Guiram Ghoshal v *Lal Behary Das*, 16 Ind. Cas. 182; 37 C. 578; 14 C. W. N. 611; 11 Cr L. J. 292; 12 C. L. J. 22; *Ram Saran Pattak* v *Raghu Nandan Gir*, 9 Ind. Cas. 6; 38 C. 387; 12 Cr. L. J. 3; 13 C. L. J. 445; dissented from.

Kader Batcha v. *Kader Batcha Rowthan*, 4 Cr. L. J. 58; 29 M. 237; *Muhammad Musaliar* v. *Kunji Chek Musaliar*, 11 M. 323; 2 Weir 117, followed.

Section 147 of the Code of Criminal Procedure does not require a Magistrate to formally record a proceeding that there is in his opinion danger of a breach of the peace.

Millar v. *Rajendra Nath Chowdhry*, 2 C. W. N. 670, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Joint Magistrate of Salem, in Miscellaneous Case No. 8 of 1914, dated 4th April 1914.

Mr. *L. S. Veeraraghava Aiyar*, for the Petitioner.

Dr. *S. Swaminadhan*, for the Respondents.

ORDER.—This is a petition against the order of the Joint Magistrate of Salem passed under section 147 of the Criminal Procedure Code directing the petitioner not to perform the *kumbabhishekam* ceremony till he establishes his claim in a Civil Court. The case for the petitioner was that he as *Guru* of the Nattu and Vellala Gowndanars was the only person who was entitled to perform the *kumbabhishekam* ceremony in the Chinnamman Temple, that the counter-petitioners were arranging to have the ceremony performed by another person contrary to *mamul* and that a dispute likely to cause a breach of the peace exists. He prayed that the counter-petitioners be prevented from entering the temple and performing the ceremony.

The Joint Magistrate held that the petitioner did not make out his right and directed him not to perform the ceremony until he established his right in a Civil Court.

The grounds urged by the petitioner are:

(1) that the right in dispute is not one falling under section 147 of the Criminal Procedure Code and that the Magistrate had no jurisdiction to pass the order;

(2) that there being no finding that there was any likelihood of a breach of the peace, the order is irregular;

(3) that the right claimed being one which is not cognizable by a Civil Court the order directing petitioner to abstain from the exercise of the right till he established his claim in a Civil Court, is illegal.

As regards the first point, there is a conflict of authority between the Calcutta and the Madras High Courts. In *Guiram Ghoshal* v. *Lal Behary Das* (1) it was held that a dispute merely concerning the right to act as *pujari* in a temple is not within the scope of section 147 of the Code and this decision was followed in *Ram Saran Pattak* v. *Raghu Nandan Gir* (2).

In *Kader Batcha* v. *Kader Batcha Rowthan* (3), it was held that a dispute as to the rights to use a mosque between persons claiming to be entitled to officiate as *Kazi* therein is a dispute coming within section 147 of the Code of Criminal Procedure.

(1) 6 Ind. Cas. 182; 37 C. 578; 14 C. W. N. 611; 11 Cr. L. J. 292; 12 C. L. J. 22.

(2) 9 Ind. Cas. 6; 38 C. 387; 12 Cr. L. J. 3; 13 C. L. J. 445.

(3) 29 M. 237; 4 Cr. L. J. 58.

The case of *Muhammad Musaliar* v. *Kunji Cheh Musaliar* (4) also supports the view taken in *Kader Batcha* v. *Kader Batcha Rowthan* (3). In the present case the right claimed is the right to enter the temple and officiate at the *kumbabhishekam* ceremony whenever it is necessary to perform the ceremony, and it is difficult to distinguish it from the Madras cases above cited which I am bound to follow.

As regards the second point, the petitioner alleged fear of a breach of the peace both in his petition and the statements given to Court. The Magistrate does not in so many words say that he is satisfied that there is danger of a breach, but this seems to have been taken for granted by all parties. In the case of *Millar* v. *Rajendra Nath Chowdhry* (5) it was held that section 147 does not require the Magistrate formally to record a proceeding that there is in his opinion danger of a breach of the peace.

The order of the Magistrate is not bad on this ground.

As regards the third point, the materials before me are not sufficient to enable me to decide whether the right claimed is purely one relating to religious rites or ceremonies and does not involve the right to use the temple for specific purposes and to receive emoluments. I see no reason to interfere with the order as to costs awarded by the Magistrate.

The petition fails and is dismissed.

Petition dismissed.

(4) 11 M. 323; 2 Weir 117.
(5) 2 C. W. N. 670.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 8 OF 1914.
CRIMINAL REVISION PETITION No. 7 OF 1914.
September 21, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

IMANDY APPALASWAMI—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 182, 211—Autrefois acquit—Burden of proof—Offence under s. 182—Complaint to public servant, whether necessary.

The burden of establishing the existence of facts necessary for the application of the doctrine of *autrefois acquit* lies upon the accused.

To sustain a prosecution for an offence under section 182, Indian Penal Code, it is not necessary that the complaint should have been made to a public servant with the intention of inducing such public servant to take action of a sort which a public servant of the description in question could take and which would not be open to a private individual.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate of Koraput, in Criminal Appeal No. 12 of 1913, preferred against that of the 2nd Class Magistrate of Vizagapatam, in Calendar Case No. 175 of 1913.

FACTS.—The accused, a village postman, was prevailing upon a villager to whom he was delivering a money order to pay him a small sum as present when a third party interfered and took him to task for demanding the present. The accused thereupon threw down his bag, ran back to the Sub-Postmaster and told him that he had been beaten by that third party who robbed him of his bag, etc. The Sub-Postmaster immediately gave information to the Police, who inquired into the matter and referred the complaint as false. Proceedings were then initiated against the postman under section 211, Indian Penal Code, for giving false information to the Police which, however, ended in his favour. He was then prosecuted under section 182, Indian Penal Code, for giving false information to the Sub-Postmaster with a view to his taking action against the third party and was convicted. Against that conviction he filed this criminal revision petition in the High Court.

Mr. *B. Narasimha Row*, for the Petitioner:—The doctrine of *autrefois acquit* applies to this case. The petitioner has been tried on the same facts for an offence under section 211, Indian Penal Code, and acquitted. He cannot again be tried for the present offence on the same facts. *K. Ganapathi Bhatta* v. *Emperor* (1). *Secondly*, section 182, Indian Penal Code, is inapplicable. That section refers only to cases where information is given to public servants with a view to induce them to take such an action can be

(1) 19 Ind. Cas. 310; 24 M. L. J. 463; 13 M. L. T. 360; 14 Cr. L. J. 214; 36 M. 308

taken only by such public servants and not by private individuals. The word 'ought' in the section and the illustration to the section amply bears out this view.

The *Public Prosecutor*, for the Crown:—There is nothing on record to show that the accused was acquitted in the previous case. He might have been discharged, in which case there would be nothing illegal in his being tried again. Anyhow the burden is upon the accused to establish his previous acquittal and he has failed to do so. Section 182 is clearly applicable. The interpretation placed upon the section by the petitioner's Counsel is ingenious but not tenable.

ORDER.

OLDFIELD, J.—It is first argued with reference to *K. Ganapathi Bhotta's* case (1) that the accused, who has been placed on his trial on a charge of an offence punishable under section 211, Indian Penal Code, cannot be tried again for one punishable under section 182, Indian Penal Code. It was for the accused to establish the facts necessary for the application of this authority; and we cannot find on the record anything to show that he was acquitted in the previous proceedings and not merely discharged. In these circumstances the plea has not been established.

Next, it is urged that section 182 applies only to a complaint to a public servant when it is made with the intention of inducing such public servant to take action of a sort which only a public servant of the description in question could take and which would not be open to a private individual. In illustration (*a*) to section 182 the action expected to be taken by the public servant was simply dismissal of a subordinate and any master could do the same. This illustration is, therefore, irreconcilable with accused's interpretation of the section which must be rejected.

The petition is, therefore, dismissed.

TYABJI, J.—I agree that the plea of previous acquittal is not made out.

On the facts proved I think the conviction was justified because the accused gave to a public servant (the Sub-Postmaster) information which the accused knew to be false intending thereby to cause the Sub-Postmaster to do something (*viz.* sending information to the Police) which he ought not to have done if the true state of facts were known by him. It is argued that the Sub-Postmaster did not send information to the Police in his official capacity. I will assume that that would be relevant to the question. I do not express any opinion on this point. The act referred to in illustration (*a*) to the section as likely to be brought about by the false information is dismissal by the Magistrate of his subordinate. That is clearly an official act that could be done by the Magistrate only as a Magistrate. It seems to me, however, that the information by the Sub-Postmaster in the present case was sent by him in his official capacity.

The petition is, therefore, dismissed.

Petition dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASES NOS. 106 AND 151 OF 1914.

CRIMINAL REVISION PETITIONS NOS. 93 AND 128 OF 1914.

August 25, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

TANGUTURI SRIRAMULU AND OTHERS—PETITIONERS

versus

NALAM KRISHNA ROW AND OTHERS—COUNTER-PETITIONERS.

Criminal Procedure Code (Act V of 1898), ss. 350, 253 (2), 258—Trial re-commenced under s. 350—Charge, whether cancelled—Discharge—Acquittal.

A Magistrate who re-commences an "inquiry" or "trial" under section 350, Criminal Procedure Code, does not thereby modify its nature or the stage at which it has arrived. Therefore, once a charge is framed and trial begun, the charge cannot be cancelled by reason of re-commencement of the trial under section 350 and the only order which the second Magistrate can pass is that of acquittal under section 258, and not that of discharge under section 253 (2), Criminal Procedure Code.

Petitions, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the District Magistrate of Godaveri, in Criminal Revision Petition No. 2 of 1914, preferred against that of the Joint Magis-

trate of Rajahmundry, in Calendar Case No. 109 of 1913.

Messrs. *J. L. Rosario*, *T. Prakasam* and *B. Narasimha Rao*, for the Petitioners.

The *Public Prosecutor*, for the Government.

Messrs. *E. R. Osborne*, *D. Appa Rao*, *V. Ramadoss* and *N. S. Narasimha Chariar*, for the Counter-Petitioners.

ORDER.

AYLING, J.—We are asked to revise an order of the District Magistrate of Godaveri, which directs under section 437 of the Criminal Procedure Code further inquiry into a case of defamation in which the Joint Magistrate of Rajahmundry, Mr. Stewart, had passed what purports to be an order of discharge under section 253 of the Criminal Procedure Code.

Mr. Rosario, on behalf of the petitioners, argues that Mr. Stewart's order was, in effect, an order of acquittal under section 258 of the Criminal Procedure Code. If this is so, the District Magistrate undoubtedly had no power to order further inquiry under section 437 and his order must be set aside as *ultra vires*. The facts are these. The case against petitioners was first heard by Mr. Bardswell, Mr. Stewart's predecessor-in-office. He heard the prosecution witnesses and framed a charge under section 254 of the Criminal Procedure Code, to which petitioners pleaded not guilty. He was then transferred. Mr. Stewart re-commenced the inquiry under section 350 of the Criminal Procedure Code, examined the complainant as Prosecution Witness No. 1 and then passed an order of discharge under section 253 (2).

Mr. Rosario contends that a charge having once been framed, it is not cancelled by reason of the re-commencement of inquiry and the only course open to Mr. Stewart was either to record an order of acquittal or to convict (*vide* section 258 of the Criminal Procedure Code).

The only question is whether the re-commencement of a "trial" under section 350 of the Criminal Procedure Code implies the cancellation of a charge framed by the first Magistrate. There appears to be no direct authority of this or any other High Court on the point, though the Punjab Chief Court has considered a precisely similar case and arrived at the conclusion that the charge remains in force and the subsequent order must be treated as one of acquittal and not of discharge [*vide Emperor* v. *Nathu* (1)].

The interpretation of section 350 is by no means free from doubt: but on the whole I am inclined to agree with the view taken by the learned Judges of the Punjab Chief Court. The only object of the substantive portion of clause (1), section 350, seems to be to leave it to the discretion of the Magistrate to either act on evidence recorded by his predecessor or to hear it over again for himself. The discretion is somewhat restricted by proviso (*a*), and proviso (*b*) gives the superior Courts special powers of interference. Subject to these provisos the discretion is absolute. It is not clear why this should involve the cancellation of the charge or the transformation of the proceedings from a "trial" back into an "inquiry." As far as this Court is concerned, it is settled law that the proceedings before a Magistrate in a warrant case under Chapter XXI of the Criminal Procedure Code are only an "inquiry" until a charge is framed and on a charge being framed become a trial: vide *Palaniandy Gounden* v. *Emperor* (2) and *Narayanaswamy Naidu* v *Emperor* (3). Bearing this distinction in mind, it would seem to follow that where the proceedings re-commenced under section 350 are only an inquiry, they are re-commenced as an inquiry. Where they have developed into the trial stage they are re-commenced as a trial, *i.e.*, a proceeding in which a charge has been framed. The second Magistrate cannot ignore the charge framed by his predecessor and his position is practically the same as that of his predecessor would have been if, after framing a charge, he had heard further cross-examination of the prosecution witnesses under section 256 (1) and on a consideration thereof, become satisfied that the charge was not well founded. It may not be altogether out of place to refer to *Sadagopacharyar* v. *Raghavacharyar* (4) wherein it was held that the re-commencement

(1) 14 P. R. 1903 Cr.; 175 P. L. R. 1903.

(2) 1 Ind. Cas. 54; 32 M. 218; 5 M. L. T. 218; 9 Cr. L. J. 146.

(3) 1 Ind. Cas. 228; 32 M. 220 (F. B.); 5 M. L. T. 233; 9 Cr. L. J. 192; 192; 19 M. L. J. 157.

(4) 9 M. 282; 2 Weir 243.

of an inquiry under sention 350 did not cover a reference to the Police under section 202 of the Criminal Procedure Code. I do not press the analogy, but it is consistent with this to hold that a Magistrate who re-commences an inquiry or trial does not thereby modify its nature or the stage at which it has arrived.

Mr. Stewart's order must, in my opinion, be received as one of acquittal and the District Magistrate's order for further inquiry must be set aside.

TYABJI, J.—Section 350 (1) of the Criminal Procedure Code provides for the re-summoning and re-hearing of the witnesses and the re-commencement of the inquiry or trial by the Magistrate who succeeds after his predecessor has already heard the evidence. The section is silent on the question whether or not on such re-hearing any charge that may have been already framed after the first hearing must subsist. In purporting to interpret section 350, therefore, we have really to decide what would have been provided in the section had the point been explicitly dealt with.

It does not appear that the point can be considered to have been dealt with by some necessary implication in that which is expressly laid down. On the other hand, if it is assumed in this connection that the charge already framed should be considered to be wiped out, the assumption involves that the Legislature has also overlooked the point that the succeeding Magistrate ought in that case to be empowered to frame a fresh charge or to adopt the charge already framed with or without alterations.

I am not prepared to say, therefore, that the interpretation put upon the section by the Chief Court of the Punjab is not the most reasonable one.

The petitioners ought, therefore, to have been acquitted instead of being discharged and the District Magistrate had no power to order further inquiry. His order to that effect must consequently be set aside.

Order set aside.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL NO. 9 OF 1914.

May 20, 1914.

Present:—Mr. Hayward, J. C.

BULCHAND RAMCHAND AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 499, Exceps. 8, 9—Defamation—Receiving property from unadjudicated insolvent, whether receiving stolen property—Imputation—Good faith.

Where the creditors of an unadjudicated insolvent saw the complainant leave his shop with a bundle in his arm and suspecting that it contained the insolvent's property, accused him of receiving stolen property but on opening it was not found to contain the expected stolen property:

Held, that the imputation was not made in good faith within the meaning of exception 8 or 9, to section 499 of the Penal Code and that the creditors were guilty of defamation.

Appeal against the order of the Additional City Magistrate, Karachi.

Mr. *Wadhumal Oodharam*, for the Appellant.

Mr. *E. Raymond*, Public Prosecutor, for the Crown.

JUDGMENT.—The three appellants appeal against their conviction on a charge of defamation by the Additional City Magistrate.

It appears that an application had been filed to declare one Hasomal an insolvent and an *ad interim* Receiver had been appointed. The creditors then made an application on 15th April 1913 for the seizure of Rs. 6,000 worth of property belonging to the insolvent, Hasomal, and alleged to have been transferred to Kisumal. That same night, the 15th of April 1913, some of the creditors and others saw Kisumal leave his shop with a bundle under his arm and full of suspicions, they followed him to the shop of one Pamanmal. The 3rd appellant, Rochiram, one of the creditors, appears to have been among the crowd and to have charged Kisumal with having stolen property in his bundle. The 2nd appellant, Belomal, who is also one of the creditors, appears to have made the same charge and to have called in the assistance of 1st appellant, Bulchand, who though a friend only of the other two and not a creditor joined in the charge by urging that Kisumal should be taken up by the Police. Anyway Kisumal did, as a matter of fact, find his way with

the three appellants to the Police Station and a charge of having stolen property in the bundle was made against him before the Sub-Inspector. The bundle was then opened and to the disappointment of the appellants was found to contain nothing but bits of cloth which, they had to admit, was not the expected stolen property in respect of which they had made the charge before the Sub-Inspector. The three appellants were on these facts found guilty of defamation in having charged Kisumal with having stolen property in his possession at Pamanmal's shop and at the Police Station.

It has been contended on behalf of the appellants that they have not all been shown to have joined in the charge against Kisumal and that in any case the charge made was in good faith for the protection of their interests. There appears to me, however, no reason to doubt that all the three appellantsd id actually charge the complainant, Kisumal, with having stolen property in his possession in the bundle found under his arm. This is sufficiently proved amongst other evidence by the statements of the shop-keeper Pamanmal and the Sub-Inspector. The only substantial question for discussion is whether the three appellants were justified in the circumstances in making this charge of theft against Kisumal. Their object in making this charge is quite obvious. They had already taken civil proceedings to secure the property of the insolvent believed to be in the hands of Kisumal. They know the insolvent had been helped by Kisumal and they had, no doubt, grounds for suspicion about the bundle carried by Kisumal. But there had been no adjudication of insolvency and, therefore, no vesting of the estate in the Receiver, who was only an *ad interim* Receiver and not the Official Receiver. They must have been well aware that it was not a case of theft on the part of Kisumal as the property had not vested in the Official Receiver. But it was necessary for them to call the property stolen property in order to obtain the immediate assistance of the Police. The property was not stolen property as it had not been transferred by theft or by robbery and could not, in my opinion, be said to have been transferred either by criminal misappropriation or by breach of trust within the meaning of section 410, Indian Penal Code. The imputations and accusations of theft made by the appellants cannot, therefore, be said to have been made in good faith within the meaning either of the 8th or 9th exception of section 499, Indian Penal Code.

The convictions and sentences must, therefore, be confirmed and the appeals dismissed. The offence may not have been a very grave one in all the circumstances and the charge made may have been brought on himself by Kisumal. But people must learn not to endeavour to go beyond the law and bring before the Police and Magistrates, matters which should really only be litigated in the Civil Court.

Convictions and sentences confirmed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 77 OF 1914.
CRIMINAL REVISION PETITION NO. 66 OF 1914.
August 26, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

SUBBIAH SERVAI—PETITIONER

versus

CHOKKALINGA THEVAN AND OTHERS—COUNTER-PETITIONERS.

Criminal Procedure Code (Act V of 1898), *s.* 145 *—Costs ordered by one Magistrate—Successor, whether competent to assess Death of party in whose favour order is made—Application by deceased's son for assessment of costs, whether entertainable—Procedure—Interpretation —Power of Courts to invent rules.*

The Code of Criminal Procedure contains no special provisions for bringing on record representatives of accused parties. All that the Court has to see is that the appeal or application has not abated by reason of the death of one of the parties.

The successor of a Magistrate, who decided a case under section 145, Criminal Procedure Code, and directed a party to pay his opponent's costs, has jurisdiction to assess the amount of costs.

Per *Sadasiva Aiyar, J.*—Courts should always lean in favour of that view of the law which would enable a party who has got an order in his favour to obtain the fruits of that order, and not in favour of highly technical objections which render the Court's order infructuous and a mere piece of waste paper.

Courts have the power within reasonable limits to invent rules of procedure for this purpose when the Legislature has not enacted such rules, unless the Legislature prohibits them from doing so.

MUHAMMAD ALI MUHAMMAD KHAN *v.* EMPEROR.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, and section 15 of the Charter Act, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate of the Pattukottai Division, in Miscellaneous Case No. 18 of 1909, dated 21st August 1913.

Mr. *P. R. Narayanasawmy Aiyar*, for the Petitioner.

Mr. *M. Narasimhan*, for the Counter-Petitioners.

The *Public Prosecutor*, for the Government.

ORDER.

SPENCER, J.—In proceedings under section 145 of the Code of Criminal Procedure, M. R. Ry. P. S. Vasudeva Row, the Sub-Divisional Magistrate, passed a final order which included a direction that the counter-petitioners should pay the petitioner's costs. Within three days after the order of 24th August 1910, two memoranda for taxing costs were put into Court by the petitioner's Vakils. The Magistrate passed an order on the second of these memoranda, "Check and include," but through some negligence in the Magistrate's office costs were not actually taxed.

Nearly three years later, the petitioner's son applied to the Magistrate's successor-in-office for costs being assessed, the petitioner having died in the interval.

The Magistrate has rejected his application on the ground (1) that the petitioner's son had not been brought on record as legal representative of his deceased father, (2) that there had been great delay in applying.

The first objection is not good. The Code of Criminal Procedure contains no special provisions for bringing on record representatives of deceased parties. All that the Court has to see is that the appeal or application has not abated by reason of the death of one of the parties.

The delay might have been overlooked if the son's petition had been treated as a reminder to the Court to do that which it should have done when the memoranda were presented.

The respondents' Counsel and the Public Prosecutor have raised another question, which is whether the successor of the Magistrate who decided the case has jurisdiction to assess the amount of the costs.

I think that this has been rightly settled in the affirmative by the decisions in *Mahomed Ershadali Khan Choudhry* v. *Saroda Prosad Shaha* (1), which dissented from *Bhojal Sonar* v. *Nirban Singh* (2) and followed *Giridhar Chatterjee* v. *Ebadulla Naskar* (3), *Binoda Sundari Chowdhurani* v. *Kali Kristo Pal Chowdhury* (4).

We set aside the Magistrate's order and direct him to pass orders, assessing costs in the case.

SADASIVA AIYAR, J.—I entirely agree. Courts should always lean in favour of that view of the law which would enable a party who has got an order in his favour to obtain the fruits of that order, and not in favour of highly technical objections which render the Court's order infructuous and a mere piece of waste paper. Courts have the power within reasonable limits to invent rules of procedure for this purpose when the Legislature has not enacted such rules, unless the Legislature prohibits them from doing so.

Order set aside.

(1) 23 C. 37.
(2) 21 C. 609.
(3) 22 C. 384.
(4) 22 C. 387.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION NO. 114 OF 1914.

July 17, 1914.

Present:—Mr. Kendall, A. J. C.

The Hon'ble. Raja Sir MUHAMMAD ALI MUHAMMAD KHAN—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

U. P. Motor Vehicles Act (II of 1911), *s.* 13 (*b*)—*'Employs', meaning of—License to drive motor.*

The word 'employs', as used in section 13 (*b*) of the U. P. Motor Vehicles Act (II of 1911), means 'has' or 'retains' in his employ and not 'takes into his employ'.

The section provides *imprimis* for the case of a man who at the time in question is driving a motor vehicle without a license and, therefore, clearly refers to the case of a license in force at the time of such driving.

Appeal against the order of the Sessions Judge, Lucknow, dated 23rd April 1914, upholding that of the City Magistrate, Lucknow, dated 13th March 1914.

Mr. *Wazir Hasan*, for the Applicant.

The *Government Pleader*, for the Opposite Party.

KYA NYUN v. EMPEROR.

JUDGMENT.—Shafi Ahmad, a motor-driver in the employ of the Raja Saheb of Mahmudabad, was caught driving his master's car without a license. He has been fined Rs. 10. The Raja Saheb has also been fined Rs. 5, under section 13 (*b*) of the Motor Vehicles Act (II of 1911): and the latter has applied in revision to this Court on the grounds that the lower Court has misinterpreted sections 4 and 13 of the Act and that on the facts found he is not guilty of any offence.

Section 13(*b*) runs as follows: "whoever drives a motor vehicle without having obtained a license under section 4 or employs any person to drive who has not obtained a license shall be punishable..." It is admitted that the chauffeur had a Roorkee certificate, and it is admitted that, when the Raja engaged him on the 4th of February 1913, he held a license issued in the Punjab and which would be still in force up to the 19th February 1913. That license, at the time of his apprehension in the early months of 1914, had long since lapsed and had not since been renewed. It is argued that the word "employs" in section 13 (*b*) means "takes into his employ." I cannot accept this interpretation. The word evidently means "has" or "retains in his employ:" and that is the sense the word is used in, *e.g.*, 32 and 33 Vic., Chapter 14, rules 22 and 27, which Act deals with the question of certain duties of customs and inland revenue and which sections deal with duties payable by persons keeping servants, etc. It is next argued that all this section requires is that the man should at some time have obtained a license under section 4, as this chauffeur had done, whether or not that license had lapsed and not been renewed; for it is said that section 4 applies to the original taking out of a license, whereas its renewal is dealt with in section 5. This interpretation again cannot be accepted. This is not a sub-section which simply requires that an owner should at the time of engaging a chauffeur see that the man is able to drive. It provides *imprimis* for the case of a man who at the time in question is driving a motor vehicle without a license; and it clearly refers to the case of a license in force at the time of such driving. Renewed licenses are, equally with original licenses, licenses under section 4. The application is, therefore, rejected.

Application rejected.

LOWER BURMA CHIEF COURT.

CRIMINAL APPEAL No. 883 OF 1913.

December 8, 1913.

Present:—Sir Henry Hartnoll, Offg. Chief Judge, and Mr. Justice Twomey.

KYA NYUN—APPELLANT

versus

EMPEROR—RESPONDENT.

Jury trial—Verdict not unanimous—Re-consideration after delivery, whether legal—Questions to Jury—Procedure—Criminal Procedure Code (Act V of 1898), ss 302, 303, 307.

When a Jury has returned a clear and unambiguous though not unanimous, verdict, the Sessions Judge has no power to put questions to the Jury under section 303 of the Criminal Procedure Code. If he disagrees with the verdict of the majority, he should proceed under section 307.

Mr. *May Oung*, for the Appellant.

JUDGMENT.

HARTNOLL, OFFG. C. J.—The appellant, Maung Kya Nyun, has been tried for murder, punishable under section 302 of the Indian Penal Code, by the Sessions Judge, Tenasserim Division, and a Jury. He was charged with the murder of one Ma Shan Ma by stabbing her with a dagger.

In charging the Jury the learned Sessions Judge in explaining the law said: "If you find that accused stabbed Ma Shan Ma then you must also find with what intention he did so.

"(1) Did he stab with the intention of causing death? If so, then your verdict should be murder under section 302 of the Indian Penal Code.

"(2) Did he stab with the intention of causing bodily injury sufficient in the ordinary course of nature to cause death? If so, then your verdict should be murder under section 302 of the Indian Penal Code.

"(3) Did he stab with the intention of causing such bodily injury as was likely to cause death? If so, then your verdict should be culpable homicide not amounting to murder punishable under the first part of section 304 of the Indian Penal Code.

"(4) Is he guilty of voluntarily causing grievous hurt by means of a dangerous weapon? If so, then your verdict should find under section 326 of the Indian Penal Code."

At the end of the charge the Sessions Judge said practically the same again. The Jury then returned a verdict by a majority of 3 to 2 of culpable homicide not amounting to murder under the first part of section 304 of the Indian Penal Code. Taken in conjunction with the charge this is a clear and unambiguous verdict.

The Sessions Judge was not satisfied with it and put to the Jury the following question:—

"Do you not consider that accused stabbed with the intention of causing death or of causing bodily injury, and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death? If you do, then you would be justified in bringing in a verdict of murder under section 302 of the Indian Penal Code."

The Jury retired again and then returned with the answer that they were unanimously of opinion that accused intended to cause bodily injury sufficient in the ordinary course of nature to cause death. The Judge then said: "Then, do you consider the accused guilty of murder?" The answer was "Yes." On this the Judge found appellant guilty of murder undr section 302 of the Indian Penal Code and sentenced him to be hanged.

It was urged on appeal that the Jury having, returned a clear and unambiguous verdict the Sessions Judge erred in putting questions under section 303 of the Criminal Procedure Code and erred in not holding that the verdict under section 304 of the Indian Penal Code was right as a matter of law. The Sessions Judge may have thought that, as the first verdict of the Jury was not unanimous, he had the power under section 302 of the Code of Criminal Procedure to require them to retire for further consideration. In my opinion that section gives the Sessions Judge no such power after the verdict has been actually delivered. He could have asked them to retire for further consideration when he ascertained that they were not unanimous and before the delivery of their verdict, but could not do so after the actual delivery of the verdict. If he disagreed with the verdict of the majority, he should have proceeded under section 307 of the Criminal Procedure Code. This is the view taken in the case of *Hurry Churn Chuckerbutty* v. *Empress* (1), but I would not go so far as to say that a Sessions Judge cannot act under section 302 of the Code of Criminal Procedure when he has merely asked the Jury the exact majority and has not actually taken the verdict.

The question remains as to what orders should now be passed. This is the second trial of appellant and a third trial is inadvisable. The first verdict of the Jury was clear and unambiguous. I would accept it.

I would alter the conviction to one under the first part of section 304 of the Indian Penal Code and the sentence to one of transportation for life.

TWOMEY, J.—I agree in holding that the action of the learned Sessions Judge was not warranted by law. On receiving the plain verdict of guilty under the first part of section 304, Indian Penal Code, the Judge's only lawful, course if he disagreed with the majority, was to submit the case with the grounds of his opinion to this Court under section 307. He had no authority in the circumstances to put questions to the Jury or to send them back for further deliberation. This view is in accordance with those expressed by the Bench in the Calcutta case to which my learned colleague refers. But I note that the judgment in that case does not go the length of saying that a Sessions Judge may not act under section 302 of the Code of Criminal Procedure when he has merely ascertained from the Jury in what proportion they are divided. It is only when the nature of the actual finding has been disclosed that the Court is debarred from sending the Jury back.

The charge of murder appears to me to have been fully established by the prosecution in this case, and the result must, therefore, be regarded as a miscarriage of justice. At the same time and although we have the power to order a fresh trial I think it would be inexpedient to do so,

(1) 10 C. 140 at p. 144; 13 C. L. R. 358.

In re NARAYANA PADAYACHI.

seeing that the appellant has been already tried twice.

I, therefore, concur in altering the conviction to one of culpable homicide not amounting to murder under the first part of section 304, Indian Penal Code, and the sentence to one of transportation for life.

Conviction altered.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 479 OF 1912.

October 18, 1912.

Present:—Mr. Justice Napier.

In re NARAYANA PADAYACHI—ACCUSED.

Forest Act (Mad. Act V of 1882), ss. 53, 55—Compounding offence—Payment of compensation during proceedings in Court—Proceedings, lapse of.

The provisions of section 53 of the Forest Act (Madras Act V of 1882) that on payment of compensation 'no further proceedings shall be taken' mean that proceedings in progress must lapse.

Case referred for the orders of the High Court under section 438 of the Criminal Procedure Code by the District Magistrate of South Arcot, in his letter, dated 18th August 1912, Miscellaneous Case No. 1124 of 1912.

Mr. *L. A. Govindaraghava Aiyar*, Acting Public Prosecutor, for the Crown.

ORDER.—The accused in this case was charged with an offence under section 26 of Act V of 1882. This offence is compoundable under section 55 of the Act. It is admitted that the accused has paid Rs. 2 by way of compensation to the village *monegar* for the Forest Authorities.

Section 53 provides that on such payment no further proceedings shall be taken against such person. This section must mean that proceedings in progress must lapse. That being so, the Magistrate had no jurisdiction to convict the accused. I set aside the conviction and order the fine to be refunded.

Conviction set aside.

In re D. SURYANARAYANAN ROW.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 675 OF 1914.

CRIMINAL REVISION PETITION No. 569 OF 1914.

October 9, 1914.

Present:—Mr. Justice Sadasiva Aiyar.

In re D. SURYANARAYANA ROW AND ANOTHER—ACCUSED—PETITIONERS.

Criminal Procedure Code (Act V of 1898), s. 233—Two accused tried jointly for one offence—Power of Appellate Court to convict one of them of different offence.

Where two persons are tried together and convicted of a certain offence, the Appellate Court can acquit one of them of the offence of which he was found guilty by the trial Court and convict him of a different offence found proved against him on the facts.

Sahib Singh v. *Emperor*, 38 P. R. 1905 Cr.; 115 P. L. R. 1905; 2 Cr. L. J. 694, not followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Dharamavaram, in Criminal Application No. 35 of 1914, preferred against that of the Taluq Second Class Magistrate of Dharmavaram, in Calendar Case No. 37 of 1914.

Mr. *S. Ranganadha Aiyar*, for the Petitioners.

ORDER.—I see no reason to interfere with the convictions and I don't agree with the case of *Sahib Singh* v. *Emperor* (1), which decides that because it is illegal to try two persons for two distinct offences committed by them, the Appellate Court has no power to convict one of two persons tried for a certain offence of another offence found done on the facts.

As regards the sentence on the first accused who is a young man affected by the evil influence of his elder brother, I reduce it to the term of imprisonment already undergone by him. The case as regards the other accused is dismissed.

Sentence modified.

(1) 38 P. R. 1905 Cr.; 115 P. L. R. 1905; 2 Cr. L. J. 694.

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An admission made by a creditor after transferring his debt to a third person to the effect that the debt had been paid to him in part or whole before he had sold the claim, is not binding upon the vendee under section 18 of Act I of 1872.

Where the judgment of a lower Appellate Court is reversed on a point of law in second appeal, the High Court is competent under the joint force of

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Article 144 of the Limitation Act applies to a case of adverse possession of the equity of redemption. **O.** HUBDAR KHAN *v.* GAJADHAR CHAUBE, 17 O. C. 294 **600**

—— —— —— *Hindu co-parcener's possession when adverse—Transferee of such co-parcener, title of.*

Possession, which can be referred to a lawful title, cannot be adverse.

A Hindu co-parcener's possession is not adverse to other co-parceners unless they have notice of his purporting so to hold the property. A person holding property with limitations cannot pass to a transferee a title free from those limitations.

The transferee of a Hindu co-parcener's interest does not stand on a higher footing than the co-parcener himself and cannot claim title by adverse possession without setting up an adverse title to the knowledge of the other co-parceners. **M.** MUTHUKRISHNA IYANGAR *v.* SANKARANARAYANA IYER, 16 M. L. T. 196; 1 L. W. 694; (1914) M. W. N. 708; 27 M. L. J. 600 **573**

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—— —— —— *Mortgage-debt satisfied—Mortgagee's possession after redemption—Limitation Act (IX of 1908), Sch. I, Art. 144.*

When a Court by its decree pronounces a mortgage-debt to be satisfied and the mortgagor entitled to immediate possession, that is equivalent to a declaration that the relation, between the parties, of mortgagor and mortgagee has come to an end.

Therefore, where in foreclosure proceedings under the Bengal Regulation XVII of 1806 the mortgagor deposited within the year of grace in the Court the

Adverse possession—concld.

full amount necessary to redeem the mortgage but the mortgagee refusing to accept the money so deposited brought a regular suit for foreclosure and possession and despite its dismissal the mortgagee continued in possession:

Held, that, after the dismissal of the mortgagee's suit, his possession ceased to be that of a mortgagee and became adverse as against the mortgagor within the meaning of Article 144 of the Limitation Act, 1908. **A.** *Musammat* ZAIBUNNISSA *v.* PARICHHAT **611**

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——— ——— ——— ——— **s. 58,** *applicability of — Mortgage of* sir *land—Subsequent mortgage of* zemindari *rights, effect of, on prior mortgage.*

In 1892 *A* mortgaged a portion of his *sir* land to *D*. In 1897 he mortgaged his entire *zemindari* share to *P* who, having obtained a decree thereon, purchased in execution thereof the portion which had been mortgaged to *D*. *P* sued for ejectment of *A* without impleading *D* and got an order of ejectment. *P* now seeks to eject *D* under section 58 of the Agra Tenancy Act as a tenant of some kind:

Held, that *D* is a mortgagee of proprietary rights in the *sir* and until his mortgage is satisfied he is entitled to retain possession of the land as such and that the subsequent mortgage of the *zemindari* rights by *A* in favour of *P* did not entitle *P* to enter into possession without redeeming that mortgage. **A.** KALYAN MAL *v.* SAMONDU **272**

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Under clause XI (*cc*) of section 7, Court Fees Act, as amended by Act VI of 1905, suits between landlords and tenants have to be valued for the purpose of payment of Court-fees upon the rent payable for the year next before the date of presenting the plaint; and the valuation for jurisdiction must be taken to be the same as the valuation for Court-fees.

Therefore, no appeal lies to the Judge from an order of an Assistant Collector in a suit for ejectment valued at less than Rs. 100. **A.** NANDAN SINGH *v.* DEBI DIN, 12 A. L. J. 933 **975**

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The *Awans* of Tahsil Talagang in the Attock District have extensive powers of alienating their ancestral immoveable property to their relatives, as daughters, sisters and their sons, but they have limited powers like other agriculturists of alienation in favour of a stranger, whether an *Awan* or not.

The question of necessity is almost always a question of fact and should rarely be treated as a question of law for purposes of second appeal. **P.** SHER MUHAMMAD *v.* ALI MUHAMMAD, 60 P. W. R. 1914; 151 P. L. R. 1914 **715**

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In matters of alienation of ancestral land a childless *Brahman* proprietor of *Mauza* Dangoh Khurd in the Una Tahsil of the Hoshiarpur District is governed by agricultural custom and not by Hindu Law.

A rule of custom may be established and held to be of binding force even when no instance is forthcoming, if there is an overwhelming preponderance of oral testimony of those governed by it and likely to know of its existence in its favour.

The proof of custom should not be confined to judicial precedents and definite instances, but might consist in deliberate and well-considered opinion of the people living and governed by the custom and in other recognized modes of establishing its existence.

A settlement arrived at between the parties before a local Commissioner appointed to investigate their case is not a lawful compromise and on it no decision can be based if either party has the option to repudiate it afterwards on certain conditions. **P.** RAM LAL *v.* GOPI, 24 P. R. 1914; 58 P. W. R. 1914; 196 P. L. R. 1914 **710**

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A question of law cannot be said to be "involved" if it would arise only in the event of the Privy Council reversing those findings. **L. B.** THIEN NOO *v.* RAMASAWMY CHETTY, 7 L. B. R. 103 **922**

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A concurrent finding as to receipt of consideration cannot be interfered with on second appeal.

Where an alienor has a large family to support and there is no allegation that he is a man of bad character or wasteful or extravagant or has any cause to waste the property, the presumption is that the alienation has been made for necessity, particularly when it has been made at a period immediately following a severe famine and has not been attacked for about eleven years. **P.** AMAR DAS *v.* SUKH DIAL, 86 P. W. R. 1914; 186 P. L. R. 1914 **511**

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While the credibility of evidence which has been accepted by the Courts below cannot be considered, a Court on second appeal is entitled to consider whether that evidence amounts to an adequate proof of custom.

Where a *Wajib-ul-arz* stated that if there are no sons the widow, as long as she remains chaste in her husband's house, will be *malik*:

Held, that the word "*malik*" simply meant *malik* as a widow with restricted powers of alienation.

The mere fact of alienation by a Hindu widow does not raise any presumption as to the existence

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of any special custom entitling her to do so. A slight presumption in favour of some such custom may be raised if an out and-out transfer is allowed to pass unchallenged by those having a right to challenge it; but no such presumption can at all be raised where the transfer is in favour of the next reversioners themselves or where it is still open to challenge.

One instance can never suffice to prove a custom. **O.** RAM DAT *v.* SUKHIA, 1 O. L. J. 470 **869**

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A second appeal would lie on a question of fact in a case where evidence is disbelieved simply because the witness is a *Patwari* or a relative of the party producing him, for to discredit witnesses merely for general reasons not affecting the particular credit of any individual deponent is to commit an error of law.

Where the witnesses are respectable aged persons whose distant relationship to the party producing them gives them special means of knowledge of the matters they depose to, their evidence ought not to be necessarily disbelieved, nor should verbal evidence be necessarily regarded with suspicion in cases where only verbal evidence is ordinarily procurable. **U. P. B. R.** GAYA PRASAD PANDE *v.* ABBAS BANDI BIBI, 1 O. L. J. 383 **660**

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Arbitration—Agreement to refer to arbitration —Authority for Pleader to admit award—Decree in accordance with award set aside **371**

——— ——— *Award—Bar to further action—Limitation—Specific Relief Act (I of 877), s. 21—Civil Procedure Code (Act V of 1908), Sch. II, Para. 18.*

A valid award is operative even though it has not been enforced by suit or by application under the Code of Civil Procedure. An award extinguishes all claims embraced in the submission and after it has been made, the submission and award furnish the only basis on which the rights of the parties can be determined and constitute a bar to any action on the original demand, apart from section 21 of the Specific Relief Act which to some extent is replaced by paragraph 18 of the Second Schedule of the Civil Procedure Code. **L. B.** R. M. A. R. FIRM *v.* M. R. M. S. FIRM **220**

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———— *Award made against firm, whether bad—Contention on conjectural grounds, value of—Submission to arbitration—Application to set aside award, grounds of.*

An award is not bad for the fact that it was made against the name of a firm without ascertaining who were the parties liable, for the new Civil Procedure Code provides for suits against firms in the firms' names.

No value can be attached to a contention based on purely conjectural grounds.

Where a party has submitted to the arbitration of the Chamber of Commerce, he cannot be allowed to see the effect of the award and then come to Court to have it set aside, without showing that the rules of the Chamber have not been complied with. **C.** GHAZNAVI & Co. *v.* BUDGE-BUDGE JUTE MILLS **955**

———— *Award—Submission by contract—Party refusing to do anything, right of—Award in excess of claim Remission of award.*

In the contracts entered into between the parties it was provided that all disputes arising out of those contracts shall be referred to the arbitration of the Bengal Chamber of Commerce, whose award shall be considered binding. When a dispute arose and was referred to the Chamber by one party, the other party, although repeatedly written to, deliberately refused to do anything:

Held, that the arbitrators were not bound to further give him an opportunity to be heard.

Where the award is in excess of the claim, the Arbitrators' act beyond their jurisdiction and the award cannot be sustained and should be remitted for re-consideratoin. **C.** NABIN CHANDRA SAHA *v.* SINCLAIR MURRAY & Co. **951**

———— *Reference by person with limited rights of alienation Sind Incumbered Estates Act (XX of 1881), s. 28—Award in excess of delegated authority, whether permissible.*

The powers of an arbitrator are strictly limited to the authority which has been duly delegated to him by the parties through the reference; and he cannot, by his award, accomplish a legal act beyond the powers of those from whom he receives his authority. **S.** MIR MAHOMED KHAN *v.* POHUMAL MOTUMAL, 8 S. L. R. 86 **946**

Arbitration Act (X of 1899) ss. 13, 14—*Award set aside for legal misconduct, whether can be remitted to same arbitrator—Party not given opportunity to put his case—All points in dispute not decided—Irregular procedure—Legal misconduct—Moral misconduct—Award, definite character of.*

An arbitrator who does not give a party an opportunity to put his case before him and who does not decide all matters in dispute between the parties, acts improperly and his conduct amounts to a legal misconduct.

Where an arbitrator's award is set aside for legal misconduct or irregular discharge of his duties, and not for moral misconduct, corruption or partiality, the Court can remit the award to the same arbitrator for further consideration.

An award must be definite with regard to all points in dispute between the parties. **C.** CROMPTON & Co. LD. AND MOHAN LAL, 41 C. 313 **954**

———— **S. 14** **391**

Arbitrator and Commissioner, *positions of, difference between—Partition made by person nominated by parties and appointed by Court—Objections to partition made by Commissioner, entertainability of—Civil Procedure Code (Act V of 1908), O. XXVI, r. 14.*

There is a difference between the positions of an Arbitrator and a Commissioner. The latter submits his report for the approval of the Court and has no greater power than what the parties or the Court nominating him chose to give him, whereas the former has a final authority to settle all matters in difference between the parties which form the subject of the reference, subject to the power of the Court to set aside the award if certain specific circumstances affecting his conduct are proved to exist.

A decree based on a compromise directed that unless the parties made a partition between themselves it should be effected by the person nominated by the parties in the compromise petition. The parties having failed to effect a partition among themselves, their nominee did it as a Commissioner appointed by the Court. Objections were taken to his mode of partition:

Held, that in the absence of any indication in the decree that the nominee was to act as an Arbitrator, the objections were entertainable under Order XXVI, rule 14, Civil Procedure Code. **O.** ABDUL BASIT *v.* ABDUL SALAM **227**

Arms Act (IX of 1878), s. 19 (a)—*Clasp knives, whether arms.*

Clasp knives are not arms within the meaning of section 19 (*a*) of the Arms Act. **L B.** EMPEROR *v.* ME THIN, 7 BUR. L. T. 167; 15 CR. L. J. 585 **337**

Arrest—*Warrant addressed to bailiff not by name, whether legal.*

An arrest is not illegal merely because the warrant for arrest is addressed, not by name, but only to "the bailiff of the Court." **M.** ABDUL RAHIM SAHIB *v.* EMPEROR, (1914, M. W. N. 498; 15 CR. L. J. 576 **328**

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———*Sequestration of property by attachment, effect of Creditor, right of Personal liability of heirs-at-law Heirs, right of, to profits—Civil Procedure Code (Act V of 1908), s. 52.*

Till the sequestration of the estate by attachment or otherwise, a creditor is not entitled to seize the rents and profits of the property of the deceased accruing after the property has devolved on his heirs-at-law or to make them personally liable to the extent of those profits prior to the sequestration. Such profits cannot be treated as the estate of the deceased and the heirs of the deceased are entitled to appropriate them. **O** KISHEN LAL ATAL *v.* UMAR-UL-FATIMA, 17 O. C. 207 **384**

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Bengal Cess Act (IX of 1880), ss. 43, 44, 46, 48, 95—*'Interest', meaning of—Basis of distribution of cesses among co-sharers—Valuation of shares as between co-sharers—Jurisdiction—Burden of proof.*

After opening a separate account for the purposes of the payment of land revenue the only way in which a co-proprietor can obtain an apportionment of the cesses payable by him on any basis other than the basis of the amount of land revenue to which he is liable is by preferring an objection in accordance with the procedure prescribed by section 44.

Section 48 of the Bengal Cess Act gives any share-holder in an estate, who may have paid the road cess and public works cess payable in respect of such estate or any part thereof in excess of the amount proportionate to his own interest in such estate, a right to recover from his co-sharers any amount paid by him on account of their respective shares and interests.

The words "proportionate to his own interest" in section 48 refer to the share of the estate held by the share-holder and not to valuation of that share or the income which he derives from it.

The word "interest" in section 48 means an interest of a kind capable of being entered in the Land Register. The section implies that the co-sharers as between themselves are bound to pay in proportion to their respective shares without regard to the valuations of those shares submitted to or adopted by the Collector for the purpose of determining the total amount of cesses payable.

The basis of distribution of cesses is the land revenue payable, or, in other words, the share or interest recorded in the Land Register and not, in the first instance, the valuation (for road cess purposes) of the new estates.

Until a separate apportionment is obtained by a share-holder under the provisions of the Act, the extent of his liability for cesses as between himself and his co-sharers is the extent of his share or extent of his liability for land revenue.

If a share-holder comes into a Civil Court to recover from his co-sharer a sum paid in excess of the cesses payable by him and if the question arises whether the valuation submitted by him to the Collector is or is not correct, the burden is on him to prove that it is correct, because under section 95 the return filed by him is only admissible in evidence against, and not in his favour. **C.** NARENDRA NARAIN SINGH *v.* GOPI SUNDARI DASYA 366

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Bengal Land Revenue Sales Act (XI of 1859), s. 3—Khas mahal—*Failure to pay Government assessment—Determination of interest of defaulter—Sale of* mahal *by Government—Suit for recovery of possession of* mahal *by purchaser—Limitation—Adverse possession—Revenue Officers, value and weight of proceedings of—Estoppel—Privy Council Practice—Concurrent finding of Courts below on questions of fact, when can be disturbed.*

On the failure of an owner of a *khas mahal* to pay the Government assessment his estate or interest in the law is determined and if the *mahal* is then sold under Act XI of 1859, what is sold is, not the interest of the defaulting owner, but the interest of the Crown, subject to the payment of the Government assessment; and, therefore, the limitation to recover possession of the *mahal* by the purchaser commences to run from the date of the sale and not from an earlier date, inasmuch as under the provisions of Act XI of 1859, adverse possession is only an incumbrance on the *mahal* purchased and on sale the *mahal* vests in the purchaser free from all incumbrances.

Proceedings of Revenue Officers are determinations by public officials of the matters in dispute between the parties to those proceedings, if all the parties interested are given the opportunity of making their claims, raising their objections and producing their evidence. But the parties to such proceedings are not estopped by the decisions arrived at, as they would be in regular proceedings in Courts of Law, but those determinations are of high authority, and when acquiesced in by all the parties interested for a length of time, and made the basis of important transactions, should not be disturbed unless upon the clearest proof that they are erroneous.

The Judicial Committee of the Privy Council will not disturb the concurrent findings of the Courts below on an issue of fact, unless it has been established that their judgments were clearly wrong. **P. C.** SURJA KANTA ACHARJYA BAHADUR *v.* SARAT CHANDRA ROY, 18 C. W. N. 1281; 6 M. L. T. 290; 27 M. L. J. 365; 1 L. W. 807; (914) M. W. N. 757; 16 BOM. L. R. 925; 20 C. L. J. 563 309

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Bengal Tenancy Act (VIII of 1869), s. 46 171

Bengal Tenancy Act (VIII of 1885), ss. 3, cl. (8), 11—Nimhowla *tenures of Backergan j—Transferable and heritable—Permanent tenure—Transfer notified—Landlord, whether entitled to rent from original tenant.*

Nimhowla tenures of Backerganj are permanent

Bengal Tenancy Act—contd.

tenures within the meaning of section 3, clause 8, of the Bengal Tenancy Act, and as such capable of transfer and bequest like other immoveable property under section 11 of the Act.

Where the transfer of such a tenure has been notified to the landlord he is no longer entitled to claim the rent in respect of it as against the original tenants. **C.** PROMODE RANJAN GHOSH *v.* ABIJAN BIBI **373**

——— ——— ——— **s. 11** **373**

——— ——— ——— ——— **s. 13** **880**

——— ——— ——— ——— **s. 22 (2)**—*Transfer of non-transferable occupancy holding, creates no interest as against landlords—Purchase by one of landlords similarly ineffective.*

Sub-section 2 of section 22 of the Bengal Tenancy Act (VIII of 1885) applies only to a case in which a transferable occupancy holding has been purchased. If the holding which has been transferred is a non-transferable holding the purchaser acquires no interest as against the landlords, and it is so even if the purchaser is himself one of the landlords. **C.** LAKHI KANT DAS *v.* BALABHADRA PROSAD DAS, 19 C. L. J. 400 **546**

——— ——— ——— ——— **s. 26**—*Non-occupancy tenant—Holding heritable* — Expressio unius est exclusio alterius—*Uncertain guide.*

Apart from possible exceptions, the holding of a non-occupancy *raiyat* is heritable.

The maxim *expressio unius est exclusio alterius* is at best an uncertain guide to the true meaning of a Statute. **C.** MIDNAPORE ZEMINDARI CO. LD. *v.* HRISHI KESH GHOSH, 18 C. W. N. 828; 19 C. L. J. 505; 41 C. 408 **562**

——— ——— ——— **s. 29**—Abwab—*Illegal cesses—Stipulation as to payment of husks over and above certain* nakdi *rent, whether legal.*

Where a *kabuliat* stipulated for the payment of one cart-load of *bhusa* over and above certain *nakdi* rent, and the plaintiff in his plaint did not treat the husks as a part of the rent, nor were cesses claimed or paid on the basis of the husks being a part of the rent:

Held, that the claim as to husks came within the statutory prohibition against *abwabs* and other illegal cesses and could not be recovered. **C.** KALAR SINGH *v.* MATHURA PROSAD, 19 C. L. J. 402 **547**

——— ——— ——— **ss. 29, 109B**—*Applicability of* kabuliat—*Agreement for enhancement, when not in violation of s. 29.*

An agreement embodied in a *kabuliat* to pay a certain amount of rent agreed upon by the parties in settlement of a *bona fide* dispute regarding the rate of rent and to avoid further litigation is not an agreement in violation of the terms of section 29 of the Bengal Tenancy Act.

Section 29 of the Bengal Tenancy Act is limited to cases where there is real contract for enhancement, which cannot ordinarily take place where there is a *bona fide* dispute about the rent payable before, either for area or for rate.

Section 109B of the Bengal Tenancy Act, which was inserted into the Act in 1907, contemplates an inquiry into agreements adjusting disputes about enhancement, but it does not apply to a case where the agreement was made 15 years before the Settlement proceedings. **C.** BATA MANDAL *v.* MANINDRA CHANDRA NANDI, 19 C. W. N. 321 **829**

——— ——— ——— **ss. 29, 74, 147B**—*Compromise—Enhancement of rent in kind.*

In the Record of Rights the rent which was payable in kind, was stated to be one-half of the produce. The landlord sued for more than a half share of the produce; the defendants did not resist the claim. In fact, the common case of both the parties was that for a long series of years the tenants had paid rent to the landlord at the rate alleged and they jointly prayed that a decree might be drawn up in terms of the petition of compromise filed by them:

Held, that neither section 29 nor section 74 of the Bengal Tenancy Act applied to the case.

Section 29 deals only with the case of enhancement of money rent of an occupancy *raiyat.*

Section 147B of the Bengal Tenancy Act also did not touch the matter, as the presumption of accuracy which attaches to an entry in the Record of Rights had been rebutted in the case. **C.** FAZAL IMAM *v.* SUKOR MAHTON, 19 C. L. J. 323 **442**

——— ——— **ss. 49, 161A, 167**—*Ejectment of sub-tenant or under-*raiyat—*Notice—Purchaser of* taluk, *right of—"Sub-tenancy", meaning of.*

A sub-tenant is not entitled to a notice of ejectment under section 167 of the Bengal Tenancy Act, nor is an under-*raiyat* entitled to a notice under section 85 of the Act if he does not hold under a registered lease.

The purchaser of the right of a superior *Talukdar* does not step into the shoes of the occupancy *raiyat*, nor is there a merger under section 22 of the Bengal Tenancy Act.

His right to eject an under-*raiyat* arises upon the termination of the interest of the occupancy *raiyat* and a notice under section 49 of the Act is unnecessary.

The word "sub-tenancy" in section 161 A means a tenancy directly under the tenancy which has been purchased. It is not an incumbrance within the meaning of the section. **C.** SARADA KIRPA LALA *v.* CHAITANYA CHARAN DE **741**

——— ——— ——— **s. 50 (1) and (2)**—*Land held at fixed rate for twenty years—Enhancement of rent*—Kabuliat—*Evidence.*

Where a landlord sues for enhancement of rent of a tenure held at rent or rate of rent which has not been changed for a period of twenty years immediately before suit, the tenant is protected from an increase of rent under sub-section (1) of section 50 of the Bengal Tenancy Act, 1885, unless the contrary required by sub-section 2 of the same section is proved.

A *kabuliat*, which only proves the recognition of an already existing tenure, does not amount to the contrary evidence required by sub-section (2) of section 50 of the Act.

Where there has been no alteration in the area of land held permanently, the rent cannot be enhanced. **C.** BISSESWAR RAI *v.* RAJENDA KUMAR SINGHA, 19 C. W. N. 949 **428**

——— ——— ——— ——— **s. 51**—*Rate of rent, presumption as to—Presumption, how arrested,*

Bengal Tenany Act—concld.

The presumption, arising under section 51 of the Bengal Tenancy Act, 1885, applies not only in respect of a particular succeeding year when it is proved that rent was realised for the immediately preceding year at a particular rate, but also to each successive year one after another, until its operation is arrested by proof on the part of the tenant that the conditions of the tenancy were altered in the meanwhile. **C.** RAJABALA DEBI BHADURI *v.* SRISH CHANDRA GHOSH **552**

——— ——— ——— ——— **s. 52 (6),** *presumption under—Rent determined by reference to area—Consolidated rent.*

If once it be held that a Court is entitled to make the presumption permitted, though not made obligatory, by section 52 (6) of the Bengal Tenancy Act, it follows that the rent is one to be determined by reference to the area and is not a consolidated rent. **C.** UMA SINGH *v.* RAI TARINI PROSAD BAHADUR, 19 C. L. J. 451 **532**

——— ——— ——— ——— **ss. 61, 62, Sch. III, Art. 2, cl. (a)**—*Deposit of rent—Suit for rent—Limitation—Contract, construction of—Terms plain—Oral evidence, whether admissible to vary terms—Bengal Tenancy Act (VIII of 1869), s. 46.*

Where the terms of a contract are plain, the rights of the parties must clearly be determined upon the terms of the contract; oral evidence is not admissible to show that the parties really intended to enter into a contract different from that embodied in the instrument itself.

The provisions of sections 61 and 62 of the Bengal Tenancy Act, taken as a whole, support the view that the period of limitation prescribed by Article 2, clause (*a*), of Schedule III of the Act is applicable to a suit for rent wherever rent has been deposited under section 61, even though the allegation of the tenant that what he had deposited was the full amount due at the time may ultimately prove to be incorrect.

The omission from section 61, Bengal Tenancy Act, of the words "what he(the tenant considers to be the full amount of rent due from him at the date of the tender" (section 46 of Act VIII of 1869 B. C.) and the substitution in lieu thereof of the words, "the full amount of the money then due," (section 61 of Bengal Tenancy Act, VIII of 1885) does not really indicate a change in the law, as the words omitted were superfluous.

Where the parties have agreed that upon failure to deliver the rent payable in kind a fixed sum would be paid in lieu thereof, the entire rent is payable in cash and the provisions of section 61, Bengal Tenancy Act, are applicable.

Quære.—Whether rent payable partly in cash and partly in kind where no money value is fixed can be deposited under section 61, Bengal Tenancy Act? **C.** SASI BHUSAN DEY *v.* UMAKANTO DEY, 20 C. L. J. 153 **171**

——— ——— ——— ——— **s. 62** **171**

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——— ——— ——— ——— **Sch. III, Art. 2 (1)**—*Deposit of rent—Suit for rent—Limitation* **171**

——— ——— ——— **Sch. III, Art. 3** **414**

Bombay District Municipal Act (III of 1901), s. 92—*Requiring to keep open space in re-building—Improvement of public road—No regular line determined—Set-back not obtainable—Owner's right to re-build in spite of condition to set back.*

On an application under the Bombay District Municipal Act, III of 1901, for permission to re-build a house, the permit was granted subject to the condition of keeping an open space so as to leave a width of road considerably more than the width of the public road at that locality for the improvement of the said public road. No regular line had been determined either for the existing street or for the future as contemplated in section 92 of the Act:

Held, that under the circumstances a set-back could not be obtained under section 92 and that the owner of the house was entitled to an injunction restraining the Municipality from pulling down the house built in contravention of the condition laid down by it. **B.** BAI FATMA *v.* RANDER MUNICIPALITY, 16 BOM. L. R. 529; 38 B. 662 **411**

Bombay Prevention of Gambling Act (IV of 1887), s. 6—Warrant, issue of **985**

Buddhist Law. *See* CUSTOM.

——— ——— ——— *Husband and wife—Desertion for more than one year—Dissolution of marriage.*

Where the wife left her husband and lived separate from him for a period of six years and where in the meantime the wife sought a divorce from the husband for cruelty and the husband from the wife for adultery but no divorce was granted, and where 17 months after separation the husband took a second wife:

Held, on a consideration of the facts, that the conditions contemplated by section 17 of Chapter V of the *Manugye* for the dissolution of a marriage became complete. **L. B.** MAUNG THA KADO *v.* MA THIN MYAING, 7 BUR L. T. 197 **95**

Bundelkhand Land Alienation Act (II of 1903), s. 9—*Suit for foreclosure—Whether defendants members of agricultural tribe—Reference to Collector—Collector finding against defendants but refusing to take action under section 9—Case returned to Civil Court—Power of Civil Court—Decree absolute.*

In a suit for foreclosure of a mortgage by conditional sale the defendant pleaded that he was a member of an agricultural tribe. The Court, holding that this was a point to be considered after a preliminary decree for foreclosure had been passed, passed that decree. When the decree-holder applied for a decree absolute, the Court referred the case to the Collector under clause 3 of section 9 of the Bundelkhand Land Alienation Act. The Collector held that the judgment-debtor was not a member of an agricultural tribe. But the question being raised before him as to whether the decree-holder would not accept a mortgage for a term of years in lieu of a foreclosure decree, he made a note of the terms of the mortgage. The mortgage was executed by the judgment-debtor, but the decree-holder refused to accept it. The Collector thereupon returned the record to the Civil Court without taking any further action:

Bundelkhand Land Alienation Act —concld.

Held, that the Civil Court had no option but to continue the proceedings before it independently of the provisions of the Bundelkhand Land Alienation Act and to pass a decree absolute for foreclosure. **A.** GOBIND RAO *v.* KAMTA PRASAD, 12 A. L. J. 503; 36 A. 376 **400**

Burden of proof, *acceptance of—Second appeal—Plea of having no duty to call evidence—Estoppel.*

Where the plaintiff accepted the burden of proof put upon him by the Court below and produced certain witnesses in order to prove execution of the deed:

Held, that he was not entitled in second appeal, because the evidence of the witnesses he put forward had been disbelieved, to turn round and say that it was not his duty to call evidence at all and to ask the Court to disregard the evidence which he had given. **O.** SITA RAM *v.* HAIDAR KHAN, 17 O. C. 134; 1 O. L. J. 352 **138**

——— ——— ———*Autrefois acquit* **1000**

——— ——— - — — —Burden of proving that minor, female, or person not learned in *Vedas* cannot perform service of reciting the *Vedas* **283**

——— ——— ——— ——— Consideration, proof of **924**

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——— ——— ——— ———Decree against Hindu father —Son's liability to satisfy **917**

——— ——— — — Divorce—Sufficiency of words used **387**

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——— — — Malabar Law - *Karnavan* erecting building on *Tarwad* property **775**

——— — —— Mortgage — Redemption — Title to redeem **353**

— ——— ——— ——— *not to be minded after whole evidence on both sides has been let in—Court's duty after recording evidence—Transfer of Property Act (IV of 1882), s. 53—Fraudulent transfer—Fraudulent "alienation" and "acquisition," distinction between —Hindu Law—Property fraudulently alienated by one member That member cannot recover his share by setting up other members to challenge transfer—Fraudulent transfer by father—Son cannot recover more than his own share—Pleadings—Issue clearly raised—Form of pleadings immaterial.*

When the whole evidence on both sides has been let in it is not legally sound to lay stress on the burden of proof, and the Court should weigh the evidence let in and the probabilities as a whole and then arrive at its findings. The Courts should bear in mind that the burden of proof in most cases is not a burden "that goes on for ever resting on the shoulders of the person upon whom it is first cast."

On principle there is no distinction between the fraud by which a dishonest debtor alienates his properties nominally to a third person and the fraud by which he purchases properties nominally in the name of a third person. In either case the dishonest debtor is guilty of legal fraud.

A member of a joint Hindu family, after having fraudulently transferred the family properties and successfully defrauded creditors, ought not to be allowed to recover his share of the properties by setting up another member of his family (in this case his son) to recover the whole property including the former's share also. The member who sues can recover only his own share.

As a Hindu son does not claim his share in the joint family property under his father, the decision in *Yaramati Krishnayya v. Chundru Papayya*, 20 M. 326, which prevents not only the fraudulent debtor but also his heirs from recovering the fraudulently transferred property, is not applicable to a son's suit for possession of his own share in such property.

Where the pleadings in Indian Courts raise an issue with reasonable clearness, the fact that the party does not put the plea forward in a particular form is immaterial.

Per *Tyabji, J.*—There is no distinction between a fraudulent alienation and a fraudulent acquisition by a dishonest debtor: the fraud in each case consists of a dishonest mode of dealing with property. **M.** RAMASUBBA AIYAR *v.* AVUDAI AMMAL, (1914) M. W. N. 595 **123**

——— ——— ——— ——— *Pardanashin lady*, transactions by—Validity of deed to be established by persons relying upon it **861**

——— ——— ——— Parties seeking to oust jurisdiction of ordinary Civil Court **891**

——— — ——— ——Possession and dispossession within twelve years **82**

——— ——— ——— *Possession of Government land —Public pathway, title to.*

Where a person proves against Government possession of land, belonging to Government, for more than twelve years and no origin can be ascribed to that possession, a presumption arises as to title in that person and the burden is shifted on to Government to prove possession or title within 60 years; but this rule does not apply where the title claimed is to a public pathway, even where acts of ownership exercised by private persons extend over 40 years, the presumption being that the title or possession is with Government. **M** SAMBASIVA MUDALIAR *v.* SECRETARY OF STATE, 27 M. L. J. 299; 1 L. W. 758; (1914 M. W. N. 7)1 **608**

——— — ——— — Presumption — Fraudulent transfer—Intention to defraud future creditors **183**

——— ——— Receipt of consideration in deed **426**

— — — — *Registered sale-deed—Proof of consideration—Delay in suing for possession after death of vendor—Vendee to prove consideration.*

The plaintiff sued in March 1908 for possession of land and house property of which he claimed to be the vendee under a sale-deed executed on the 26th and registered on the 28th September 1900. The alleged vendor died in or about 1904, and the defendant, his

Burden of proof—concld.

widow, was apparently entered as owner of the land in his place without any attempt by plaintiff to contest the mutation order:

Held, that under the circumstances the lower Courts were amply justified in following the ruling of *Ram Chand* v. *Harnam Singh*, 68 P. R. 1900, and in placing the onus of proving consideration for the sale on the plaintiff notwithstanding registration of the sale-deed. **P.** BHAGWAN DAS v. RAM BAI, 58 P. R. 1914; 236 P. L. R. 1914; 52 P. W. R. 19 4 **538**

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Civil Procedure Code—(1908)—contd.

Order XXXII, Civil Procedure Code, does not purport to be exhaustive and in a proper case a Court has jurisdiction to dismiss a suit filed by the next friend of a minor, on the ground that it is not in the interests of the minor that the suit should be allowed to go on.

The fact that the next friend of the minor is indebted to the minor, is a good ground for the conclusion that he is suing on behalf of the minor with a view to avoid payment of his debt. **M.** LAKSHMANAM CHETTY *v.* LAKSHMANAM CHETTIAR, 1 L. W. 875 **738**

ss. 2, 47, O. XXXIV, r. 5—*Transfer of Property Act (IV of 1882), ss. 56, 81—Property mortgaged by mortgagor after mortgage-decree—Second mortgagee having no notice of first mortgage or decree thereon—Representative of judgment-debtor—Notice—Objection—Pleadings.*

After a mortgagee of several properties had obtained a decree upon his mortgage in the usual form, the mortgagor mortgaged by way of conditional sale one of those properties to a third person who, having acquired the property as an unincumbered one without notice of the previous mortgage and the decree based thereon, foreclosed his mortgage and entered into possession of the property. Soon after when the first mortgagee obtained an order for the sale of the properties mortgaged to him, the second mortgagee applied that the properties other than that of which he had obtained possession by foreclosure should be sold first and that that property should be sold last. His application was opposed both by the mortgagor and the first mortgagee but it was allowed. Upon this the mortgagor alone appealed against the order of the Court:

Held, that (1) as the subsequent mortgagee was bound by the decree on the previous mortgage, as regards the property which had been mortgaged to him he was the representative of the mortgagor and that, therefore, his application was an application under section 47, Civil Procedure Code, and the order of the Court amounted to a decree within the meaning of section 2 and not merely to an order under Order XXXIV, rule 5, of the Code;

(2) the second mortgagee, being in the position of a purchaser from the mortgagor, had as against him a positive right under section 56 of the Transfer of Property Act to have the first mortgagee satisfied out of the properties (so far as they went) other than the property which he had foreclosed;

(3) the first mortgagee not having preferred an appeal against the lower Court's order, it was not open to the mortgagor to take an objection which the first mortgagee did not care to press;

(4) as the question of notice of the first mortgage was not raised in the Court below or in the grounds of appeal, it could not be allowed to be raised for the first time at the hearing of the appeal;

(5) the Courts have power, in appropriate circumstances, to make such orders under sections 56 and 81 of the Transfer of Property Act. **C.** TARA PRASANNA BOSE *v.* NILMONI KHAN, 41 C. 418 **118**

s. 2, O. XX, r. 12 (2)—*Suit for possession and mesne profits—Order by Appellate Court deciding question of possession but sending case back for ascertainment of mesne profits—Preliminary decree.*

Civil Procedure Code—(1908)—contd.

Sub-section (2) of rule 12, Order XX, of the Code of Civil Procedure, refers to the preparation of a final decree in respect of mesne profits, and this implies that the decision with regard to possession is a preliminary decree within the meaning of section 2 of the Code. **C.** KUMUD LAL ROY *v.* RAMANI MOHON ROY, 19 C. L. J. 346 **436**

ss. 10, 151—*Suit by next friend of minor—Death of next friend—Suit dismissed—Fresh suit—Illegal order, effect of—Estoppel—Abuse of process of Court.*

On the death of a minor plaintiff's next friend the suit does not abate and, therefore, should not be dismissed.

If, however, an order of dismissal is passed it is a nullity and can have no effect upon the rights of the plaintiff. The duty of the Court is either to appoint a new friend or to allow the suit to be pending till the minor attains majority.

If a party misconceives the effect of an order which is legally a nullity and, therefore, of no force, he is not estopped from pleading subsequently that it was not necessary for him to have that order set aside.

Section 10 of the Civil Procedure Code (corresponding to section 12 of the old Code) does not bar the institution of suits but only their trial, and in this respect there is no substantial difference between the language of the new and old Codes.

Section 151 of the Code of Civil Procedure has been inserted to enable Courts to deal effectually with attempts to abuse the process of the Courts.

The institution of a second suit against the same party for the same relief and on the same cause of action is not "an abuse of the process of the Court" within the meaning of section 151, Civil Procedure Code. **M.** VENKATESWARA IYER *v.* CHERNERI MADATHIL RAVUNNI NAIR, 27 M. L. J. 405; (1914) M. W. N. 740 **597**

s. 11—*Transfer of Property Act (IV of 1882), s. 52—Former suit for mesne profits—Alienation made while that suit pending—Suit decided against alienor—Title of alienee—Res judicata.*

In a suit for mesne profits or crops of land an issue as to right to that land was directly and specifically raised and decided against the plaintiff in that suit. While that suit was still pending the plaintiff in that suit sold the land to another person who brought a suit for recovery of the land from the same defendant:

Held, that the second suit was barred by the rule of *res judicata*.

Per *Sadasiva Aiyar, J.*—Although section 52 of the Transfer of Property Act applies only to immoveable property, yet the principle underlying it might appropriately be applied to moveables as well in cases where the alienee of the moveables is proved to have had notice of the pending litigation at the time of the alienation. **M.** TALARI KAVOLI NAGADU *v.* VISWANATHAM PEDDA GOVINDAPPA, 16 M. L. T. 158; 1 L. W. 587 **13**

ss. 11, 13—*Judgment of Court in British India, whether can operate as* res judicata *in Court of Native State—Injunction, suit for—Foreign judgment, effect of.*

The plaintiff sued the defendant for a declaration

Civil Procedure Code—(1908)—contd.

that a judgment obtained between the parties in British India would operate as *res judicata* even in a Native State and prayed that the defendant be restrained by a perpetual injunction from continuing his suit against the plaintiff in the Native State:

Held, that, as the Court in British India was not competent to try the suit in respect of the property which was situated in the Native State, the judgment of the Court in British India could not operate as *res judicata* in the Court of the Native State within the meaning of section 11 of the Civil Procedure Code.

A 'foreign judgment' has no force or authority as such in British India. A foreign judgment may give a cause of action and a suit may be based upon it to obtain the same relief as was given in the foreign judgment.

It is only in proceedings based upon 'foreign judgments' that the question of the effect of the foreign judgment can properly arise. **A.** MAQBUL FATIMA *v.* AMIR HASAN KHAN, 12 A. L. J. 1074 **193**

——— ——— ——— ——— s. 11 (4) **396**

——— ——— ——— ——— s. 11 Exp. (4)—Plea which might have been made ground of defence, not adjudicated upon, whether operates as *res judicata* **615**

——— ——— ——— ——— s. 11, Exp. IV—*Suit to enforce recurring charges—Certain properties not included in former suit—Amendment of plaint before decree—No notice to defendant—Decree absolute—Defendant given notice—Second suit including those properties*—Res judicata

In a former suit to recover recurring charges the plaintiff omitted to include certain properties of the defendant, who was served with notice but did not appear. The other defendants in the suit raised a plea that these properties were also liable. Subsequently before the passing of the decree in the suit the plaintiff applied for amendment of the plaint so as to include the properties of the defendant. No notice of this application was served upon the defendant. A preliminary decree for sale of the properties including these properties was passed. The plaintiff later on applied for an order absolute under section 89 of the Transfer of Property Act. Notice of this was served on the defendant, but he again did not appear. In the present suit in respect of charges for other years the defendant raised the plea that his properties were not liable for charges:

Held, that as the defendant with full knowledge of the preliminary decree allowed the final decree to be passed without taking any objection, he was barred by the rule of *res judicata* to raise this plea now. **A.** MUHAMMAD ABDUL HAMID *v.* HEDAYETUNNISSA BIBI, 12 A. L. J. 751 **284**

——— ——— ——— ——— s. 13 — Judgment of Court in British India, whether can operate as *res judicata* in Native State **193**

——— ——— ——— ——— s. 17, O. II, r. 2, cl. 3—*Two different trespasses—Bar of second suit—Test—Cause of action, significance of.*

Where the title of the plaintiff is the same and the trespasser-defendant is the same defendant in both suits, the question whether the second suit is barred by the first, under Order II, rule 2, clause 3, Civil Procedure Code, depends upon the answer to the following question, namely, "Did the two trespasses take place in or about the same time and as part of the same transaction so that the two trespasses might be considered (taking a commonsense view of the facts) as a single transaction forming one and the same cause of action?"

If both trespasses had taken place before the first suit had been brought, Order II, rule 2, clause 3, might be a bar to the second suit but not otherwise.

The High Court rulings on the point discussed.

The phrase "cause of action" in Order II, rule 2, clause 3, is used in a more comprehensive sense than it is used in section 17. **M.** JAGATHAMBA AMMAL *v.* RAMASWAMI IYENGAR **579**

——— ——— ——— ——— s. 19 — *Jurisdiction — Consent or contract, whether can give jurisdiction to Court—Pleadings—Plea of jurisdiction raised neither before High Court nor before Privy Council on appeal but pressed in argument before Privy Council—Facts not disputed—Plea allowed—Suit relating to lands situated in Sonthal Parganas instituted in Bhagalpur—Settlement of lands not completed and concluded before suit—Sonthal Parganas Settlement Regulation (III of 1872), ss. 5, 6—Exclusive jurisdiction of Settlement Officers or Officers appointed by Lieutenant-Governor of Bengal—Sonthal Parganas Act (XXXVII of 1855), s. 2—Sonthal Parganas Justice Regulation (Act V of 1893), Part 2—Bengal Civil Courts Act (VI of 1871)—Bengal, North-Western Provinces and Assam Civil Courts Act (XII of 1887)—Compound interest—Interest exceeding principal—Interpretation of Statute—Proviso, how to be interpreted.*

Lands, two-thirds of which were situated in the District of Sonthal Parganas and one-third in the District of Bhagalpur, were mortgaged by mortgagors residing in the former District, by a bond executed at Bhagalpur containing a stipulation that the mortgagees might enforce it in the Bhagalpur Court. Before the date on which the mortgagees sued on their mortgage in the Court of the Subordinate Judge at Bhagalpur, some portions of the lands situated in the Sonthal Parganas had been settled and notification had been duly made under section 5 of the Sonthal Parganas Settlement Regulation, III of 1872 that such Settlement had been completed, but other portions of the lands were not so settled prior to that date. The defendants pleaded, *inter alia*, that the Court in which the suit was instituted had no jurisdiction to entertain it under the Sonthal Parganas Regulations, and that the plaintiffs were precluded from claiming compound interest or interest exceeding the amount of the principal advanced, under section 6 of Regulation III of 1872. On both these questions the Subordinate Judge found against the defendants. On appeal to the High Court as well as to the Privy Council the question of jurisdiction was not raised, but it necessarily presented itself in the argument before the latter tribunal:

Held, that 1 their Lordships could not decline to entertain the question of jurisdiction, although it was not specifically raised in the appeal, because it depended on no disputed facts and necessarily presented itself in the argument;

2 as the land situated in the Sonthal Parganas had not been settled and the Settlement declared by a notification to have been completed and concluded, the suit came within the provisions of section 5 of the Sonthal Parganas Settlement Regula-

Civil Procedure Code—(1908)—contd.

tion III of 1872, and must have been brought before Settlement Officers or Courts of Officers appointed by the Lieutenant-Governor of Bengal under section 2 of the Sonthal Parganas Act (XXXVII of 1855) & the Sonthal Parganas Justice Regulation (Act V of 1893), and therefore, the suit could not lie in a Court established under the Bengal Civil Courts Act (VI of 1871) or under the Act which has taken its place, namely, the Bengal, United Provinces and Assam Civil Courts Act (XII of 1887);

(3) as the Court of the Subordinate Judge at Bhagalpur had no jurisdiction to entertain the suit, the parties could not give it the necessary jurisdiction by consent, that is to say, by the stipulation in bond that the mortgagees could enforce it in the Court of Bhagalpur;

(4) the provision of section 6 of the Sonthal Parganas Regulation III of 1872 is not one of procedure but of substance, and so far as the Courts having jurisdiction within the Sonthal Parganas are concerned, it places all contractual stipulations as to compound interest in a position of non-enforceability and limits statutably the total interest which can be decreed on any loan or debt;

(5) the phrase "all Courts having jurisdiction in the Sonthal Parganas" in section 6 of the Sonthal Parganas Regulation did not mean Courts locally situated in the Sonthal Parganas and dealing with matters purely local, but meant all Courts having jurisdiction in the Sonthal Parganas and acting under and by virtue of such jurisdiction;

(6) apart from the question of jurisdiction any Court dealing with the subject-matter of the suit would be bound to give full force and effect to the provisions of section 6 of the Sonthal Parganas Regulation III of 1872, and to refuse to decree compound interest or total interest exceeding the principal of the original debt or loan; and

(7) unlike an exception, a proviso to a clause should be taken in connection with the general language of the previous portion of the clause. **P. C.** MAHA PRASAD SINGH *v.* RAMANI MOHAN SINGH, 18 C. W. N. 994; 16 M. L. T. 105; (1914) M. W. N 565; 1 L. W. 619; 20 C. L. J. 231; 27 M. L. J. 459; 16 BOM. L. R. 824 **451**

——— ——— ——— **ss. 21, 43, 104**—*Order for abatement of suit, whether decree and appealable.*

An order directing the abatement of a suit is not a decree within the meaning of that term as defined in the Code of Civil Procedure and, therefore, is not appealable. **A.** WALAYAT HUSAIN *v.* RAM LAL, 12 A. L. J. 1113 **643**

——— ——— ——— ——— **s. 22**—*Suit capable of institution in two Courts—Transfer from one Court to another—Evidence of defendant available outside jurisdiction, whether sufficient reason.*

When a suit, which can be brought in either of two Courts, has been instituted in one of them, it cannot be transferred to the other merely on the ground that the defendant has all his evidence at the latter place. **S.** FIRM OF SHAMUSSUDDIN MAHIR BUX *v.* FIRM OF ALI MAHOMED ALIDINA, 8 S. L. R. 43 **874**

Civil Procedure Code—(1908)—contd.

——— ——— ——— ——— **s. 23**—*First hearing—Transfer of case—Convenient place of trial.*

When a case is ready to proceed, it is the first hearing contemplated under section 23, Civil Procedure Code, 1908.

Where the materials on the record are insufficient to determine the place of residence, the case is triable at the place where the cause of action has arisen and where at least some of the assets in suit are situate, particularly when at that place an administration suit is going on between the defendants *inter se* and other suits are pending against the estate in dispute. **P.** AMIR BEGAM *v.* MUHAMMAD ISMAIL KHAN, 65 P. W. R. 1914; 15 P. R. 19 4 **723**

——— ——— ——— **s. 24**—*Case remanded to District Judge for disposal—Power of District Judge to transfer it to his subordinate Court.*

Under section 24 of the new Civil Procedure Code, a District Court's power of transferring cases is much wider than under the old law.

Therefore, a case remanded to a District Judge can be transferred to a subordinate Court. **A.** PANDOHI *v.* SHEO BHAROS, 12 A. L. J. 1094 **141**

——— ——— ——— ——— **s. 34** — Interest after date of suit —Discretion **658**

——— ——— ——— ——— **s. 37** — *Execution of decree—Court of Wards made party to execution proceedings—Competency of Court to proceed with execution.*

The Court passing a decree has jurisdiction to proceed with its execution, notwithstanding that after the decree the Court of Wards becomes a party to the execution proceedings. **B.** BANDOO KRISHNA *v.* NARSINGRAO, 16 BOM. L. R. 527; 38 B. 6.2 **406**

——— ——— ——— **s. 43** **643**

——— ——— ——— **s. 47** **118, 884**

——— ——— ——— **s. 47**—*Suit for declaration that decree has been satisfied, whether maintainable.*

Section 47 of the Code of Civil Procedure, 1908, does not bar a suit for declaration that a decree obtained by the defendant against the plaintiff and others has been satisfied so far as the plaintiff's father is concerned, and that it is incapable of execution against him (plaintiff). **P.** JAMUN RAM *v.* KISHEN RAM, 42 P. R. 1914; 79 P. W. R. 1914; 234 P. L. R. 1914 **642**

——— ——— ——— ——— **ss. 47, 151**—*Revoking order for delivery of possession to execution purchaser, whether an order within s. 47 of the Code—Inherent power of Court, where to be exercised—Jurisdiction.*

An executing Court's order under section 151, Civil Procedure Code, 1908, re-calling on the appeal of the judgment-debtor an order previously made for delivery of possession of immoveable property to the transferee from the purchaser at execution sale, is not an order falling within section 47 of the Code and, as such, is not appealable.

The Court has no power to grant such a relief to a party in the exercise of its inherent power within the meaning of section 151, Civil Procedure Code, 1908, as it is forbidden to do so by the express provisions of the Code.

Principles regulating the exercise of the inherent power of the Court discussed,

Civil Procedure Code—(1908)—contd.

It would be a patent misapplication of section 151, if in the exercise of its inherent power a Court were to assume jurisdiction to grant a review where it has been expressly forbidden by the Legislature to entertain such an application.

The inherent power of a Court can only be invoked for the attainment of the ends of substantial justice for the administration of which alone the Courts exist.

Where the effect of the order of the Court would be that one of the parties would be needlessly driven to a suit for possession to which no defence is possible on behalf of the other party in whose favour the order has been passed, the Court should not exercise its inherent power. **C.** SASIBHUSHAN MOOKERJEE *v.* RADHANATH BOSE, 20 C. L. J. 433 **267**

s. 47, O. XLI, r. 5 —*Order of Appellate Court refusing stay of execution of decree, appeal from.*

No appeal lies to the High Court against an order of the lower Appellate Court refusing to stay execution of a decree against which an appeal is pending before that Court. A Court hearing an appeal is "not a Court executing a decree" within the meaning of section 47 of the Civil Procedure Code. **M.** MALAMMAL VITTIL KRISHNAN NAIR *v.* KAVALAPPARA MOOPPIL NAIR AVERGAL, 27 M. L. J. 171 **47**

s. 52 **384**

s. 60 —*Political pension* —Sanad *Grant, interpretation of—Absolute estate granted to descendants of grantee—Property whether liable to be attached and sold in execution of decree.*

The rights of a grantee of land must be determined by reference to the original *sanad*.

Where under the terms of a grant the descendants of the grantee were given an absolute estate in the property granted:

Held, that they had heritable and transferable right in the property; and that the property not being a political pension could be attached and sold in execution of a decree. **A.** KANIZ FATIMA BEGAM *v.* SAKINA BIBI, 12 A. L. J. 437, 3 A. 318 **140**

ss. 60, 61—*Execution —Outerdoor closed—Opening by getting over roof—Subsequent entry by amin—Attachment, legality of—Cattle and seed—Grain of agriculturists, how far exempt from attachment.*

An attachment of moveables effected by an *amin* is not invalidated by the fact that he entered the house, which had been closed, after the same had been opened by certain persons who gained entrance into it by getting over the roof.

Under section 60 of the Civil Procedure Code seed-grain and cattle of agriculturists are not absolutely free from attachment. That section is only intended for the benefit of *indigent* agriculturists and an attachment of such cattle and seed-grain is perfectly valid-especially when the judgment-debtor is able to replace them without much inconvenience. **M.** CHAKRAVARTHI NAINAR *v.* AMMAIPPA NAINAR, 1 L. W. 519 **117**

s. 62 **117**

s. 63—*Successive attachments by two Courts Sale under second attachment, whether effectual.*

Civil Procedure Code—(1908)—concld.

Where there are two successive attachments of the same property under the decrees of two different Courts, it is only the Court which first attached the property that can bring it to sale. A sale by the other is ineffectual and no suit is necessary to set it aside **M.** PEETIYAKKAL VATAKKA *v.* MARAKKARAKATH AHAMMAD, (1914) M. W. N. 796 **906**

s. 65 **8**

s. 66 **735**

s. 66 — *Civil Procedure Code (Act XIV of 1882), s. 317 - Civil Procedure Code (Act VIII of 1859), s. 260 - Benami purchaser —Actual purchaser—Defence—Procedure.*

The special plea, which was available to a certified purchaser at a Court sale against the actual purchaser under section 260 of the Civil Procedure Code (Act VIII of 1859) and section 317 of the Civil Procedure Code (Act XIV of 1882), was a rule of procedure and after the repeal of those Codes it is no longer available by way of defence, as no one has a vested right in a particular form of procedure.

Under section 66 of the New Code of Civil Procedure the plea is open not only to the certified purchaser personally but also to his assigns and heirs. **A.** GAYA PRASAD *v.* LARETI KOER, 12 A. L. J. 1145 **821**

s. 66 — *Property purchased* benami *Real purchaser obtaining and remaining in possession—Declaratory suit by real purchaser, whether barred—Specific Relief Act (I of 1877), s. 42.*

A real purchaser at an auction-sale who purchases the property sold through a *benamidar* but remains in uninterrupted possession of the same, is not precluded by section 66, Civil Procedure Code, from suing for a declaration that he is the owner of the property. **L. B.** MYAT GALE *v.* SAN THA, 7 L. B. R. 135 **810**

s. 86—*Raja of Tipperah —Suit against Ruling Chief—Consent of Governor-General in Council.*

The Raja of Tipperah is a Ruling Chief as described in section 86 of the Civil Procedure Code and no suit against him can be maintained without the consent of the Governor-General in Council. **A.** RAMNATH VAYAS *v.* SRI THAKUR RASH BEHARIJI MAHARAJ **271**

s. 92, *whether applies to private trusts.*

The provisions of section 92, Civil Procedure Code, apply only to a trust for a public purpose and a suit relating to a private trust is not maintainable under those provisions in the Court of a District Judge, but in an ordinary Civil Court. **A.** ABUL HASAN *v.* AZIZ AHMAD **661**

s. 92, O. I, r. 10 —*Trust property alienated Suit against trustee—Alienee, whether necessary and proper party Procedure.*

In a suit under section 92 of the Civil Procedure Code neither a decree for possession nor even for a mere declaration can be given against the alienees of trust property.

Per *Wallis, J.*- In a suit under section 92, Civil Procedure Code, the alienees of trust property ought not to be made parties against their will, for the suit involves a great variety of other matters and cannot

Civil Procedure Code—(1908)—contd.

effectually and completely adjudicate upon and settle their rights, but if they desire to be made parties an order adding them is proper.

Per *Seshagiri Aiyar, J.*—The proper course to adopt in cases where an alienation by a trustee is in question, is to implead the person in whose favour the alienation was made and to decide the case in his presence, inasmuch as he is a proper if not a necessary party. It is necessary in the interests of justice and to avoid a conflict of decisions that he should be a party.

Suits of every description are controlled as regards the array of parties by Orders I and II. The fact that section 92 provides for a particular class of litigation will not take it away from the purview of these Orders. **M.** ASAM RAGHAVULU SETTY *v.* PELLATI SITAMMA, 16 M. L. T. 178; 27 M L. J. 256; (1914) M. W. N. 692 **794**

——— ——— ——— ——— **ss. 96, cl. (3), 104, cl. (2), O. XLIII, r. 1 (m)**—*Compromise petition filed—Objection by one party—Recording of compromise by Court — Decree — Appealability — Court's power to pass decree—Terms outside scope of suit, whether can be incorporated in decree—Consideration for compromise.*

Where a Court of first instance passed a decree in accordance with the terms of a compromise agreement which it recorded and where on appeal against the said decree the District Judge confirmed the same:

Held, that a second appeal lay against the decree of the District Judge and that Order XLIII, rule 1 (*m*), and section 104 of the Civil Procedure Code of 1908 did not bar the same.

Where, in spite of the objection of one of the parties to a compromise, that he only consented to execute a sale-deed outside the Court in consideration of the plaintiff withdrawing the suit and did not consent to a decree being passed against him, the Court held that there was a consent of the parties to the terms of the compromise agreement which it recorded and passed a decree in accordance therewith:

Held, that an appeal lay against the said decree and that section 96, clause (3), of the Code of Civil Procedure of 1908 did not prohibit it.

All terms which form consideration for the adjustment of the matters in dispute in a suit, whether they form the subject-matter of the suit or not, become related to the suit and can be embodied in the decree. **M.** AYYAGRI VEERASALINGAM *v.* KOVVURI BASIVIREDDI, 16 M. L. T. 125; 1 L. W. 54; 27 M. L. J. 173 **56**

——— ——— ——— ——— **s. 104** **643**

——— ——— ——— ——— **s. 104, cl. 2** **56**

——— ——— ——— ——— **s. 104 cls. (1) (f), (2)**—*Appeal from appellate order.*

Where a Court refuses to file an award made without the intervention of the Court and that order is set aside on appeal, there is no appeal from the order of the Appellate Court. **L. B.** MA KYAING *v.* MA SHWE THIN, 7 L. B. R. 277 **7**

——— ——— ——— ——— **s. 107, O. XXIII, r. 1**—*Appellate Court, whether can permit withdrawal of suit in appeal with liberty to bring fresh suit.*

An Appellate Court cannot permit a plaintiff, whose suit has been dismissed by the lower Court and who appeals against that dismissal, to withdraw from his appeal with liberty to bring a fresh suit, inasmuch as the language of Order XXIII, rule 1, Civil Procedure Code, implies that a suit has not yet been disposed of. **M.** CHORAGUDI CHINNA KOTAYYA *v.* VARADARAJA APPA ROW, 1 L. W. 613; 16 M. L. T. 186; 27 M. L. J. 244 **388**

Civil Procedure Code—(1908)—contd.

——— ——— ——— ——— **s. 110** **922**

——— ——— ——— ——— **ss. 115, 151**—*Abuse of judicial process—Civil circulars of Bombay High Court—Money-lender obtaining pro-note—Agreement to refer to arbitration—Authority for Pleader to admit award—Decree in accordance with award set aside.*

On the 9th of July 1913 a money-lender obtained from an Officer a promissory-note, and under date the 11th July two other documents, one in the form of a reference to arbitration, whereby the Officer and the money-lender agreed to refer the matter of money dealings between them to a Pleader and nominated him arbitrator to settle the accounts and pass a judgment against the Officer in favour of the money-lender on the strength of the promissory-note, and the other document was a *vakilpatra* by the Officer appointing and authorizing a Pleader to appear in Court and admit the award that might be passed against him by the arbitrator. On the 16th July, the money-lender made an application to the Court for filing the award said to have been passed by the arbitrator, and on the 22nd of July the Court passed a decree in accordance with the award:

Held, setting aside the decree, that upon the proceedings it was quite clear that there was no point of difference between the parties and that the Judge had disregarded a circular of the High Court and allowed a most transparent abuse of judicial process. **B.** VELCHAND *v.* LIEUT. LISTON, 16 BOM. L. R. 517; 38 B. 638 **371**

——— ——— **s. 115**—*Adjournment conditional on payment of costs—Interlocutory order—Revision*

An order granting adjournment of a case on condition of payment of costs to the opposite party, being an interlocutory order, is not revisable under section 115, Civil Procedure Code. **A.** MUL CHAND *v.* JAGGI LAL, 12 A. L. J. 460 **207**

——— ——— **s. 115**—*Admission of evidence, whether question of Law or of jurisdiction—Exclusion of document from evidence—Document, nature of*—Res judicata.

It is only when a document has some legal effect on the decision in a case that its exclusion from evidence can be treated as a question of error by refusing to exercise jurisdiction. Ordinarily the question of admission of evidence is a question of law only and not of jurisdiction.

Where, therefore, a particular document merely proves that the claim of the plaintiff in a particular rent suit should be allowed but without further obligations, express or implied, such document cannot operate either as *res judicata* or as admission of relationship of landlord and tenant between the parties; and its exclusion from evidence cannot raise a question of jurisdiction under section 115 of the Code of Civil Procedure, 1908. **C.** PRANHARI GUHA *v.* CHANDRA KUMAR GUHA **204**

s. 115—*Error of law, whether High Court competent to interfere—Remedy by suit open—Revision.*

Where there has been an error of law and not of procedure, it is not open to the High Court to interfere in revision.

Where the remedy by suit is open to a party, a petition under section 115 of the Code of Civil Procedure is not the best way of settling questions arising under section 73, especially where there has been payment subsequent to the application to third parties and they are not made parties to the application.

A High Court will not decline to interfere in revision in all cases where there is a remedy by way of suit. But where a more efficatious remedy can be had by regular suit and where the result of interference by the High Court will affect the rights of parties not before the Court *co nominee*, the High Court will not be justified in interfering in revision. **M.** SOMASUNDARAM CHETTY *v.* TIRUNARAYANA PILLAI, (1914) M. W. N. 738 **592**

s. 115—*New defendants added—Plaint not amended—Defendants not prejudiced—Interference by High Court.*

Where, on the addition of new defendants, the plaint was not amended so as to set forth a cause of action against them and both parties proceeded with the trial just as if the plaint had been amended, and the added defendants were not prejudiced by the omission:

Held, that under the circumstances the irregularity was not such as justified interference by the High Court. **M.** NILAMBUR THACHARAKKAVIL KOVILAGATH MANAVIKKARAN *v.* MANJERI PUTTEN KAVILAGAM KARNAVAN, 1 L. W. 775 **607**

s. 115—*Order setting aside* ex parte *decree without sufficient cause—Revision—High Court's power to interfere.*

Where a Subordinate Court sets aside an *ex parte* decree without sufficient cause and allows the suit to proceed, the High Court can, in the exercise of its revisional jurisdiction under section 115 of the Code of Civil Procedure, interfere with such an order (even if it be interlocutory in its nature) and set it aside.

A distinction exists between *an order setting aside an ex parte decree and an order refusing to set it aside*; in the latter case an appeal lies and section 115 of the Code does not apply, while in the former case it is otherwise. **M.** KARUPPAYEE *v.* CHINNAMMAL, 16 M. L. T. 101; 1 L. W. 537 **191**

s. 115 — *Revision — Material irregularity*—Ex parte *decree, set aside when case about to be transferred.*

A Judge acts with material irregularity if he sets aside an *ex parte* decree knowing that the case is about to be transferred from his Court. **C.** NARAYAN PROSAD MONDAL *v.* JOTINDRA NATH BHATTACHARJEE, 19 C. L. J. 258 **79**

s. 115, O. XX, r. 7—*Revision, wrong decision on point of limitation, whether ground for—Presidency Small Cause Courts Act (XV of 1882), s. 38—Eight days' period, from what date to commence when decree amended as to costs.*

An erroneous decision on a question of limitation by a Court having power to decide that question does not justify a High Court's interference under section 115, Civil Procedure Code.

Even where a decree is amended as to costs the eight days' period of limitation for re-opening the case on its merits will be reckoned from the date of the original decree and not from the date of the amended decree. **M.** KUPPUSAMY AIYANGAR *v.* NARAYANA AIYANGAR, 1 L. W. 855; 16 M. L. T. 438 **647**

s. 151—Abuse of Judicial process **371**

s. 151—Abuse of process of Court **597**

s. 151—*Inherent power of Court—Order obtained by fraud set aside in exercise of inherent power.*

Under section 151 of the Civil Procedure Code the Court has inherent power to vacate an order obtained by manifest fraud on it. **M.** VILAKATHALA RAMAN *v.* VAYALIL PACHU, 27 M. L. J. 172 **213**

s. 151—Inherent power of Court, where to be exercised—Jurisdiction **267**

s. 153, O. XXI, r. 57—*Application for execution dismissed—Attachment, effect on—Subsequent application for sale only defective - Amendment.*

As an attachment of property in execution ceases upon the dismissal of the application for execution, a subsequent application for execution by sale only is defective.

Such a defect, however, can be cured by amendment under section 153, Civil Procedure Code. **M.** KUNCHAPUDY ANANTHA VENKATA VEERARAGHAVA CHARYULU *v.* MALLIKARJUNA PRASADA NAIDU, 1 L. W. 665 **883**

O. I, rr. 2, 9, O. II, r. 6—*Misjoinder or non-joinder of parties—Suit not to be defeated—Proper order to be passed—Suit dismissed for misjoinder or non-joinder of parties—Second appeal incompetent.*

No second appeal lies from the decree of a District Judge confirming on appeal the decision of the first Court dismissing a suit both for misjoinder of parties and of causes of action.

Under Order I, rule 9, the Court has no power to direct a suit to be defeated by reason of the misjoinder or non-joinder of parties, but under the circumstances it should take action under Order I, rule 2, and Order II, rule 6, of the Code of Civil Procedure. **C.** GUR PRASAD SINGH *v.* GUR PROSAD LAL, 19 C. L. J. 316 **438**

O. I, r. 6 **881**

O. I, r. 9—*Civil Procedure Code (Act XIV of 1882), s. 31—Non-joinder of parties—Suit dismissed.*

Where a person, who claimed a declaration of his exclusive right to certain property, omitted to join his sisters and mother who apparently were his co-sharers:

Held, that the plaintiff was not entitled to the declaration sought;

Civil Procedure Code—(1908)—contd.

first, because he was not exclusively entitled to the property; and.

secondly, because it was wrong to have omitted to join his co-sharers.

Order I, rule 9, of the present Code of Civil Procedure does not apply to a suit instituted before the Code came into force, and section 31 of the Code of 1882 did not contain a saving clause in favour of non-joinder of parties. **C.** FAIZU v. DOMAN, 19 C. L. J. 455 **536**

O. I, r. 9, O. II, rr. 1 and 2—*Joinder of causes of action—Joinder of parties—Necessary party not added—Party impleaded by Appellate Court—Higher Court will not interfere on score of limitation—Punjab Courts Act (XVIII of 1884), s. 75 (2)—Function—District Judge transferring case to Additional District Judge—Assignments—Jurisdiction—Hindu Law—Father's debt time-barred, son's duty to discharge—Will not acted upon—Family arrangement—Son's right to object to father's alienation—Unfriendliness on part of father does not destroy son's right as co-parcener—Evidence Act (I of 1872), s. 115—Estoppel—Mortgagor condoning defects in mortgage, effect of—Letter, when it will not require registration—Hindu Law—Trust-deed—Trustee alien in race and religion—When valid—Revocable trust—Valid, how far.*

Sub-section (2) of section 75 of the Punjab Courts Act, 1884, cannot be properly construed so as to prevent a District Judge from transferring to a subordinate Court a suit pending before himself. The sub-section is intended merely to invest a District Judge with power of control over the distribution of business, and by no means implies that an Additional District Judge has no judicial powers until the District Judge confers them on him. An Additional District Judge obtains his powers when he is appointed and gazetted, and even if to give him jurisdiction there must be an assignment of function by the District Judge, the transfer of, and direction to try, a particular case to the former by the latter is such an assignment.

Order II, rule 1, Civil Procedure Code, 1908, has reference mainly, if not exclusively, to correct joinder of causes of action, adequate inclusion of reliefs claimed and so forth, rather than to joinder of parties, and even violation of such a rule as Order II, rule 2, does not involve dismissal of suit, but merely that omitted claims shall not be sued for separately.

Where the first Court finds that a particular person is not a necessary party and then proceeds with the suit, the Appellate Court cannot, in view of Order I, rule 9, allow the suit to be defeated, even if it holds that the said person should have been impleaded. If the first Court, however, finds that the said person is a necessary party and directs that he be made one, and the plaintiff refuses thereafter to implead him, that Court would be bound to dismiss the suit.

It is settled law that when an Appellate Court does implead a person interested in the result of an appeal, a higher Court will not upset the order on the score of limitation.

Where a Hindu father was, during all the years when his debts were accumulating, living an immoral life, wasting his estate in debauchery and extravagance, it would not be reasonable to call upon his son, while challenging the validity of the debts, to prove that this and that item of debt was incurred for use on this or that piece of immorality or extravagance.

To a Hindu the payment of his father's debt, though time-barred, is a pious duty and such a debt is a just antecedent debt, however old it may be.

Where after the death of a Hindu testator, in mutation proceedings between his heirs, no mention was made of the Will, nor was it invoked when the suit between them was compromised, and the settlement of shares was not in strict accordance with the personal law of the parties:

Held, under the circumstances of the case, that the settlement was in the nature of a family arrangement, the essence of which was that, notwithstanding the Will, the property was still family property and was inherited from the testator.

Under Hindu Law a son has from birth an indefeasible right as a co-parcener in the family estate and mere unfriendliness on the part of his father cannot destroy that right. He can object to the alienations, made by his father, of the family property.

Where a mortgagor fully condones all defaults and defects in connection with and in the mortgage, he or his representative will not be allowed to assail the mortgage on the ground of those defaults and defects.

Where a person made another think that he recognized and accepted a particular transaction of his father, and in this way induced that other to pay out large sums of money, to undertake heavy liabilities and so forth, himself gaining the benefit of a steady, if not very handsome, maintenance allowance, he would be estopped from going back upon his repeated recognition and acceptance of the aforesaid transaction.

A letter by which the writer intimates that h intends to raise no objection to a certain transaction entered into by the trustees of his father in respect of immoveable property worth more than a hundred rupees, without mentioning that the writer has rights which he is giving up for a consideration or otherwise or that any other person is asserting new rights which he, for consideration or otherwise thereby expressly recognizes, or that he is conferring any rights or privileges, does not require registration.

A trust-deed of a Hindu whereby the trustees are to take over all the estates, collect rents and outstandings, pay debts, bring and defend suits, raise loans etc., and at the same time pay certain maintenance allowances to the author of the trust and his son, who with all the other members of the family could live where and how they pleased without any interference on the part of the trustees, is not unlawful simply because the trustees are of alien race and religion.

A trust revocable by its creator is a valid trust, in so far that the acts of the trustee will be binding on the creator of the trust up to revocation. **P.** SHIB NATH v. ALLIANCE BANK OF SIMLA LTD., LAHORE, 110 P. W. R. 1914; 215 P. L. R. 1914; 3 P. R. 1915 **480**

O. I, r. 10 **794**

Civil Procedure Code—(1908)—contd.

——— ——— ——— **O. I, r. 13, O. 2, r. 7**—*Misjoinder of causes of action and parties—Suits Valuation Act (VII of* 1887), *s.* 11—*Jurisdiction, objection as to.*

Objections as to misjoinder of causes of action and parties and as to want of jurisdiction (owing to under-valuation) when not raised before the Court of first instance are no ground for reversing a decree when they do not affect the decision of the case on its merits. **M.** NARAYANA NAMBUDRIPAD *v.* NARAYANA NAMBUDRIPAD **25**

——— ——— ——— ——— **O. I, r. 13**—*Non-joinder, objection to.*

An objection as to non-joinder of parties cannot be allowed to be raised after settlement of issues. **M.** KOLLICHINA VENKATARAMAYYA *v.* GUDAVALLI SUBBARAYUDU **122**

——— ——— ——— **O. 2, rr. 1, 2 480**

——— ——— ——— ——— **O. 2, rr. 2, 4**—*Cause of action—Suit for possession and rent.*

The 'cause of action' upon which the plaintiff may base various claims in one suit under Order II, rule 2, does not depend upon the character of the relief for which he prays. It refers to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour.

The words of Order II, rule 4 (*c*), do not imply that in all cases a suit for the recovery of immoveable property must necessarily be based upon a different cause of action to a suit for arrears of rent for the same land.

A lease for ten years provided that if the lessee failed to pay rent of any year, the lessor would be entitled to recover possession of the land. The lessee failed to pay rent for two years. A suit for recovery of possession was filed under the forfeiture clause. The plaintiff stated in the plaint that he would bring a separate suit for rent, but he did not obtain permission of the Court in that respect. A decree for possession was passed and possession obtained.

Subsequently, the plaintiff sued to recover the arrears of two years' rent from the defendant:

Held, that the suit was barred under Order II, rule 2, of the Code of Civil Procedure. **B.** KASHINATH *v.* NATHOO KESHAV, 16 BOM. L. R. 454; 38 B. 444 **73**

——— ——— ——— **O. 2, r. 2 (3)**—Cause of action, significance of—Two different trespasses—Bar of second suit—Test **579**

——— ——— ——— ——— **O. 2, r. 6**—Misjoinder or non-joinder of parties—Suit not to be defeated—Proper order to be passed **438**

——— ——— ——— ——— **O. 2, r. 7 25**

——— ——— ——— **O. 3, r. 2**—*Special Powers-of-Attorney—Evasion of law relating to appointment of Pleaders and Advocates—Upper Burma Civil Courts Regulation I of* 1896, *ss.* 25, 26.

Where an ex-petition-writer and ex-apprentice clerk made a business of appearing for parties under cover of special powers-of-attorney and thus practically performed the functions of an Advocate and thereby evaded the provisions of the law relating to the appointment of Advocates and Pleaders:

Civil Procedure Code—(1908)—contd.

Held, that he made himself liable to punishment under section 26 of the Upper Burma Civil Courts Regulation.

Held, further, that the provisions of Order III, rule 2, could not enable an unqualified person to practise as an Advocate in spite of the provisions of section 25 *seqq.*, Upper Burma Civil Courtf Regulation. **U. B.** NGA NYUN *v.* NGA PO O, 7 BUR. L. T. 206 **163**

——— ——— ——— ——— **O. 5, rr. 15, 16, 27, 28**—*Service of notice, when sufficient—Appellant in marine service—No special service.*

An appeal was decided *ex parte* against the appellant who was employed in His Majesty's Marine Service. He applied to set aside the *ex parte* decree on the ground of insufficiency of notice. It was found that a notice was served under the provisions of rules 15 and 16 of Order V of the Civil Procedure Code and the appellant had an opportunity of appearing as he was in communication with his family members both before and after the service:

Held, that the service was sufficient and the *ex parte* decree could not be set aside:

Held, also, that the officer or mechanic in the employ of the Indian Marine Service is subject to exactly the same rules with regard to service of summons as any other person as provided in rules 27 and 28 of Order V of the Civil Procedure Code. **C.** INTU MIAH *v.* DARBUKSH BHUIYAN, 42 C. 67 **380**

——— ——— ——— ——— **O. 5, rr. 16, 27, 28 380**

——— ——— ——— **O. 6, r. 14 140**

——— ——— ——— ——— **O. 6, r. 17**—*Amendment of plaint after passing of preliminary decree—Partition suit—Equitable jurisdiction of Court.*

The rule allowing amendment of plaint is a rule of conduct rather than a rule of rigid law and must be read as subject to the inherent powers of the Court to prevent abuse of its powers. The Court has to see that material justice is done.

In a suit for partition, a Court of Equity does not act ministerially and in obedience to the call of those parties who have a right to partition, but adjusts the equities of all parties interested. **S.** TURABALISHAH *v.* BIBI NAJU, 8 S. L. R. 28 **863**

——— ——— ——— ——— **O. 6, r. 17**—*Pre-emption suit—Plaint omitting to mention portion of property claimed—Amendment after expiry of period of limitation—Amendment allowable—Date of institution date of presentation of original plaint.*

Where in a pre-emption suit, the plaintiff, by mere inadvertence, omitted to mention in the plaint a portion of the property claimed, and was subsequently allowed to amend his plaint after the expiry of the ordinary period of limitation:

Held, that there was nothing illegal in allowing the plaint to be amended.

Where a plaint has been rightly amended, the date of institution of the claim is the date of presentation of the original, and not of the amended, plaint. **P.** JALAL DIN *v.* QAIM DIN, 62 P. R. 1914; 255 P. L. L. R. 1914; 161 P. W. R. 1914 **439**

——— ——— ——— ——— **O. 7, rr. 5, 11 77**

——— ——— ——— **O. 7, r. 6**—Suit not on face of plaint time-barred **463**

Civil Procedure Code—(1908)—contd.

O. 7, r. 11—Order rejecting plaint—Decree—Appeal **738**

O. 7, r. 11—*Valuation of suit—Jurisdiction—Court-fee—Suit for possession of colony land—Custom—Alienation by father—Market-value of land determines valuation of suit—Suit improperly valued—Procedure.*

The plaintiff sued for possession of some colony land, alleging that a sale by the plaintiff's father was without necessity. The suit was instituted in the Court of a first Class Munsif and was stamped at Rs. 1-2, calculated at five times the revenue. It was not clear what this revenue represented.

The Munsif held that the jurisdictional value of the suit was Rs 2,598 under the Suits Valuation Act calculated at fifteen times the net profits and returned the plaint for presentation to a competent Court.

On appeal the Divisional Judge held that the valuation of colony lands should be based on the market-value and dismissed the appeal. The plaintiff applied for revision of the order of the Divisional Judge. Subsequently the plaint was rejected by the District Judge:

Held, that the Divisional Judge was right in holding that the valuation of the suit for purposes of both jurisdiction and Court-fees would be the market-value. But the Divisional Judge ought not to have dismissed the appeal. He should have determined the market-value of the land and allowed the plaintiff time to pay up the deficiency in the Court-fee and present his plaint to the proper Court after it was properly stamped. **P.** WASAWA RAM *v.* BAHADUR CHAND, 194 P. L. R. 1914 **24**

O. 7, r. 11 (b)—Deficiency in Court-fee not made up when order—Suit not to be dismissed—Plaint to be rejected **435**

O. 7, r. 11 (b)—*Rejection of plaint for non-payment of full Court-fee—Order appealable—Revision incompetent.*

Where the Court, finding the suit to have been undervalued, required the plaintiff to pay the requisite Court-fee on the valuation made by the Commissioner appointed for the purpose, and on the plaintiff begging for four months' time within which to pay up the deficiency in Court-fee rejected the plaint under Order VII, rule 11 (*b*), Civil Procedure Code:

Held, that the order of rejection was appealable, and, therefore, a petition for revision of the order was incompetent. **P.** SADA KUAR *v.* BUTA SINGH, 80 P. R. 1914; 265 P. L. R. 1914; 167 P. W. R. 1914 **565**

O. 8, r. 5—*Failure to deny allegations in plaint, effect of—Issue framed on a point not denied in written statement, competency of Appellate Court to deal with point—Amendment of plaint—Discretion of Court.*

There was nothing in the Civil Procedure Code of 1882 corresponding with Order VIII, rule 5, of the present Code. Under the new Code, however, the effect of failure to deny the allegations in the plaint does not necessarily amount to a proof in the plaintiff's favour.

Where the first Court has distinctly put in issue a certain point on which the parties have gone to trial, it is open to the Appellate Court to decide that point notwithstanding anything that may appear or not appear in the written statement.

It is in the discretion of Court to allow or not to allow amendment of plaint. **C.** SATYES CHANDRA SARKAR *v.* MONMOHINI DASI, 19 C. L. J. 518 **567**

O. 9, r. 9 (1)—*Application by minor for restoration of suit—Guardian's laches—Duty of Court to inquire.*

Where a minor's suit has been dismissed, the Court, while entertaining an application under Order IX, rule 9, of the Civil Procedure Code, ought to inquire whether the minor's guardian has been guilty of gross neglect of his interests. Minority itself is not "sufficient cause" for restoration. **M.** ADAYA PADI RAMANNA UDPA *v.* KRISHNA UDPA, 27 M. L. J. 167 **450**

O. 14, r. 3 (1) (6), O. 15, r. 3 (1), proviso—*Summons to defendant for settlement of issues only—Suit finally disposed of—Jurisdiction.*

Where summons was issued for settlement of issues only, a Court has no jurisdiction to make a final disposal of the suit on the day fixed for issues. **M.** TIRUPATI VARADACHARIAR *v.* A. PARTHASARATHY IYENGAR, (1914) M. W. N. 501 **9**

O. 15, r. 3 (1) proviso 9

O. 20, r. 7 647

O. 20, r. 7—*Limitation Act (IX of 1908), s. 12 (2), Sch. I, Art. 152—Date of decree same as date of judgment.*

Order XX, rule 7, of the Code of Civil Procedure, read with Article 152, Schedule I, of the Limitation Act, IX of 1908, makes the "date of the decree" for calculating time for appeal to be the date on which the judgment was pronounced.

But where some time is taken in getting the decree drafted because the extra Court-fee is not paid and time is given for its payment, such time must be taken to be the time requisite for obtaining copies within the meaning of section 12 (2) of the Limitation Act, provided that an application for copy was put in before the preparation of the decree. **M.** NARAYANASWAMY TEVAN *v.* KRISHNASAMI PILLAI **67**

O. 20, r. 9—*Decree for possession of immoveable property—Boundaries given—Decree, whether indefinite or incapable of execution—Evidence—Boundaries, determination of.*

Where a decree for possession of immoveable property specifies the boundaries and the property can be identified thereby the decree is not indefinite and incapable of execution and the decree-holder can obtain delivery of possession.

The boundaries in such cases should be determined on evidence to be adduced by the parties. **C.** DOYAL CHANDRA MANDAL *v.* KAURI (CHARAN) NASKAR **534**

O. 20, r. 12 (2) 436

O. 20, r. 15—Preliminary decree—Discretion of Court in passing **146**

O. 21, r. 2, cl. 2 884

Civil Procedure Code—(1908)—contd.

——— ——— ——— ——— **O. 21, r. 35**—*Usufructuary mortgage by father—Decree against father—Joint possession with son—Partition, right of—Transfer of Property Act (IV of 1882), ss. 2, 44.*

Where a usufructuary mortgage effected by a Hindu father was found valid only to the extent of his interest and a decree was passed in favour of the mortgagee for joint possession with the mortgagor's son, who objected on the ground that no such decree could be passed except in a suit for partition:

Held, Per *Oldfield*, J., (*Napier*, J., dissenting), that the mortgagee was not entitled to a decree placing him in possession under Order XXI, rule 35 (2), of the Code of Civil Procedure, but only to a decree declaring his rights to possession and entitling him to institute a suit for partition to recover it.

Per *Napier*, J.—The mortgage passing only the mortgagor's unascertained share, the mortgagee can only have a decree for common possession. Section 44 of the Transfer of Property Act provides for partition as a means of making the possessory right available and Order XXI, rule 35, provides a means of giving possession which will not injure another person who is also legally in possession. **M.** KOTA BOLABHADRA PATRO *v.* KHETRA DOSS, 16 M. L. T. 229 **401**

——— ——— ——— ——— **O. 21, r. 57 883**

——— ——— ——— **O. 21, rr. 53, 63**—*Attachment of debt—Objection proceeding—Garnishee—Cross-debt—Set-off—Payment of Court-fee.*

Order XXI, rule 58, applies in terms to any property attached in execution and thus relates to debts so attached. Under Order XXI, rule 63, of the Code of Civil Procedure, 1908, it is not open to a garnishee to plead a defence which has already in an execution inquiry been unsuccessful, except in a suit instituted within one year from the date of the adverse order.

If a cross-debt is due to the garnishee at the date of attachment, he has a right of set-off in his favour, and the equity arising from the cross-debt can be set up without payment of a Court-fee. **B.** 16 BOM. L. R. 520, 38 B. 631 **375**

——— — - ——— **O. 21, rr. 60, 61, 63**—*Order on claim petition, nature of—Suit under r. 63—Continuation of claim proceedings—Transfer of Property Act (IV of 1882), s. 52*—Lis pendens—*Sale of attached property after order on claim petition and before suit by unsuccessful party—Limitation Act (IX of 1908), s. 22, Sch. I, Art. 11*—*Purchaser* pendente lite—*Plea of limitation.*

Suits under Order XXI, rule 63, are not original suits but a mere continuation of proceedings in the claim petitions. Therefore all alienations of the attached property made after the date of order passed on the claim petition and before the institution of the suit to set aside that order are alienations *pendente lite* within the meaning of section 52 of the Transfer of Property Act.

An alienee *pendente lite* not being a necessary party cannot, if made party after the period of limitation, advance the plea of limitation under section 22.

Per *Sadasiva Aiyar*, J.—An order on a claim petition under Order XXI, rules 60, 61, is connected with rights in immoveable property attached and is not merely an affair between the parties in their personal capacities unconnected with rights to and over the properties. **M.** KRISHNAPPA CHETTY *v.* ABDUL KHADER SAHEB, 26 M. L. J. 449 **11**

——— ——— ——— ——— **O. 21, rr. 61, 63 11**

——— ——— ——— **O. 21, r. 63 375**

——— ——— ——— ——— **O. 21, r. 63**—*Execution—Attachment—Claim petition—Judgment-debtor party to claim—Claim allowed—Judgment-debtor, whether competent to sue for declaration of his title to property attached and for cancellation of attachment.*

A judgment-debtor, who was a party to claim proceedings, can file a suit under Order XXI, rule 63, Civil Procedure Code, for a declaration of his right to the properties and for vacating an adverse order in the said proceedings.

Though the discussion of evidence in the judgment of the lower Appellate Court may not be satisfactory, yet that by itself is not sufficient ground for interference in second appeal, like absence of evidence or disregard of it. **M.** SABELLA APPANNA *v.* MALLIDI APPANNA, 1 L. W. 772; 16 M. L. T. 300; (1914) M. W. N. 833 **700**

——— ——— ——— ——— ——— **O. 21, r. 63**—*Value of suit for purposes of jurisdiction—Right of appeal governed by Act in force at time of filing appeal—Alienation made pending temporary injunction not void—Sale by debtor to defeat creditor—Purchaser aware of fraudulent intention of vendor—Fraudulent transfer.*

In a suit for declaration under Order XXI, rule 63, of the Civil Procedure Code, 1908, by the decree-holder, where there is no dispute as to title between the judgment-debtor and the other objector and the former is merely a *pro forma* defendant, the value of the suit for purposes of jurisdiction is the amount of the decree.

Under the Punjab Courts Act, as it stood before the Amending (Punjab) Act I of 1912, there was no right of further appeal in a case decided by the first Appellate Court, but at the date of filing an appeal from the appellate decree the Amending Act had come into force which conferred a right of second appeal from the decree appealed from:

Held, that the second appeal was competent under the circumstances of the case.

An alienation made pending a temporary injunction is not void.

A sale effected by a debtor with intent to defeat the just claims of a creditor is void if the purchaser is aware of the fraudulent intentions of the debtor. **P.** BHAGWAN DAS *v.* KANSHI RAM, 253 P. W. R. 1914 **180**

——— ——— ——— ——— **O. 21, rr. 69 (2) and 90**—*Sale adjourned for more than seven days—Fresh proclamation of sale, not issued—Irregularity.*

The omission to issue a fresh sale-proclamation, as required by Order XXI, rule 69 (2), Civil Procedure Code, in case of the sale being adjourned for more than seven days, amounts merely to an irregularity; and accordingly, as provided by Order XXI, rule 90, Civil Procedure Code, the existence of this irregularity is no sufficient ground for setting the sale aside

Civil Procedure Code—(1908)—contd.

unless it is shown that the person applying therefor has sustained substantial injury. **O.** MOTI SINGH *v.* PRITHIPAL SINGH 17

O. 21, r. 90 17

O. 21, r. 90—*Auction sale—Irregularity—Substantial injury—Proof.*

In order to get a sale set aside on the ground of material irregularity, a party applying under Order XXI, rule 90, must prove that there was such irregularity in publishing or conducting the sale as resulted in substantial injury to him. **A.** MOHAMAD MAQBUL-UL-RAHMAN *v.* SAIYED ALI KHAN 18

O. 21, rr. 90, 92—*Auction sale, insufficient notice of—Loss.*

Where several improper orders are passed relating to the sale of a minor judgment-debtor's property and the decree-holder does not comply with the instructions given by the executing Court and the judgment-debtor suffers substantial loss thereby, the proper course is to set aside the sale and not to direct the judgment-debtor to resort to the cumbrous remedy by fresh suit against his guardian and the decree-holder.

Where on account of insufficient notice of sale the property of a judgment-debtor has been knocked down for an inadequate price, the sale is liable to be set aside as irregular. **P.** MIRAJ DIN *v.* DILBAGH RAI, 48 P. W. R. 1914; 144 P. L. R. 1914 51

O. 21, r. 90—*Formal array of parties in preamble of application, necessity of.*

There is no absolute necessity for a judgment-debtor, filing an application under Order XXI, rule 90, Civil Procedure Code, to set out in the preamble of the application any formal array of parties and, therefore, such an application should not be thrown out simply because an auction-purchaser was not shown therein as a party. **O.** GHAZANFAR HUSAIN *v.* RAM RATAN, 17 O. C. 306 907

O. 21, r. 92 51

O. 21, r. 94 8

O. 22, rr. 4, 9—*Application for substitution of name filed beyond six months—Abatement—Limitation Act (IX of 1908), s. 5—Extension of time.*

An appeal abates where no application is made in the case to bring on the record the legal representatives of the deceased respondent within the six months prescribed by the Limitation Act. Section 5 of the Limitation Act does not apply to such an application.

Under Order XXII, rule 9, of the Civil Procedure Code the remedy of the appellant after such abatement is to apply to have the order of abatement set aside on the ground that he was prevented by any sufficient cause from continuing the suit or the appeal, as the case may be, and this rule clearly makes section 5 of the Limitation Act applicable to it. **A.** SECRETARY OF STATE *v.* JAWAHIR LAL, 12 A. L. J. 299; 36 A. 235 48

O. 22, r. 1 328

O. 23, r. 1—*Withdrawal of suit with permission to bring fresh one—Sufficient ground—Omission to include in plaint several inconsistent causes of action, effect of.*

Civil Procedure Code—(1908)—contd.

The omission by the plaintiff to include in his plaint all his causes of action, which are inconsistent with each other, cannot be said to constitute a formal defect in the suit and is not a sufficient ground to allow him to withdraw the suit with permission to bring a fresh one.

Where the plaintiff sues on the basis of adoption and the defendant denies the adoption, plaintiff cannot be allowed to withdraw the suit with permission to bring a fresh suit on the basis of a Will, as the dismissal of his suit on the basis of the adoption would not operate as a bar to his new suit on the basis of the Will. **A.** MANBHARI *v.* SUMER CHAND, 12 A. L. J. 441 175

O. 23, r. 2 188

O. 23, r. 3—Compromise before Local Commissioner when not binding 710

O. 23, r. 3—Pleader, power of, to compromise 935

O. 26, r. 14 227

O. 30, r. 1—*Suit in name of firm—Firm must consist of two or more persons—Plaint, whether can be signed and verified by one partner.*

Where under Order XXX, rule 1, of the Civil Procedure Code a suit is brought in the name of a firm there must be two or more persons carrying on business in that name. One single person carrying on business in the name of a firm cannot sue in the name of the firm.

In suits brought in the name of firms each partner can sign and verify plaints for himself and as agent for other co-partners. It is not necessary that all the partners or even two partners should sign and verify the plaint. **A.** FIRM SWARATH RAM *v.* SARUP LAL RAM, 12 A L. J. 1220 131

O. 32, r. 7 874

O. 32, scope of 738

O. 33, r. 1 9

O. 34, r. 1 931

O. 34, rr. 2 and 3 752

O. 34, rr. 4, 6—*Transfer of Property Act (IV of 1882), s. 88—Decree directing payment of money within fixed time and in default sale of mortgaged property—Money-decree—Further order under rule 6, unnecessary.*

Where a decree directs payment of the amount decreed within a fixed time and orders sale of mortgaged property in default, the decree is not merely a mortgage-decree but also a money-decree and no further order under rule 6, Order XXXIV, is necessary. **M.** CHERUVALATH KUNHANARI *v.* THEYYATATH KORAN, (1914) M. W. N. 766 50

O. 34, r. 5 118

O. 34, r. 6 50

O. 34, r. 6—*Decree—Decree for sale of mortgaged property and personal decree against other property—Decree, construction of.*

It is not necessary to obtain a fresh decree under Order XXXIV, rule 6, Civil Procedure Code, if the decree originally passed is both a decree for the sale of the property mortgaged and a personal decree against the other property of the judgment-debtor.

Civil Procedure Code—(1908)—contd.

A decree might be construed in the light of the judgment. **O.** BISHESHAR BAKHSH SINGH *v.* DEBI BAKHSH SINGH, 17 O. C. 153 **121**

O. 38, r. 5—*Attachment before judgment—Property outside Court's jurisdiction—Interpretation of Statute—Reference to proceedings of Legislature.*

A Civil Court has no power to issue a warrant of attachment before judgment on property situated without its jurisdiction.

A Court is not justified in referring to the proceedings of the Legislature, which resulted in the passing of an Act, as an aid to the construction of any of its provisions. **U. B.** BHAI KHAN *v.* DES RAJ, U. B. R. 1914 II, 16 **771**

O. 40, r. 1 (d) (1) **645**

O. 40, r. 1 (2)—*Party in possession of property in dispute—Gross mismanagement—Waste—Receiver.*

Order XL, rule (2) of the Civil Procedure Code, 1908, refers to a case of removal of property from the possession or custody of a person other than the parties to the suit. But as between the parties to a suit in which the main question is, who is entitled to the immediate possession of the subject-matter of the suit, there is no bar to the appointment of a Receiver, if a proper case is made out for the appointment

The only object and effect of appointing a Receiver should be to maintain the property in its present condition pending the litigation, and for that period, at any rate, to avoid further waste.

Where it was clearly proved that the estate was being grossly mismanaged and that if the management continued the whole estate would be jeopardized:

Held, that a clear case for the appointment of a Receiver was made out. **C.** SATYA NARAIN SINGH *v.* KESHABATI KUMARI, 18 C. W. N. 547 **406**

O. 41, r. 1—*Limitation Act (IX of 1908), s. 12 (2)—Appeal presented out of time without copy of judgment—Copy of judgment produced in connected appeal—Delay, when to be excused.*

A memorandum of appeal should always be accompanied by a copy of the judgment unless its production is dispensed with by the Court. An appellant is not entitled to a deduction of the time taken in obtaining copies of judgments to be filed in another connected appeal where a judgment is available to the Court at the hearing of the appeal, even if it may have been filed in another appeal. The Court may overlook delay in presentation if there are any merits in the case. Rules of procedure are to subserve the administration of justice and are not to be taken to furnish a means for dealing with the claims of suitors by the application of mechanical tests as a speedy and convenient substitute for adjudication upon merits. **M.** AVUDAI AMMAL *v.* GANAPATHI AIYAR **28**

O. 41, r. 1—*Madras Estates Land Act (I of 1908), ss. 112, 114 and 192—Objection to attachment—Dismissal of suit on preliminary point—Appeal to District Court—Remand—Appeal against remand order, competency of.*

Civil Procedure Code—(1908)—contd.

No appeal lies to the High Court against a remand order passed by the District Court in a suit under sections 112 and 114 of the Madras Estates Land Act I of 1908. **M.** VILVANATHA MUDALIAR *v.* MANNAR NAIDU, 1 L. W. 667 **425**

O. 41, r. 5 **47**

O. 41, r. 11 **880**

O. 41, r. 17—*Appellant absent—Appeal dismissed—Order of dismissal not stating appellant's absence as reason for dismissal—Cross-objections adjudicated upon on merits, illegality of—Dismissal, order of, to be considered as one on preliminary point—Second appeal—Remand—Fresh proceedings.*

Where an appeal is dismissed under Order XLI, rule 17, Civil Procedure Code, the cross-objections cannot be adjudicated upon on the merits.

Where on the appellant being absent and unrepresented at the time that the appeal was called on for hearing, the Court dismissed the appeal without entering into the merits, without deciding any point raised in the grounds of appeal and without stating that the appeal was being dismissed owing to the absence of the appellant, and dismissed the cross-objections on the merits after argument:

Held, (1) that the appeal not having been dismissed under the provisions of Order XLI, rule 17, Civil Procedure Code, but under an erroneous impression as to the law of procedure, which had the effect of a dismissal upon a preliminary point, an appeal lay from the order of dismissal;

(2) that the order dismissing the cross-objections was also incorrect;

(3) that the hearing of the appeal and the cross-objections should proceed *de novo* and the previous proceedings be considered a nullity. **O.** SUBHADRA KUAR *v.* BIRESHWAR PRASAD, 1 O. L. J. 485 **916**

O. 41, r. 20—*Discretionary—Discretion not to be exercised in case of extreme negligence—Law of limitation inapplicable to action taken under rule.*

The law of limitation has no application to action taken by the Court under Order XLI, rule 20, of the Civil Procedure Code.

The power to take action under Order XLI, rule 20, Civil Procedure Code, is discretionary, and in an extreme case of appellant's negligence, where the omission to make a party is not of the same character as a clerical error or slip of the pen, but seems to have been due to an essential misunderstanding of the case and of the law applicable to it, the Appellate Court will decline to exercise the discretion. **P.** SHAHAB DIN *v.* MIRAN BAKHSH, 79 P. R. 1914; 268 P. L. R. 1914; 169 P. W. R. 1914 **549**

O. 41, r. 24 **144**

O. 41, r. 27 (b)—*Appellate Court's power to call for fresh evidence.*

An Appellate Court has no power to call for fresh evidence under rule 27 (*b*) of Order XLI, when a party has deliberately declared in the Court of first instance that he has no witnesses at all. **M.** ARASAPPA PILLAI *v.* MANIKA MUDALIAR, 16 M. L. T. 301 **587**

Civil Procedure Code—(1908)—concld.

——— ——— ——— ——— **O. 41, r. 31**—*Judgment of Appellate Court, what it should contain.*

There should be in the judgment such a statement of the case as to enable the Appellate Court to be satisfied that the Court below has understood the real issues between the parties and that it has tried those issues and has considered the evidence. A judgment of the first Appellate Court merely to the effect that it is in entire agreement with the findings of the Court of first instance and, therefore, dismisses the appeal, is not sufficient and does not comply with the provisions of Order XLI, rule 31, Civil Procedure Code. **O.** BENI MADHO *v.* RAM HARAKH, 1 O. L. J. 334 **596**

——— ——— ——— ——— **O. 41, r. 33 973**

——— ——— ——— ——— **O. 41, r. 33**—*Power of Appellate Court to decree suit against defendant who was exempted from liability by first Court.*

Where a suit against two persons is decreed against one and dismissed against the other and only the former appeals, making the latter a party to the appeal, the Appellate Court can decree the suit only against the latter, exempting the appellant altogether from liability. **A.** BHAWANI DAS *v.* BABU SINGH **273**

——— ——— ——— ——— **O. 42, r. 1 144**

——— ——— ——— ——— **O. 43, r. 1 (m) 56**

——— ——— ——— ——— **O. 43, r. 1 (w), O. 47, r. 7**—*Review—Order granting review—When appealable.*

Order XLIII, rule 1, clause *(w)* of the Code of Civil Procedure, must be read with, and subject to, rule 7 of Order XLVII of the Code, and an order granting an application for review may be appealed against only on grounds mentioned in rule 7 of Order XLVII. **C.** HARI CHARAN SAHA *v.* BARAN KHAN, 41 C. 746 **903**

——— ——— ——— ——— **O. 47, r. 4 880**

——— ——— ——— ——— **O. 47, r. 7 903**

——— ——— ——— ——— **Sch. II, r. 16 (a)**—*Arbitrator appointed without agreement of parties—Decree based on award—Appeal—Revision.*

The rule that no appeal lies against a decree based upon an arbitration award applies equally whether the decree is impugned on the ground that the award was given by an arbitrator not properly appointed or that the award was invalid because of irregularities in the procedure of the arbitrator. In both cases the award is impugned as one made by a tribunal not constituted by the agreement of parties. The principle is that the decreeing Court is made the sole Judge of the propriety of the decree. The decree in both cases is one passed under rule 16 (2) of second Schedule of the Code of Civil Procedure and is not appealable.

A High Court will not ordinarily interfere in revision in such cases. **M.** NIDAMURTHI KRISHNAMURTHY *v.* GARGIPARTHI GANAPATHILINGAM, (1914) M. W. N. 865 **583**

——— ——— ——— ——— **Sch. II, para. 18 220**

Clasp knives, whether arms **337**

Commission agent, liability of **927**

Companies Act (VI of 1882)—*Directors irregularly appointed—Allotment of shares, validity of—Allotment of shares after unreasonable delay—Failure to give notice of allotment—Liquidation of company—Contributories.*

Where under the Articles of Association of a Company the least number of Directors required to form a quorum is three and out of those three two only are regularly appointed, the constitution of the Board is irregular, and the allotment of shares by such irregularly constituted Board of Directors is invalid. But if the Articles of Association validate an act done by a *de facto* Director in a *bona fide* manner, the Courts will uphold his act. Where the applicants for shares did not decline to accept the shares allotted to them on the ground of unreasonable delay, they could not raise an objection against their being put on the list of contributories when the company had to go into liquidation.

Where no notice of allotment of shares is served upon those to whom shares are allotted, they cannot be put on the list of contributories when the Company goes into liquidation. **A.** CHANGA MAL *v.* PROVINCIAL BANK LD., 12 A. L. J. 667; 36 A. 412 **210**

——— ——— ——— ——— **s. 28**—*Contract to take shares—Company, winding-up of—Share-holder, liability of—Payment in cash, what constitutes—Agreement not to pay price of shares in cash, when valid.*

If, before a contract to take shares is rescinded a winding-up be commenced or a concern cease to be a going concern, the shareholder can no longer be relieved, but will be liable to be a contributory.

The setting off of a debt due from the Company against future calls on shares can only be considered a payment in cash within the meaning of section 28 of the Indian Companies Act if the debt be due *in presenti*.

An arrangement that a registered Company's purchased shares are not to be paid for in cash but are to be issued to the purchaser as fully paid-up shares as part of an advance which the Company has undertaken to make, is illegal if it is not made in writing and filed with the Registrar of the Joint Stock Companies as laid down under section 28 of Act VI of 1882. **P.** LACHHMAN SINGH *v.* LIQUIDATORS OF THE INDUSTRIAL EAST CO. LD., 102 P. W. R. 1914; 201 P. L. R. 1914 **672**

——— ——— ——— ——— **ss. 128, 141**—*Company—Petition by creditors for winding-up—During pendency of petition, share-holders resolving on voluntary liquidation—Appointment of liquidators by share-holders—Court ordering compulsory winding-up and appointing its own liquidators—Right of appeal.*

After a petition had been presented by certain creditors to the District Judge of Lahore for the winding-up by the Court of the Peoples' Bank, Limited, and the 14th November 1913 had been fixed for the hearing of the said petition, a meeting of the shareholders of the Company was held on the 9th November 1913 and a resolution passed to the effect that the Company should go into voluntary liquidation, subject to the supervision of the Court, and that the present appellants should act as liquidators. This resolution was brought to the notice of the District Judge on the said 14th November by an application addressed to him by the appellants which was ordered to be filed on the record. The District Judge after full consideration of the facts and with the said resolution of the

Companies Act—concld.

Company before him, decided to direct a compulsory winding-up by liquidators appointed by him:

Held, that the liquidators appointed by the Company *pendente lite* had no right to contest the order directing the compulsory winding-up. **P.** PEOPLE'S BANK OF INDIA, LD. *v.* NARAIN DAS, 73 P. R. 1914; 279 P. L. R. 1914 **553**

——— ——— — **s. 128**—*Petition for winding up—Grounds to be alleged—Petition by creditor or share-holder—Distinction—Discretion of Court*

In section 128 of the Indian Companies Act the first four grounds for winding up a company are specific, and any other ground alleged under (*e*) must be of a like nature to those given under headings (*a*) to (*d*) A petition by a share-holder for winding up stands on a different footing to a petition by a creditor. It should be more closely scrutinized on presentation. The usual ground for a creditor's petition would be that the respondent-company is unable to pay its debt, and in such a case the company must pay the debt or submit to a winding up order. A share-holder's petition must, as a general rule, allege one of the grounds under headings (*a*), (*b*), (*c*) and (*d*) or any ground which the Court is satisfied is of a like nature to those in section 128, and if any of those grounds are alleged, the Court will, under ordinary circumstances, admit the petition. If any other grounds are alleged the petition does not satisfy the requirements of the Act.

There is nothing in the Act or Rules which deprives the Court of the discretion which it has in every other case so that the Court may, if it thinks fit, refuse to admit a petition, or, as an alternative course, give the company concerned notice that a petition has been presented, so that it may take proceedings to restrain the petitioner from proceeding with his petition.

Where the petition by a share-holder contains allegations which all relate to the internal management or mismanagement of the company's affairs, it is a matter for the share-holders themselves to deal with, and not one that would call for interference by the Court. **S.** PIONEER BANK, *In re*; CHAINRAI VELERAN, *In re*, 16 BOM. L. R. 508 **264**

—— — —— **s. 141** **553**

Compensation, *award of—Acquittal of accused in summary trial – Failure to record objection of complainant—Criminal Procedure Code (Act V of 1898), ss. 250, 263 (g) – Interference in revision.*

Where on acquitting the accused in a summary trial the Magistrate awarded compensation to the accused without recording the complainant's objections, the Judicial Commissioner's Court, holding that it was imperative on the Magistrate to record the objections of the complainant, set aside his order and directed him to proceed according to law.

Per *Boyd, A. J. C.*—The power of interference in revision is discretionary and the Court is not bound to move even in cases of legal mistake. Still less should it move in the case of a technical mistake of adjective law, inasmuch as the object of the powers is to do justice and a technical mistake cannot be presumed to cause injustice. **S.** MINHOMAL *v.* EMPEROR, 8 S. L. R. 25; 15 CR. L. J. 666 **994**

Compromise—*Agreement to abide by sums fixed by other side—Acquiescence—Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Pleader, power of, to compromise.*

Where the parties to a suit entered into an agreement to abide by sums to be mentioned by the other side in settlement of the litigation, and in accordance therewith made no objection to the sums stated:

Held, that their acquiescence amounted to a lawful adjustment within the meaning of Order XXIII, rule 3, Civil Procedure Code

A Pleader ordinarily has no power to compromise and this power cannot be given in Sind in the *vakalatnama* in view of Form No. 4 of Sind Courts Civil Circulars **S.** MAHOMED UMAR *v.* CHIMANSING, 8 S. L. R. 91 **935**

——— ——— — Assignment by *benamidar*, effect of **555**

——— ——— — Confession of judgment, whether compromise **620**

———— ———, deed of, interpretation of **743**

——— ——— — Enhancement of rent in kind **442**

——— ——— — in interest of family, manager competent to enter into—Fraud or undue influence as ground of avoiding compromise—*Karta* plaintiff or defendant not to be distinctly stated as such—Residence of joint family members at different places—Business on behalf of family carried on in local manager's name alone—Local manager, decree against, binding on whole family **849**

——— ——— Landlord withdrawing suits in consideration of tenants executing a promissory-note—Consideration, whether lawful **80**

——— — —— in mutation proceedings—Registration **34**

——— ——— —*Party present but not signing it, whether bound – Minor, repudiation by—Civil Procedure Code (Act V of 1908), O. XXXII, r. 7.*

A person who is a party to a suit and who is present in Court at the time of compromising it but does not object to its terms, is bound by the compromise although he has not actually signed it, and particularly where he also gets some benefit thereunder.

A minor on attaining majority is incompetent to repudiate a compromise made by his next friend or guardian in a suit, if it was made for his benefit and with the sanction of the Court **P.** AMIR *v.* FAQIRA, 139 P. W. R. 1914; 242 P. L. R. 1914 **874**

——— ——— petition filed—Objection by one party—Recording of compromise by Court—Decree—Appealability—Court's power to pass decree—Terms outside scope of suit, whether can be incorporated in decree—Consideration for compromise **56**

——— ——— ——— Registration—Matter extraneous to litigation **377**

——— ———*Suit for annulling, grounds for—Trustee and* cestui que trust, *re-opening of accounts settled between.*

A plaintiff who knows all the facts of his case and deliberately compromises his suit after taking independent advice cannot get the compromise annulled.

Compromise—concld.

A compromise cannot be annulled simply because after it was effected one of the parties dealt with a portion of the property in such a way that the *status quo* could not be restored.

To re-open an account settled between a trustee and *cestui que trust*, some objection in substance must be shown, some error in the account must be established. **C.** BEJOY KRISHNA MAJUMDAR *v.* DWARIKA KRISHNA MAJUMDAR **218**

——— ——— ——— Will—Construction **313**

Confession—Care necessary in recording confessions—Questions as to ill-treatment—Magistrate's satisfaction as to voluntariness of confession—Statements in confession inconsistent with medical evidence **833**

——— ——— in Police custody—Retracted, value of **525**

——— ——— ——— *Retracted confession—Value of confession against co-accused.*

The net result of authorities on the value of confessions seems to be this:

(*i*) That it is not *illegal* to base a conviction upon the uncorroborated confession of an accused person, provided the Court is satisfied that the confession was voluntary and is true in fact;

(*ii*) that, *from the point of view of legality, pure and simple*, the fact that a confession has been retracted, is immaterial;

(*iii*) that the use to be made by the Court of a confession, whether retracted or not, is a matter rather of prudence than of law, the business of the Court being to make up its mind, in accordance with the dictates of common sense, whether it is safe to believe the confession or not;

(*iv*) that experience and common sense show that in the absence of corroboration in material particulars, it is not safe to convict on a confession, unless from the peculiar circumstances in which it was made and judging from the reasons, alleged or apparent, of the retraction, there remains a high degree of certainty that the confession, notwithstanding its having been resiled from, is genuine;

(*v*) that when it is a question of using a confession against a co-accused of the person confessing and the Court would not be prepared to accept the confession *per se* as sufficient the corroboration ought to be of the kind that not only confirms the general story of the crime, but also unmistakably connects the said co-accused with the crime. **P.** JAWAN *v.* EMPEROR, 264 P. L. R. 19·4; 30 P. R. 1914 CR.; 50 P. W. R. 1914 CR.; 15 CR. L. J. 626 **634**

Consideration, *admission of—Onus of proof—Receipt of consideration in deed—Presumption.*

Where a mortgage-deed is proved to have been executed and the document contains an acknowledgment of the receipt of the consideration, it is a strong *prima facie* evidence that the consideration had been actually received, and is evidence not only against the mortgagors but also against persons claiming under them subsequent to the date of the mortgage. The presumption, of course, can be rebutted, and the mere fact that a Court was not satisfied with the evidence which the plaintiff adduced in addition to the acknowledgment would not absolve the defendants from producing evidence

Consideration—concld.

to show that nothwithstanding the acknowledgment in the body of the deed there was no consideration in fact. **A.** BABBU *v.* SITA RAM, 12 A. L. J. 806; 36 A. 478 **426**

——— ——— ——— Barred-debt—Plea of set off—Written statement necessary **361**

——— ——— ——— Contract of suretyship—Mere recommendation for loan, whether sufficient consideration **726**

——— ——— ——— Ejectment—Trespasser—Pleadings **657**

——— ——— ——— ———, proof of—*Onus* **924**

——— ——— ——— ——— Registered sale-deed—Proof of consideration—Vendee to prove consideration **538**

——— ——— ——— Rent—Relinquishment of portion of claim **741**

Construction of deed **936**

——— ——— **of statute**—Mortgage-deed **641**

——— ——— Will—Compromise **313**

Contract, construction of **171**

———, essence of—Mortgage—Principal and interest at specified rate paid out of profits **302**

——— ——— Minority, plea of **648**

——— ——— *Principal and agent—Agent buying property with principal's money—Liability to account*

When an agent uses a debt due to his principal in order to obtain valuable property for himself, he in fact realises that debt for and on behalf of his principal and is liable to account for the same. **A.** BIRBAL *v.* KISHORI LAL, 12 A. L. J. 463 **88**

——— ——— **of sale**—*Promise to deliver on certain date—Accident excepted—Accident due to promisor's negligence—Promisor, liability of.*

Where a contract of sale of rice provides that in case of accident to machinery, the vendor would be exempt from liability for failure to deliver the rice on the promised date, he cannot take advantage of the saving clause on the happening of an accident if it is caused by his own negligence. **L. B.** MOOSAJEE AHMED & Co. *v.* BUN SWEE SOON & Co., 7 L. B. R. 105 **924**

——— ——— ——— *Turf Club Sweep tickets—Confederacy buying tickets—One member of confederacy selling half his share—Public policy—Nature of transaction—Legal.*

Eleven persons joined as the 'Bhatiana Confederacy' to buy jointly six tickets in the Calcutta Turf Club Sweep on the St. Leger of 1912. Arrangements were made by *B*, the defendant No. 2. The Confederacy drew a horse which won the 3rd prize in the Sweep. The money was duly paid to *B* who promptly distributed it to the various sharers, including *G*, the defendant No. 1. It appeared that *G*, knowing that the Confederacy had drawn a horse, had sold half his chance to the plaintiff. Hence the plaintiff demanded half of *G's* share from *B*, who declined to recognise the transfer and paid *G* in full. *G* declined to pay anything to the plaintiff, who sued both *B* and *G* for recovery of half the share of *G*:

Contract—concld.

Held, (1)that the agreement between the plaintiff and *G* was in effect one to sell for a fixed amount a definite article of which the value was indeterminate at the time and in this respect it did not differ from many other contracts of sale except perhaps that the margin of possible value was unusually large;

(2)that the plaintiff was entitled to a decree against *G* but *B* was not liable at all. **P.** B. A. GOUGH *v.* H. S. LENEHAN, 258 P. L. R. 1914 **355**

Contract Act (IX of 1872), ss. 2 (d), 127—*Contract of suretyship—Consideration must be good and valuable—Mere recommendation for loan, whether sufficient—Consideration.*

A mere recommendation by one party to another to lend money to a third party does not render the first party liable as surety for the loan if given.

A consideration must be "good" and "valuable." **M.** MUTHUKARUPPA MUDALI *v.* PI. MU. KATHAPPUDAYAN, 16 M. L. T. 194; 27 M. L. J. 249; (1914) M. W. N. 706 **726**

——— ——— **ss. 9, 70**—*Medical fee—Implied contract—Reasonable amount.*

In the absence of an express agreement for payment of fees a medical man is entitled to a reasonable remuneration to be fixed by the Court. **U. B.** HODGKINSON LACK *v* P. GALLAGHER, U. B. R. (1914) II, 19 **777**

——— ——— ——— **s. 16**—*Undue influence—Unconscionable bargain not enforced—Compound interest at Rs.* 30 *per cent. reduced to simple interest at Rs.* 18 *per cent.*

Where a debtor, who was an expectant heir and a very inefficient clerk in a Court, went on executing securities at the very high rate of interest of Rs. 30 per cent. with the result that the sum originally advanced accumulated in the course of about 20 years to more than twenty-fold

Held, that the irresistible presumption was that this was due to the creditor's undue influence within the terms of section 16 of Act IX of 1872 and that the bargain being unconscionable, was not enforceable by a Court of Justice which is not simply a blind and humble instrument of the creditor to plunder the debtor.

Accordingly the Chief Court allowed Rs 18 per cent. simple interest on the principal sum from the date of the loan to the date of institution of the suit, with further interest at 6 per cent. on the amount thus decreed from the date of institution to the date of realisation. **P.** NASIR DIN *v.* BALLA MUL, 64 P. W. R. 1914; 149 P. L. R. 1914 **719**

——— ——— ——— **s. 17** **789**

——— ——— ——— **s. 23**—*Agreements to stifle prosecution in respect of offence of public nature, validity of—Compromise in respect of offences of public nature but involving civil liability to injured party, validity of.*

An agreement to stifle a prosecution in respect of an offence of a public nature is against public policy and illegal. Agreements of that class, being founded upon the suppression of criminal offences, have a tendency to subvert public justice, and it is a well-recognised rule that a person who has a public duty to perform should not be allowed to cause public injury in order to make a profit for himself. But there is no obligation on a person to forego his private rights and in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are of a public nature, to compromise or settle his private damage in any way he may think fit.

Where the consideration for a promise is to abstain from or withdraw a criminal prosecution for a non-compoundable offence, the promise cannot be enforced. But in cases like those of criminal breach of trust or embezzlement where there is always a civil liability, a bond can be taken in acknowledgment of that civil liability, provided the stifling of the prosecution forms no part of the consideration. **O.** LACHMAN DAS *v.* NARAIN, 17 O. C. 213; 1 O. L. J. 553 **409**

Contract Act—contd.

——— ——— ——— **s. 23**—*Landlord and tenant—Suit for ejectment—Compromise—Landlord withdrawing his suit in consideration of tenant's executing a promissory-note—Consideration, whether lawful.*

A *zemindar* sued a tenant for ejectment. The tenant pleaded that he was an occupancy tenant in respect of the holding, being the heir of the last tenant under the Tenancy Act. The suit was compromised. The *zemindar* withdrew the suit acknowledging the defendant to be an occupancy tenant. The defendant, on the other hand, executed a promissory-note for a sum agreed to be paid by him in consideration of the withdrawal of the suit

Held, that the consideration of the promissory-note was not unlawful or opposed to public policy. **A.** RAM KIRPAL *v.* GAYA DAT, 12 A. L. J. 331 **80**

——— ——— ——— **s. 23**—*Lease for farm and sale of drugs—Agreement by lessee to transfer portion of profits or losses resulting from lease—Civil Procedure Code (Act V of* 1908), *O. XX, r.* 15—*Preliminary decree, discretion of Court in passing.*

Where the parties had agreed to start a business in partnership and to contribute capital therefor and to divide the profits and losses in fixed shares and a lease for the farm and sale of drugs was acquired in the name of the plaintiff after that agreement had been made

Held, that the agreement was not illegal.

The rules on the subject which have the force of law lay down no more than that the Government refuses to recognize any person for the purposes of management of the realization of the Government demand other than the person or persons named as lessees. There is nothing in the rules to prevent a lessee agreeing to transfer a portion of the profits or losses resulting from the lease to a third party.

Under Order XX, rule 15, Civil Procedure Code, it is within the discretion of a Court either to pass or not to pass a preliminary decree and a Court makes an improper use of this discretion if it passes a preliminary decree for the determination of points on which the parties had already agreed. **O.** *Musammat* MERHA *v.* KUNDAN LAL, 17 O. C. 193 **146**

——— ——— ——— **s. 25** **89**

——— ——— ——— **s. 25**—*Barred debt—Consideration—Plea of set-off—Written statement necessary.*

A barred debt is a valid "consideration" for a promise to pay under section 25 of the Indian Contract Act even if the promisor did not know it *to be barred* on the date of the promise,

Contract Act—contd.

No plea of set-off can be raised without filing a written statement. **M.** MRS. C. SIMON *v.* ARGIASAMI PILLAI, 16 M. L. T. 122 **361**

——— **S. 30**—*Contract to pay differences—Actual delivery either excluded or optional—Wagering contract.*

Contracts in which only differences are payable and delivery is either excluded or optional, are wagering contracts within the meaning of section 30 of the Contract Act. **C.** BALDEODASS BASANTLALL *v.* LOLIT MOHUN NANDY **747**

——— **S. 80**—*Grain-pit purchased through commission agents—Re-sold by same agents—Intention of purchasers to re-sell it—Transaction, whether gambling.*

A grain-pit which in fact existed with its contents was originally purchased by the plaintiffs. It was sold to various persons and eventually was purchased by the plaintiffs as commission agents on behalf of the defendants. Subsequently the defendants being unwilling or unable to pay the purchase-money, the grain-pit was re-sold by the plaintiffs at a loss. The probabilities, to the knowledge of the plaintiffs, were that the defendants would re-sell the contents of the grain-pit through the plaintiffs as commission agents, getting the benefit of any rise in prices and suffering any fall. The plaintiffs sued the defendants for loss in price and commission

Held, that the plaintiffs were not prevented by the provisions of section 30 of the Contract Act from recovering the moneys which they had to pay to the vendor of the grain-pit. **A.** BISHESHAR DAYAL *v.* JAWALA PRASAD, 12 A. L. J. 817; 36 A. 426 **415**

——— **SS. 59, 60, 61** **560**

——— **S. 63**—*Rent—Relinquishment of portion of claim—Consideration—Madras Estates Land Act (I of 1908), s. 26.*

Where a landlord agreed to collect from his tenants half the amount of the rent due for certain *faslis* and then filed suits to recover the full amount:

Held, that he could not recover the full amount as under section 63 of the Contract Act no consideration is necessary to forego a portion of the rent payable.

Section 26 of the Estates Land Act does not exclude the operation of the general law as to consideration embodied in the Contract Act. **M.** VEDACHALLA MUDALIAR *v.* SIVAPERUMAL MUDALI, 16 M. L. T. 184 **741**

——— **SS. 69, 70**—*Improvement—Benefit conferred without knowledge or consent—Contribution, right of.*

A person should not be made liable to pay for a benefit conferred on him without his knowledge or consent, without giving him an option of declining to accept the benefit, inasmuch as no one can be said to enjoy a benefit which he gets without any option of rejecting or accepting it. But the acceptance or rejection should not precede the conferring of benefit.

Therefore, by putting up a masonry dam across a river and thereby increasing the flow of water to other riparian owners a *zemindar* cannot claim contribution from them for the improvements effected by him, unless they are given an opportunity of accepting the benefit and they adopt the benefit with that knowledge. **M.** RAJAH OF PITTAPUR *v.* SECRETARY OF STATE, 16 M. L. T. 375 **783**

Contract Act—contd.

——— **S. 70**—*Co-sharers—One co-sharer recovering property from trespassers, whether entitled to claim share of expenses from his co-sharers.*

If one of the several co-sharers, without the authority of others, spends some money on recovering by litigation their joint property from a trespasser he is not entitled to claim contribution from them.

Section 70 of the Indian Contract Act is inapplicable to such cases. **P.** DULLA SINGH *v.* KHAZANA, 61 P. R. 1914, 267 P. L. R. 1914 **542**

——— **S. 70**—Improvement—Benefit conferred without knowledge or consent—Contribution, right of **783**

——— **S. 70**—Medical fee—Implied contract—Reasonable amount **777**

——— **S. 74** **560**

——— **S. 74**—*Interest—Penal rate, when awarded.*

Where the alleged penal rate is a common rate of interest in everyday transactions, the Court would be justified in awarding it instead of giving a lower rate. **M.** VADLAMANNATHI SRINIVASADIKSHITULU *v.* DAMERA RANGAYYA, 1 L. W. 903 **702**

——— **S. 107**—*After giving notice under the section, whether seller bound to follow the procedure of section—Seller obtaining higher price by selling later than date of breach.*

The words of section 107 of the Contract Act are permissive and not compulsory. Therefore, a seller of goods, who gives notice of his intention to re-sell the goods in pursuance of the provisions of section 107, is not bound to carry out such intention and can change his mind if he likes.

If on the date of the breach of a contract to buy goods the price of goods is lower than at a later date when the seller sells them and realizes a higher price, he is bound in claiming damages from the buyer to account for the higher price obtained by him. **L. B.** JAMAL, A. K. A. S. *v.* MOOLA DAWOOD SONS & Co., 7 L. B. R. 252 **799**

——— **S. 113**—*Implied warranty—Liability of commission agent.*

A commission agent buying goods for his employer is on the same footing as regards him as the vendor and is, therefore, bound by an implied warranty that the goods supplied are of a certain denomination. **L. B.** GOVINDASAWMY PILLAY *v.* KOOLAYAPPA ROWTHER, 7 L. B. R. 110 **927**

——— **S. 127**—Contract of suretyship—Consideration **726**

——— **S. 151**—*Bailee, care to be taken by—Ordinary prudence—Point of law.*

Where plaintiff entrusted defendant with money, which the latter placed along with his own money in a box which was left unlocked, and on the money being lost the plaintiff sued for recovery:

Held, (1) that the defendant was liable, as he did not take that amount of care as a man of ordinary prudence would have taken of his own money;

(2) that whether the inference that ordinary prudence has been exercised has been drawn from the facts found, is a point of law justifying interference on second appeal. **M.** NAGALINGA CHETTIAR *v.* KAYAROHANA CHETTIAR **939**

Contract Act—concld.

——————— **ss. 151, 152**—*Goods entrusted to Railway Company destroyed by fire—Liability of Company—Burden of proof—Negligence, amount and quantity of—General principles.*

When any one has entrusted goods to a railway company for carriage and those goods are lost, damaged, or destroyed while in the possession and under the control of the railway, the fact of the loss, damage or destruction is enough to cast upon the company the burden of proving that that loss was not due to any negligence on its part. The standard of negligence is given in sections 151 and 152 of the Contract Act, but no general rule universally applicable can be laid down as a rule of law defining the amount and quality of the proof in every case which will discharge the railway company's onus.

The general principles deducible from the analysis of leading cases on the subject, however, are:

(*a*) that where a bailee cannot assign the cause of loss, he may always give evidence to prove, if he can, that, although unknown, the cause must have been external to himself and beyond his control;

(*b*) failing that, to exonerate himself he would have to prove that while unknown and in all probability attributable to himself, the cause was of such a nature that he could not have foreseen and prevented it by taking all reasonable care and precautions.

Where a railway company is sued for destruction of cotton goods by fire, before it can be exonerated, it has to satisfy the Court that, while the goods were in transit and under its exclusive control, it took every proper precaution, not only in the packing of the goods, but in the management of their numerous dangerous and unruly machines happening to come into close proximity with the goods, to have rendered any mishap of this kind impossible but for the intervention of some wholly novel and unpreventable factor, which they could not with reason have been called upon to anticipate and guard against.

Where the defendant-company admits that it is not aware of the cause of the loss, damage, or destruction, it is not on that mere pleading to be held answerable. **B.** HIRJI KHETSEY & Co. *v.* B. B. & C. I. RY. Co., 16 BOM. L. R. 467 **241**

——————— **s. 152**—Goods entrusted to Railway Company destroyed by fire—Liability of Company **241**

——————— **s. 153**—*Partnership, dissolution of—Retirement of one partner—Date on which dissolution takes effect—Statement in pleadings—Admission.*

A partnership-at-will is dissolved from the date on which one of the partners retires; it is not necessary that the retiring partner should send a notice of his intention to retire; it is enough if the partnership did not do any business with the outside public from the date of his retirement.

A statement in a plaint or written statement cannot be construed as an admission to dispense with further proof. It is only a statement of the case upon which the parties intend to rely and prove at the trial. **M.** KULLAPPA CHETTY *v.* SUBBARAYA CHETTY **22**

Contribution—Decree for mesne profits—Joint tort-feasors, liability of **729**

——————— , right of **783**

Contributories. *See* COMPANIES ACT.

Co-sharers One co-sharer recovering property from trespassers, whether entitled to claim share of expenses from his co-sharers **542**

Court-fee - Suit for possession of colony land **24**

Court Fees Act (VII of 1870), s. 7, cl. IV—*Suits Valuation Act (VII of 1887), s. 8—Suit for declaratory and consequential relief—Different valuations given—Plaint returned for amendment—Higher valuation elected by plaintiff—Right to claim that Court-fee should be for lower amount.*

A suit *to declare* a bond void contained also a prayer for *consequential relief* that it should be cancelled. The reliefs were differently valued. The plaint was returned for amendment and the plaintiff being asked to put a single valuation for both the reliefs, chose the higher valuation and paid Court-fee thereon.

Held, that, reading section 7, clause 4, of the Court Fees Act and section 8 of the Suits Valuation Act together, it was not open to the plaintiff to ask in revision that he should have paid Court-fee on the lower valuation **M.** KRISHNA MALLAR *v.* SECRETARY OF STATE, (1914) M. W. N 767; 12 M. L. T. 516 **375**

——————— **s. 7 (iv) (c), Sch. I, Art. I, Sch. II, Art. 17 (iii)**—*Declaratory suit to cancel registered release-deed—Ad valorem Court-fees to be paid—Civil Procedure Code (Act V of 1908), O. VII, r. 11 (b)—Deficiency in Court-fees not made up when ordered—Suit not to be dismissed—Plaint to be rejected—Costs awarded not to be excessive*

The plaintiff sued on a stamp of Rs. 10 for a declaration that a release-deed (*jaraghkhati*) executed by him in favour of his brother and subsequently registered be considered cancelled. Time was granted for making up the deficiency in Court-fees, which was not made up, and the suit was, therefore, dismissed

Held, (1) that the plaintiff was bound to stamp his plaint *ad valorem* with reference to the amount, whatever it may be, at which he elects to value his relief.

(2) that in case of the refusal of the plaintiff to pay the required Court-fee, the proper order to pass was one for rejection of the plaint under rule 11 (*b*) of Order VII of the Code of Civil Procedure.

Where a plaint is rejected at an early stage in the trial, there is no justification for allowing excessive costs to the defendant, especially when the parties have been endeavouring up to that stage of the trial to come to terms by private arrangement. **P.** NANAK CHAND *v.* JIWAN MAL, 35 P. R. 1914, 237 P. L. R. 1914 **435**

——————— **ss. 7 (iv) (c) and 7 (v)**—*Suits Valuation Act (VII of 1887), s. 8—Valuation of suit—Jurisdiction—Court-fees—Declaration and possession, suit for Declaration, whether ancillary to prayer for possession.*

A suit for(1) a declaration that a certain decree was of no legal effect against the plaintiffs or the various properties in their hands and (2) possession of a portion

Court Fees Act—contd.

of those properties which had been sold, in execution of the decree, is a suit for declaration with possession as a consequential relief, inasmuch as possession is not asked for on any other ground than that the decree in execution of which it was lost should be declared invalid. Therefore, Court-fee is payable only for the relief regarding possession, and no separate *ad valorem* fee is payable on the amount of the decree in respect of which the declaration is sought.

Scope of sections 7 *(iv) (c)* and 7 *(v)*, Court Fees Act (VII of 1870), discussed. **M.** RAJAGOPALA NAIDU *v.* VIJAYARAGHAVALU NAIDU, 1 L. W. 824 **683**

s. 7 (v)—*Suit for possession by tenant against landlord and another person claiming to be tenant—Court-fees—Value of subject-matter—Value of relief sought.*

A suit for recovery of possession of land of which plaintiffs claim to be tenants, against the admitted landlords and persons who also claim to be tenants, is governed by the Court Fees Act, section 7 (v), and the value of the subject-matter of the suit is the value of the relief sought as stated in the plaint. The suit is not covered by the paragraphs (*a*) to (*d*) of the sub-section, as their effect is confined to land in respect of which revenue might be paid, which it could not be in respect of the land in suit regarded as lease-hold land **C.** RAM EKBAL SINGH *v.* BALDEO SINGH, 19 C. L. J. 418 **507**

s. 7 (v) (e)—*Suit for possession of land forming garden—Assessed to land revenue—Market-value.*

In a suit for possession of land forming a garden, though assessed to land revenue, the valuation for Court-fee is governed by section 7 (V) (*e*), Court Fees Act, and is not to be arrived at either for Court-fee or in ascertaining jurisdiction by the artificial thirty times *jama* rule. **P.** BHAG BHARI *v.* JAWAHAR SINGH, 71 P. R. 1914; 241 P. L. R 1914; 155 P. W. R. 1914 **545**

s. 7 (11) (cc) **975**

s. 12, cls. (1) and (2)—*Question of Court-fees—Decision of first Court final—Appellate Court, when can re-open.*

Under section 12, clause (1), of the Court Fees Act, a decision on the question of Court-fees by the Court of first instance is final between the parties though it can be re-opened by the Appellate Court itself under clause (2) of the section only in the interest of revenue. **M.** TEKANA KAVANDAN *v.* ALIGIRI KAVANDAN **506**

Sch. I, Art. 1 **435**

Sch. I, Art. 1—*Suit for possession of property—Plea raised that plaintiff cannot succeed without paying defendant's dower-debt—Suit decreed without condition of payment of dower-debt—Appeal—Subject-matter in dispute—Court-fee—Decree.*

In a suit by the defendant's deceased husband's sister for possession of certain property, the defendant denied the plaintiff's title and also contended that the plaintiff could not succeed without paying the defendant's dower-debt of Rs. 80,000. The lower Court decreed the plaintiff's claim, holding that she

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was entitled to succeed even if the defendant's dower was not paid. The defendant appealed paying the same Court-fee as the plaintiff had paid on the plaint:

Held, that as the amount or value of the subject-matter of the appeal was not more than the value of the property which the plaintiff was seeking to recover and possession of which the defendant was seeking to retain, the defendant was not liable to pay Court-fee on the sum of Rs. 80,000 which she claimed as her dower-debt.

Held, also, that without payment of any Court-fee on the amount of dower-debt claimed by the defendant, the Court could grant to the plaintiff a decree conditional on payment of whatever may be found due to the defendant as her dower-debt. **A.** HAIDARI BEGAM *v.* GULZAR BANO, 12 A. L. J. 481; 36 A. 322 **395**

Sch. II, Art. 17 (3) **435**

Cow sacrifice—Muhammadan's right to sacrifice cattle **908**

Creditor, right of **384**

Criminal Procedure Code (Act V of 1898), ss. 4, 190 (1) (c)—*Statement that certain person keeps common gaming house, whether amounts to "complaint"—Bombay Prevention of Gambling Act (IV of 1887), 6—Warrant, issue of.*

A statement made before a Magistrate, with the object of inducing him to take action under the Bombay Prevention of Gambling Act, that a certain person keeps a common gaming house, does not amount to a "complaint" within the meaning of section 4, Criminal Procedure Code.

A Magistrate not empowered to take action under section 190 (1) (*c*), Criminal Procedure Code, cannot be said, by merely issuing a warrant under section 6 of the Bombay Prevention of Gambling Act, to have taken cognizance of a case till it is brought up before him for trial. **S.** HOTU *v.* EMPEROR, 8 S. L R. 66; 15 CR. L. J. 657 **985**

s. 17—*Power of District Magistrate to distribute work, whether can be delegated.*

Section 17 of the Criminal Procedure Code does not empower a District Magistrate to pass on his powers of calling up cases from subordinate Courts and re-distributing them. The distribution of business is confined to the District Magistrate and cannot be exercised by a Magistrate in charge of a Sub-Division or by a senior Honorary Magistrate. Therefore, the order of a District Magistrate authorizing or directing the senior Honorary Magistrate to distribute work among other Honorary Magistrates is *ultra vires*. **A.** BAL KISHUN *v.* SIPAHI LAL, 12 A. L. J. 803; 36 A. 468; 15 CR. L. J. 584 **336**

ss. 107, 250—*"Offence"—Order for compensation, whether can be made against a petitioner under s.* 107.

In view of the definition of the word "offence" in the Code of Criminal Procedure, a person in respect of whom information has been laid before a Magistrate to the effect that he is likely to commit a breach of the peace or is otherwise liable to the provisions of section 107 of the Code, is not a person accused of

Criminal Procedure Code—contd.

any offence. Therefore, an order for payment of compensation cannot be made against a man who has petitioned a Magistrate to take action under section 107 of the Code. **A.** BINDHACHAL PRASAD RAI *v.* LAL BIHARI RAI, 12 A. L. J. 506; 36 A. 382; 15 CR. L. J. 578 **330**

——— ——— **s. 107**—*Security to keep the peace—Breach apprehended from opposite party if one party exercises his right, whether ground for demanding security.*

No security to keep the peace can be demanded from a party, simply because the opposite party would commit such breach if the former party would exercise his right. **M.** V. DESIKACHARI, *In re*, 15 CR. L. J. 661 **989**

——— ——— **ss. 118, 123**—*Failure to furnish security for good behaviour—Solitary confinement for rigorous imprisonment, sentence of, whether can be passed.*

A Magistrate, while ordering rigorous imprisonment under section 123 of the Criminal Procedure Code for failure to furnish security for good behaviour, is not empowered to order a portion of the imprisonment to be spent in solitary confinement. **A.** KUNDAN *v.* EMPEROR, 12 A. L. J. 823, 36 A. 495; 15 CR. L. J. 616 **528**

——— ——— **s. 123** **128**

——— ——— **ss. 130, 397**—*Imprisonment in default of giving security for good behaviour, whether imprisonment within meaning of s 397.*

When a person is committed to prison under section 123 of the Criminal Procedure Code, he is not undergoing a sentence of imprisonment within the meaning of section 397 of the Code. **S.** EMPEROR *v.* GHULAM ALI, 7 S. L. R. 203, 15 CR. L. J. 592 **344**

——— ——— **s. 145**—*Costs ordered by one Magistrate—Successor, whether competent to assess—Death of party in whose favour order is made—Application by deceased's son for assessment of costs, whether entertainable Procedure—Interpretation—Power of Courts to invent rules.*

The Code of Criminal Procedure contains no special provisions for bringing on record representatives of accused parties. All that the Court has to see is that the appeal or application has not abated by reason of the death of one of the parties.

The successor of a Magistrate, who decided a case under section 145, Criminal Procedure Code, and directed a party to pay his opponent's costs, has jurisdiction to assess the amount of costs.

Per *Sadasiva Aiyar, J.*—Courts should always lean in favour of that view of the law which would enable a party who has got an order in his favour to obtain the fruits of that order, and not in favour of highly technical objections which render the Court's order infructuous and a mere piece of waste paper.

Courts have the power within reasonable limits to invent rules of procedure for this purpose when the Legislature has not enacted such rules, unless the Legislature prohibits them from doing so. **M.** SUBBIAH SERVAI *v.* CHOKKALINGA THEVAN, 16 M. L. T. 248; 15 CR. L. J. 676; (1914) M. W. N. 790; 27 M. L. J. 613 **1004**

Criminal Procedure Code—contd.

——— ——— **s. 145**—*Finding as to possession essential—Civil Court's view, whether conclusive.*

The decision of a Civil Court on the question of possession is not conclusive in proceedings under section 145, Criminal Procedure Code. The Magistrate must arrive at his own finding. **M.** ANNASAWMY AIYANGAR *v.* MUTHUKUMARA PILLAI, 26 M. L. J. 235; 1 L. W. 302; (1914) M. W. N. 324; 15 CR. L. J. 207 **991**

——— ——— **ss. 145, 435**—*Magistrate's order—Finality of jurisdiction—Revision.*

A Magistrate's order under section 145 of the Criminal Procedure Code cannot be interfered with by the High Court in revision. **A.** SYEDA KHATUN *v.* LAL SINGH, 12 A. L. J. 344; 36 A. 233; 15 CR. L. J. 572 **324**

——— ——— **s. 145**—*Order on merits—Revision.*

In a case under section 145, Criminal Procedure Code, when the Magistrate has, on perusal of the written statements of the parties, decided that the possession of the first party was of an agent and that the 2nd party, the principal, was entitled to possession·

Held, that the decision being on the merits the High Court will not interfere in revision. **M.** VAIDYANATHA IYER *v.* SUPPALU AMMAL, (19 4) M. W. N. 795; 15 CR. L. J. 669 **997**

——— ——— **ss. 146, 147**—*Joint possession of parties—Attachment—Jurisdiction.*

A Magistrate after finding that both parties are in joint possession of properties in dispute has no jurisdiction to pass an order of attachment under section 146 of the Criminal Procedure Code.

Per *Seshagiri Aiyar, J.*—Where both parties have been in joint possession and are still prepared to commit a breach of the peace by trying to oust each other, it will not be in the interests of preventive remedy that both should be maintained in possession. **M.** MUHAMMAD KOOLAYAPPA *v.* ABDUL KHADHIR, 27 M. L. J. 169; 15 CR. L. J. 572 **324**

——— ——— **s. 147** **324**

——— ——— **s. 147**—*Right to enter temple to perform* kumbabhishekam *ceremony, whether right to immoveable property—Danger of breach of peace, finding as to, whether necessary.*

A right to enter a temple and officiate at the *kumbabhishekam* ceremony; whenever it is necessary to perform it, is a right "to immoveable property" within the meaning of section 147 of the Code of Criminal Procedure.

Section 147 of the Code of Criminal Procedure does not require a Magistrate to formally record a proceeding that there is in his opinion danger of a breach of the peace. **M.** CHIDAMBARA GURUKKAL *v.* SENGODA GOUNDEN, 16 M. L. T. 427; 27 M. L. J. 587; 15 CR. L. J. 671 **999**

——— ——— **ss. 154, 157** **630**

——— ——— **ss. 161, 162** **978**

——— ——— **s. 164**—*Confession—Care necessary in recording confessions—Questions as to ill-treatment—Magistrate's satisfaction as to voluntariness of confession—Statements in confession inconsistent with medical evidence.*

Criminal Procedure Code—contd.

Great care and circumspection are necessary in recording a confession under section 164, Criminal Procedure Code. It is necessary to record the questions put to the accused to ascertain whether the confession was voluntary, to tell him that after his confession he will not have to go back to Police custody, to warn him of the consequence which will ensue if he falsely implicates himself in the hope of release and to ask him whether the Police or any other person has subjected him to any ill-treatment.

No hard and fast rule can or should be laid down as to the procedure which should be adopted when an accused person is placed before a Magistrate for the recording of a confession under section 164, Criminal Procedure Code, but it is not sufficient to put one comprehensive question as to the nature of the confession or to make a note at the commencement of the record of the confession that the accused has been warned not to confess through any fear or inducement and that the Police of the *then* have been removed from the Court room.

A Magistrate ought, by putting questions which occur to him, to make himself conscientiously satisfied that the man is a free agent and the confession is voluntary and has not been procured by threats or inducements.

Where in a murder case this was not done by the Magistrate recording confessions and they were retracted on trial and the statements in the confessions as to the manner in which the murder was committed were inconsistent with medical evidence, the accused were acquitted **O.** KANDHAI *v.* EMPEROR, 1 O. L. J. 407; 15 CR. L. J. 633 **833**

— — — — — — **ss. 164, 195 (b)**—*Penal Code (Act XLV of 1860), ss. 182, 193—Sanction to prosecute—Jurisdiction of Sessions Judge to set aside sanction where lower Court not subordinate—Contradictory statements—Sanction for perjury, when to be granted.*

A Sessions Judge has no jurisdiction to quash, on appeal, a sanction granted by a Sub-Magistrate for an offence under section 182 of the Indian Penal Code if the latter is not "subordinate" to the Sessions Judge within the meaning of that term used in section 195 (*b*) of the Criminal Procedure Code.

It is necessary that a Court granting sanction for prosecution under section 193, Indian Penal Code, in the case of contradictory statements should be empowered to sanction prosecution in respect of each of the statement said to be contradictory of each other. **M.** REDDI RAMI REDDI *v.* PUBLIC PROSECUTOR OF KURNOOL, (1914) M. W. N. 793; 27 M. L. J. 586; 15 CR. L. J. 612 **524**

— — — — — — **s. 190 (1) (c)** **985**

— — — — — — **s. 195** **515**

— — — — — — **ss. 195, 200, 556**—*Complaint by public officer—Sanction by superior, whether necessary—Failure to examine complainant, effect of—Conviction by officer concerned in his public capacity.*

Where a Cantonment Magistrate convicted the accused for obstructing the bailiff of the Cantonment Small Cause Court in the execution of a warrant issued by the Magistrate in his capacity of the Small Cause Court Judge and no sanction for prosecution was obtained nor was the complainant examined·

Held, (1) that failure to examine the complainant was not a sufficient reason for setting aside the proceedings;

(2) that it was open to the bailiff, a public officer, to file a complaint without any sanction;

(3) that in issuing the warrant as a Small Cause Court Judge the Magistrate was concerned in the matter only in his public capacity and was, therefore, neither a party nor "personally interested" in the case within the meaning of section 556, Criminal Procedure Code. **S.** MUSO *v.* EMPEROR, 8 S. L. R 41, 15 CR. L. J. 649 **977**

— — — — — — **s. 195**—*Income-tax Collector, whether Revenue Court.*

An Income-tax Collector is a 'Revenue Court' within the meaning of section 195 of the Criminal Procedure Code. **B.** PUNAM CHAND MANEK LAL, *In re*, 16 BOM. L. R. 446, 15 CR. L. J. 581 **333**

— — — — — — **ss. 195, 439, 476**—*Sanction to prosecute without application—Procedure—Practice—Revision.*

Sanction to prosecute should not be given under section 195 without an application.

In the absence of an application for sanction the Court may order prosecution under section 476

When, however, sanction is given and the aggrieved party does not prefer an appeal against the order, the Court will not interfere in revision on a reference made at a late stage of the proceedings **S.** EMPEROR *v.* NATHU, 8 S. L. R. 21; 15 CR. L. J. 663 **990**

— — — — — — **ss. 195 (b), 437**—*Sanction refused by lower Courts—Revision.*

Nothing in section 195 of the Code of Criminal Procedure justifies a High Court in re-considering in revision the order of a Sessions Judge passed under clause 6 of the section.

The revisional jurisdiction of the High Court can always be exercised in order to prevent a gross and palpable failure of justice. It should not be so exercised as to make one portion of the Code conflict with another or to give a right of appeal where such right is definitely excluded by the Code.

Therefore, where sanction to prosecute was refused by the trying Magistrate as well as by the Sessions Judge on appeal and it was not shown that the orders of the Courts below had proceeded upon clearly erroneous principles of law or were likely to result in obvious failure of justice, the High Court declined to interfere in revision **A.** AHSANULLAH KHAN *v.* MANSUKH RAM, 12 A. L. J. 511; 36 A. 403; 15 CR. L. J. 528 **350**

— — — — — — **s. 195**—*Sanction to prosecute—Delay in applying for sanction, effect of—Discretion of Court.*

Where an application for sanction to prosecute is made after great delay, the Court may well exercise its discretion in refusing the application. **O.** RAM BAKHSH *v.* CHHOTE, 15 CR. L. J. 577 **329**

— — — — — — **s. 195 (b)** **524**

Criminal Procedure Code—contd.

——— ——— ——— **s. 195 (6)** — *Application, whether by way of appeal—Limitation—Application by Government after one year.*

An application under section 195 (6) of the Criminal Procedure Code is not by way of appeal and is not governed by the second Schedule of the Limitation Act. But it should be made without unnecessary delay. [An application under section 195 (6) made by Government after the lapse of a year was disallowed in this case.] **S.** JIWATRAM JHAMANDAS *v.* EMPEROR, 8 S. L. R. 49; 15 CR. L. J. 654 **982**

——— ——— ——— **s. 195 (6)**—*Sanction to prosecute—Application for revocation—Notice to other party, whether necessary.*

An application for the revocation of a sanction granted by the lower Court should not be disposed of *ex parte* without giving notice to the person obtaining sanction or to the District Magistrate. **U. B.** KATAN *v.* NGA TIN, 7 BUR. L. T. 205; 15 CR. L. J. 571 **323**

——— ——— ——— **s. 195 (6)** —*Sanction to prosecute—Sanction granted in appeal—Further appeal to High Court, whether lies.*

No appeal lies to the High Court from an order of a District Judge granting sanction to prosecute under section 195 (6) of the Criminal Procedure Code, 1898. **A.** BARAN BARAI *v.* MATA PRASAD, 12 A. L. J. 821; 36 A. 469; 15 CR. L. J. 616 **528**

——— ——— ——— **s. 200** **977**

——— ——— ——— **ss. 215, 264**—*Commitment to Sessions for offence triable by Magistrate.*

A Magistrate competent to try and pass sentence in a case, has no discretion to commit it to the Court of Session. **S.** DIWANICHAND *v.* EMPEROR, 8 S. L. R. 23; 15 CR. L. J. 664 **992**

——— ——— ——— **s. 215**—*No evidence to justify commitment—Accused entitled to acquittal—High Court will not quash such commitment.*

When there is no evidence to justify a commitment, it is not open to the High Court to quash it.

The accused is entitled to be acquitted even if the case is one for further inquiry. **M.** SESSIONS JUDGE OF COIMBATORE, *In re*, 27 M. L. J. 593; 15 CR. L. J. 665 **993**

——— ——— ——— **s. 228** **630**

——— ——— ——— **s. 233** — *Two accused tried jointly for one offence—Power of Appellate Court to convict one of them of different offence.*

Where two persons are tried together and convicted of a certain offence, the Appellate Court can acquit one of them of the offence of which he was found guilty by the trial Court and convict him of a different offence found proved against him on the facts. **M.** SURYANARAYANAN ROW, *In re*, 15 CR. L. J. 680 **1008**

——— ——— ——— **s. 250** **330, 994**

——— ——— ——— **ss. 250, 422**—*Criminal Rules of Practice, r. 60—Order setting aside grant of compensation—Omission of notice to District Magistrate, whether ground for interference by High Court.*

In an appeal against an order granting compensation under section 250, Criminal Procedure Code, the District Magistrate ought to be served with a notice, but an omission to send him a notice and his consequent non-appearance would not justify the High Court's interference in revision with the Appellate Court's order. **M.** GURUSWAMI NAIKEN *v.* TIRUMURTHI CHETTI, 1 L. W. 908; 16 M. L. T. 426; 27 M. L. J. 629; 15 CR. L. J. 648 **848**

Criminal Procedure Code—contd.

——— ——— ——— **ss. 253 (2), 258** **1001**

——— ——— ——— **s. 263 (g)** **994**

——— ——— ——— **s. 264** **992**

——— ——— ——— **ss. 302, 303, 307** **1006**

——— ——— ——— **s. 341** — *Deaf-mute — Possession of stolen property—Presumption—Evidence Act (I of 1872), s. 114 (a)—Penal Code (Act XLV of 1860), s. 411.*

The recent possession of stolen property by a deaf-mute, with whom no one is able to communicate and whose infirmity prevents him from putting forward any explanation he may have to offer, does not justify the presumption that he was either a thief or a dishonest receiver of stolen property. **M.** OOMAYAN, *In re*, 1 L. W. 492; (1914) M. W. N 821; 15 CR. L. J. 578 **330**

——— ——— ——— **ss. 350, 253 (2), 258**—*Trial re-commenced under s. 350—Charge, whether cancelled—Discharge—Acquittal.*

A Magistrate who re-commences an "inquiry" or "trial" under section 350, Criminal Procedure Code, does not thereby modify its nature or the stage at which it has arrived. Therefore, once a charge is framed and trial begun, the charge cannot be cancelled by reason of re-commencement of the trial under section 350 and the only order which the second Magistrate can pass is that of acquittal under section 258, and not that of discharge under section 253 (2), Criminal Procedure Code. **M.** TANGUTURI SRIRAMULU *v.* NALAM KRISHNA ROW, (1914) M. W. N 646; 16 M. L. T. 303; 27 M. L. J 598; 15 CR. L. J 673 **1001**

——— ——— ——— **s. 397**—Imprisonment in default of giving security for good behaviour, whether imprisonment within meaning of section 397 **344**

——— ——— ——— **ss. 403, 437**—*Inquiry—Discharge without making any judicial investigation into merits of complaint—Inquiry into same charge on second complaint.*

Where a Magistrate discharged an accused person without making any judicial investigation into the merits of the complaint:

Held, that he was competent to again inquire into the same charge on a second complaint. **O.** ALAUDDIN KHAN *v.* EMPEROR, 17 O. C. 273; 1 O. L. J. 487; 15 CR. L. J. 638 **838**

——— ——— ——— **s. 422** **848**

——— ——— ——— **ss. 423, 438**—*Reference to High Court.*

When an Appellate Court does not dismiss an appeal summarily, it must dispose of it in the manner provided by section 423, Criminal Procedure Code. It has no power to refer to the High Court for decision a question of law arising in an appeal. **L. B.** EMPEROR *v.* SULAIMAN, 7 L. B. R. 251; 15 CR. L. J. 667 **995**

Criminal Procedure Code—contd.

——— **ss. 435 and 437**—*Order for further inquiry—Notice to accused.*

A District Magistrate ordered further inquiry in a case where the accused were discharged under section 253, Criminal Procedure Code, without giving notice to the accused:

Held, that the order of the District Magistrate was irregular, though not illegal. **M.** DASARI VENKATA *v.* REDDY SANJEEVI, 16 M. L. T. 285; 15 CR. L. J. 619 **627**

——— **s. 437** **838**

——— **s. 437**—Order for further enquiry—Notice to accused **627**

——— **s. 437** — Sanction refused by lower Courts—Revision **350**

——— **s. 438** **995**

——— **ss. 438, 488**—*Maintenance—Revision—Power of District Magistrate to take evidence.*

Where a Joint Magistrate has rejected a petition for maintenance, the District Magistrate has no power to take evidence under section 438 of the Criminal Procedure Code except for the purpose of a recommendation to the High Court. **A.** MAHAGINIA *v.* RAM CHARAN, 12 A. L. J. 461; 15 CR. L. J. 575 **327**

——— **s. 439** **343, 627, 990**

——— **s. 439**—Revision—Concurrent findings **982**

——— **s. 476** **990**

——— **s. 476**—*Court refusing to take action on application of party—Appeal.*

An order of a Munsif refusing, on the application of a party, to take action against another party under section 476, Criminal Procedure Code, is not appealable. **A.** BHAGIRATHI *v.* SURAJ MAL, 12 A. L. J. 684; 15 CR. L. J. 575 **327**

——— **ss. 481 (2), 537**—*Penal Code (Act XLV of 1860), s. 228—Offence—Record must show stage of interruption—Evidence—Intention.*

Where a person making a noise in Court is charged with an offence under section 228 of the Penal Code, the record convicting him must show the stage of judicial proceeding interrupted and the evidence must establish that such interruption was intentional, as such vital irregularities in procedure are not cured by section 537 of the Code of Criminal Procedure. **M.** KUKATI NARASA REDDI, *In re*, 15 CR. L. J. 621 **629**

——— **s. 488**—*Maintenance allowance paid by Muhammadan—Subsequent divorce, effect of.*

Where a Magistrate made an order under section 488, Criminal Procedure Code, directing a Muhammadan to pay a certain monthly allowance towards the maintenance of his wife:

Held, that on a subsequent divorce of his wife by the husband that order became *functus officio*. **O.** EMPEROR *v.* JADI, 17 O. C. 260; 15 CR. L. J. 646 **846**

——— **s. 488**—Maintenance—District Magistrate, power of, to take evidence **327**

Criminal Procedure Code—concld.

——— **s. 488**—*Joint liability of father of husband for maintenance of wife—Second marriage by husband no justification for wife to claim maintenance.*

Section 488 of the Criminal Procedure Code does not contemplate an order making the father of the husband jointly liable for the maintenance of the wife.

The mere fact that the husband has contracted a second marriage and therefore his first wife declined to live with him does not justify an order under section 488, Criminal Procedure Code. **P.** EMPEROR *v.* WARYAM SINGH, 12 P. R. 1914 CR.; 245 P. L. R. 1914 **329**

——— **s. 495**—*Circle Inspector permitted to conduct prosecution, whether can withdraw.*

A Police Circle Inspector who is permitted to conduct a prosecution can withdraw it as well with the permission of the trying Magistrate under section 495 of the Code of Criminal Procedure. **M.** ANANTHARAMA VADHIAR *v.* MUTHIA TEVAN, (1914) M. W. N. 776; 15 CR. L. J. 641 **841**

——— **s. 537** **515, 629**

——— **s. 566** **977**

——— **Sch. V, Form 10**—*Bond to keep the peace—Offence not involving breach of peace—No forfeiture of bond unless breach probable—Offence committed before execution of bond does not forfeit.*

A bond to keep the peace cannot be forfeited except on proof of the commission of an offence involving a breach of the peace and the use of the word 'probably' in Form 10, Schedule V, of the Criminal Procedure Code, limits forfeiture to cases in which a breach of the peace is the 'probable', and not merely the possible, result of the act of the person bound over. Thus a conviction for theft, wrongful confinement and extortion, for the abduction of a woman, or a secret attempt to poison a person, cannot justify a forfeiture of such a bond.

Where the offence was committed prior to the date on which the bond was executed, the bond could not be forfeited by reason of the commission of the offence **P.** AHMAD GUL *v.* EMPEROR, 22 P. R. 1914 CR.; 262 P. L. R. 1914; 15 CR. L. J. 605; 47 P. W. R 1914 CR. **517**

Custom, essentials of **104**

——— ———Rent payable on cultivated area **675**

——— ——— ———, whether proved by one instance **869**

——— ——— ———**Alienation**—Awans *of Tallagang Tahsil, Attock District—Alienation by proprietor in presence of sons*—Onus probandi—*Distinction between alienation by sonless proprietor and proprietor having sons—Evidence of alienations not contested, value of.*

Amongst *Awans* of the Tallagang Tahsil, District Attock, a proprietor cannot sell or dispose of his ancestral property to the prejudice of his sons except for a necessary purpose.

The onus of establishing that an *Awan* proprietor having sons has absolute power of disposing of ancestral property lies heavily upon the person asserting it.

Custom—contd.

Custom recognises a distinction between cases where an alienation is by a proprietor who has sons, and cases where it is by a sonless proprietor.

In order to establish absolute power of disposing of ancestral property, the evidence that a number of alienations have taken place within recent years and have not been contested, without disclosing the particulars and details of those alienations, is of but little value and inconclusive. **P.** LAL KHAN *v.* NURA, 12 P. R. 1914; 233 P. L. R 1914 **556**

——— **Alienation by father 24**

———Sale of ancestral holding to stranger by sonless *Awan* and widow—Objection by reversioners four degrees removed—Necessity—Question of fact—Second appeal—Punjab Courts Act (XVIII of 1884) as amended by Punjab Courts Acts (I and IV of 1912), s. 40 **715**

———Sale—Hindu Law—*Brahmans* of Dangoh Khurd of Una Tahsil of Hoshiarpur District governed by custom—Oral evidence on question of custom, when sufficient—Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Compromise before local Commissioner, when not binding **710**

——— **Marriage**—Karens—*Match-making—Cock and hen eating—Buddhist Law.*

The Nat-worshipping *Karens* have peculiar marriage ceremonies of their own. A match-maker brings the parties together; the man goes to the woman's house if the parties were not married before; but the woman may go to the man's house if he is a widower. A cock and hen eating would apparently complete the ceremony but if the parties profess Buddhism, though Karens, they may marry according to Buddhist Law. **L. B.** MG SAW TU *v.* MA SAW MA, 15 CR. L. J. 590 **342**

———**Succession**—Alizai Pathans *settled in United Provinces—Daughters, exclusion of custom relating to—Accretion to* taluka *or grant when considered to be—Intention, proof of, necessary to constitute accretion—Waste land rules, land purchased under.*

The custom of exclusion of daughters amongst *Alizai Pathans* settled in the United Provinces is not established by the evidence in the case. The facts that such a custom exists in Baluchistan and Waziristan amongst *Alizai Pathans* does not justify the presumption that the same custom exists in a family settled in the United Provinces for the last 300 years.

The determination of the question whether property subsequently acquired by a *Talukdar* or a grantee is to be considered as a portion of his *taluka* or grant, depends upon the proof of his intention to incorporate the acquisiton with the *taluka* or grant.

The land purchased under the Oudh Waste Land Rules is not a grant and any terms in the deed of such a sale could not enable a person to devise the property conveyed therein in derogation of the provisions of his own personal law. **O.** MUHAMMAD ABDUL RAQIB KHAN *v.* SALAMAT BIBI, 1 O. L. J. 403 **680**

———*Durbhanga Raj—Descent, rules of—Primogeniture*—Babuana *grant*—Sohag *grant—Distinction between the two—Hindu Law—*

Custom—contd.

Mitakshara—*Mithila School—Joint family—Separation—Partition—Co-parcenary rights—Exclusion of females*—"Auras putra poutradik," *meaning of—Custom not enforced in one instance, effect of—Accretions to* babuana *grant—Evidence—Oral or documentary—Statement of deceased as to custom, when admissible—Evidence Act (I of 1872), s. 32.*

The Durbhanga Raj is an ancient and impartible *raj*, and by the *kulachar*, or family custom, the right of succession to the *gaddi* and to the properties of *raj reasat* descends according to the rule of lineal primogeniture. The younger sons of a Maharaja of Durbhanga are styled Babus, and by the *kulachar* each younger son is entitled by way of a *babuana* grant to a portion of the *raj reasat* for the maintenance of himself and his male descendants in the male line, and the wife of a younger son of a Maharaja of Durbhanga gets, by way of a *sohag* grant, the usufruct of a portion of the *raj reasat* for the maintenance of herself and her male descendants in the male line. In each case the property, village or villages granted, continues to form part of the *raj reasat*, from which it is never separated; it is entered in the Government Revenue Registers under the name of the Maharaja for the time being of Durbhanga as the proprietor, and the property so granted reverts to the Maharaja for the time being of Durbhanga on the failure of male descendants in the male line of the grantee. *Babuana* grants and *sohag* grants differ essentially in their nature from absolute grants and are subject to the *kulachar* under which they are authorized and in accordance with which they are made. The family of the Durbhanga Raj are Hindus, and except in so far as customs of the family and its branches exist and apply, the members of the family are governed by the Mithila School of Hindu Law, which, so far as it applies to this case, may be taken as following the *Mitakshara* of the Benares School.

A separation between members of a joint Hindu family followed by a partition between them of the ancestral property which would not put an end to the co-parcenary rights in the property, is unknown to the Hindu Law.

Evidence, oral or documentary, as to statements of a deceased person as to the custom in a family is not admissible, if it appears that such statements were made after a controversy as to the custom had arisen.

A *babuana* grant in the Durbhanga Raj is made to a male, while a *sohag* grant is made to a female; there is no difference so far as the right to succession to the property is concerned between a *babuana* grant and its incidents and a *sohag* grant and its incidents. In the one case the grant is made for the benefit of the grantee and his male descendants in the male line, in the other case the grant is for the benefit of the grantee and her male descendants in the male line; in each case, females, widows and daughters and the descendants of daughters are by the custom applying to such grants excluded from the succession, and on the failure of such male descendants in the male line the property granted reverts to the Maharaja of Durbhanga for the time being.

Babuana grants cannot be made under the ordinary Hindu Law, but they are authorized by the custom which excludes females from succession.

Custom—concld.

The words *auras putra poutradik* as used in these grants or *sanads* are words of limitation consistent with the custom, and not words of general inheritance.

Babuana and *sohag* lands descend in the family of Durbhanga, not to one male heir only, but to all the existing male heirs in the male line of the grantee as co-parceners.

A well-established custom in the family cannot be defeated by the fact that in one case the custom was not enforced.

Where a *babuana* grant was made to a younger son of a Maharaja of Durbhanga and a *sohag* grant to his wife and after his, and his wife's death his two sons got the property partitioned between themselves and on the death of one of the sons, his widow entered into possession of her husband's share:

Held, on the suit of the surviving son for possession of the immoveable grant properties, the accretions thereto and mesne profits, moveables or accumulations, that the custom in the family of the Durbhanga Raj by which females are excluded from the succession to *babuana* property and to *sohag* property, applies in this case notwithstanding the separation and the partition which was effected by the plaintiff and his late brother, and that consequently on the death of his brother, the plaintiff became entitled to the possession and enjoyment of the *babuana* property and of the *sohag* property which his brother held at the time of his death.

Held, further, that the immoveable properties which were acquired from the income and profits of the *babuana* properties are to be considered as accretions to the *babuana* properties and that the plaintiff, on his brother's death, became entitled to the possession and enjoyment of the same but that he was not entitled to moveable property or accumulations:

Held, also, that the defendant was entitled to money maintenance only.

The right under the *Mitakshara* of co-parceners in Hindu ancestral property to have the joint property partitioned, is now unquestionable unless the property is held under a grant, or is subject to a custom, which expressly or impliedly prohibits any partition of the property which would have the effect of defeating the object of the grant or the custom. **P. C.** EKBADESHWAR SINGH *v.* JANESHWARI BAHUASIN, 18 C. W. N. 1249; 27 M. L. J. 373; 16 M. L. T. 382; 1 L. W. 863; (1914) M. W. N. 807; 12 A. L. J. 1217; 21 C. L. J. 9; 17 BOM. L. R. 18 **417**

——— ——— ——— ——— —— *Jat* widow—Re-marriage, effect of—Property of husband, whether divested **617**

——— ——— ——— ———Prostitutes **957**

Damages—Breach of contract—Jurisdiction **44**

——— ——— ——— Claim for compensation and damages—Consignments of goods at Railway for delivery—Loss on other railway **17**

——— ——— Servant dismissed for refusal to work—Damages, whether allowable **441**

Dancing girls. *See* HINDU LAW.

Declaratory relief—*Discretion of Court—Muhammadan's right to sacrifice cattle—Cow-sacrifice—Slaughter of cattle for purpose of food, right as to—Common Law right—Denial, bare, of general right—Specific Relief Act (I of 1877), s. 42—Decree, purely declaratory and incapable of execution, not to be passed.*

The grant of declaratory relief is a matter within the discretion of the Court.

A Muhammadan's right to sacrifice cattle is one which he enjoys in common with all those who profess the religion of Islam; and his right to slaughter cattle for the purpose of food is the Common Law right which every man enjoys in accordance with the principle *sic uteri tuo ut alienum non lædas* (*i.e.*, a man is entitled to enjoy his own property in such a manner as he chooses provided that in doing so he does not invade the legal rights of his neighbour).

A bare denial of a general right arising out of the common or personal law, *e.g.*, right to personal safety or freedom or to reputation or a Muhammadan's right to sacrifice cattle or slaughter them for the purpose of food, does not amount to such an infringement of the right as to justify the granting of a declaration.

The general policy of section 42 of the Specific Relief Act is to enable the Courts to grant relief where no relief at Common Law is available and not that the Courts should make declarations of abstract right exclusive of practical equity.

A Court ought not to pass a declaratory decree when it practically confers no benefit upon the plaintiff. **O.** ORI LAL *v.* MUHAMMAD YAKUB, 1 O. L. J. 496; 17 O. C 354 **608**

——— ——— ——— ——— **suit**—Mutation proceedings, nature of—Compromise in mutation proceedings—Registration—Statement—Evidence—Admissibility—Claim withdrawn in mutation proceedings—Estoppel **34**

Decree—Decree for sale of mortgaged property and personal decree against other property—Decree, construction of **121**

———, *interpretation of—Special agreement, holding under—Ejectment by notice vouchsafed by decree—Rights created under decree, whether personal—Successors-in-interest, position of.*

A person obtained a decree of the Revenue Court that he held under a special agreement and could not be ejected by notice. After his death, his widow succeeded him. A notice of ejectment was served upon her and she contested it:

Held, that although the person obtaining the decree might have held under a special agreement and could not have been ejected by notice, it did not necessarily follow that the same was true of his successors-in-interest. **U. P. B. R.** MUHAMMAD NAWAZ ALI KHAN *v. Musammat* JAGDEI, 1 O. L. J. 412 **716**

———, proper, form of—Suit for specific performance of **973**

———, *suit to set aside—Fraud—Party, what to prove.*

A decree obtained by fraud can be set aside only by showing that the Court which passed the decree was not merely mistaken but misled. **S.** KHUSHIRAM POHUMAL *v.* GHANSHAMDAS, 8 S. L. R. 81 **946**

———Two decrees in same terms—Only one decree appealed against—Other decree, effect of **266**

Deed, construction of **936**

Defamation—Imputation—Good faith **1003**

Dekkhan Agriculturists' Relief Act (XVII of 1879), ss. 12, 13—*Consideration, proof of* - Onus.

The custom throughout the Dekkhan is to put the onus on the creditor in an inquiry under sections 12 and 13 of the Dekkhan Agriculturists' Relief Act, if that course is indicated by the comparative positions in life and mental powers of the parties. **S.** BIKHCHAND *v.* VERHOMAL, 8 S. L. R. 57 **924**

——————— **s. 13** **924**

——————— **ss. 47, 48** **66, 67**

Deposit of money — Mortgagee drawing money—Mortgagor, whether can object **369**

——— ——— ——— ———, suit to recover **812**

——— ——— by mortgagor of mortgage-money in Court—Cessation of interest **96**

Dissolute of Marriage. *See* BUDDHIST LAW.

Distraint. *See* MADRAS ESTATES LAND ACT.

Divorce. *See* MUHAMMADAN LAW.

Document, *construction of—Words, meaning and effect of—Question of fact or law—Appeal, second.*

The expression "construction" as applied to a document includes two things, *first*, the meaning of the words and, *secondly*, their legal effect. The meaning of the word is a question of fact in all cases, the effect of the word is a question of law.

Consequently, where a document is of such a character that it does not create, modify, or extinguish the rights and obligations of the parties or otherwise affect their status, no question of its legal effect arises and, therefore, the construction of such a piece of documentary evidence does not raise a question of law.

Unless there is a question of the legal effect of a deed which may be treated as a document of title or embodies a contract or is the foundation of the suit, a second appeal does not lie. A second appeal is not admissible merely because some portion of the evidence is in writing of which the meaning has been mistaken by the lower Appellate Court. **C.** RAJAH MAKUND DEB *v.* GOPI NATH SAHU, 21 C. L. J. 45 **286**

Easements Act (V of 1882), s. 15—*Right of easement, acquisition of—Burden of proof.*

The burden of proving that a right of way has been peaceably and openly enjoyed by a person claiming title thereto as an easement and as of right without interruption and for 20 years lies upon the person who asserts the right. **A.** GANGA SAHAI *v.* SHIB CHARAN **499**

——— ——— ——— **s. 15**—*User — Interruption — Period of 20 years—Period prior to interruption, whether can be added.*

Where the user is interrupted, the user for a further full period of twenty years must be shown in order to establish a right of easement under section 15 of the Easements Act. The period of user prior to the interruption cannot be added on **A.** KEDAR NATH *v.* SOHAN LAL, 12 A. L. J. 693 **405**

Easements Act—concld.

——— ——— ——— **s. 38**—*Continuous easement—Cesser of enjoyment—Proof—Mere failure to repair servient tenement, whether sufficient.*

In order to discontitle a dominant owner to an easement on the ground of non-user, the permanent alteration made in the dominant heritage must be of such a nature as to show that the dominant owner intended to cease to enjoy the easement in future.

A mere failure to keep the servient tenement in good repair is insufficient to establish an intention to abandon the easement. **M.** VELLACHAMI CHETTY *v.* MUTHU CHETTY **383**

Eastern Bengal Tenancy Act (I of 1903 B. C.), s. 22 (2)—*Occupancy holding, transfer of, to co-sharer landlord—Recognition of transfer by other landlords—Suit for possession by co-sharer landlord—Limitation—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3.*

Where an occupancy holding is transferred to a co-sharer landlord and such transfer is recognised by the other landlords and rent received by them in respect of it, such recognition will amount to evidence either of the holding being a transferable one or of the fact that, though voidable at their instance, it has been validated by their recognition. In either view section 22 (2) of the Eastern Bengal Tenancy Act applies to such a case and the special rule of two years' limitation, Schedule III, Article 3 of the Bengal Tenancy Act does not govern it **C.** INATULLAH DAFTRY *v.* MOISON ALI **414**

Ejectment—Illegal ejectment—Recovery of possession, tenant entitled to sue for **663**

——— ——— ———, *notice of—Notice cancelled as having been issued on wrong person—Heirs of deceased tenant served with notice without delay on part of landlord—Admission, fresh, to tenancy—Acquiescence—Non-acceptance of rent, effect of—Unstamped notice of ejectment, validity of.*

Where a previous notice, issued at the earliest possible opportunity but by mistake on a person who was not the heir of the deceased tenant, was on that ground cancelled, and the landlord immediately issued another notice to the heirs of the tenant and never accepted rent from them.

Held, that there had been no fresh admission, express or implied, of the heirs to the tenancy, nor any acquiescence on the part of the landlord and that, therefore, the notice, even though unstamped, was valid. **U. P. B. R.** RAM SUNDAR SINGH *v.* MUHAMMAD MEHDI ALI KHAN, 1 O. L. J. 387 **624**

——— Person in adverse possession of land made over to another in partition proceedings—Not party to proceedings—Cannot be ejected under ejectment proceedings **867**

——— ——— ——— *Purchase of portion of holding—Vendor not authorised to sell whole—Landlord recognising sale, effect of.*

The holding within which the land in suit was situate belonged equally to two persons *M* and *S*. *M* sold the whole plot to the plaintiff, and subsequently *S* sold half of it to the defendant. The plaintiff's purchase was recognised by the landlord; that of the defendant was not recognised. The plaintiff sued to eject the defendant:

Ejectment - concld.

Held, that it was not competent to the landlord to recognise the plaintiff to the detriment of the defendant, and, therefore, defendant could not be ejected. If the entire holding had been abandoned, the position of the parties might have been different. **C.** SANDO *v.* MUHAMMAD SABED, 19 C. L. J. 462 **539**

——— ——— ——— *Res judicata*—Lease for certain period—Before expiry of period new lease executed—Condition to enhance rent on completion of certain repairs etc.—Suit for ejectment—Decision that rent could not be enhanced under second lease as no repairs had been made—Second suit for ejectment—Question whether tenant held in continuation of first lease or as trespasser—Decision in first suit not *res judicata*—Interpretation of second lease—Payment of additional rent for additional rooms built under new lease—Defendant not bound to occupy unless rooms duly completed **357**

——— ——— ——— Trespass **201**

——— ——— ——— ——— Trespasser **657**

Endorsee, right of **380**

Enhancement of rent, right as to **914**

Equitable estoppel. *See* ESTOPPEL.

Estoppel. *See* EVIDENCE; EVIDENCE ACT, s. 116.

——— ——— *Contract of indemnity—Equitable estoppel.*

The defendant had agreed, while the plaintiff was a minor, to manage the plaintiff's properties and to pay interest due on the minor's debts. He had also undertaken to indemnify the plaintiff if, in consequence of the breach of the covenant on his part to pay the interest on debts, the plaintiff was put to any loss. Interest was not paid on one of the debts and in consequence the creditor instituted a suit to which both the plaintiff and the defendant were parties. The defendant contended in that suit that he had paid up the interest, but owing to his failure to adduce evidence a decree was passed against the plaintiff. The plaintiff paid the amount and sued the defendant to recover the damages sustained by him in consequence of the defendant's failure to pay:

Held, that whether the technical rule of *res judicata* was applicable or not the defendant was equitably estopped from raising in the second suit the contention that he had really paid the interest due to the creditor.

If both the indemnifier and the party entitled to indemnity were parties to an action by the third party or if the indemnifier had notice given to him of the suit against the party entitled to the indemnity, the judgment would be conclusive against the indemnifier even as an adjudication by Court. **M.** NALLAPPA REDDI *v.* VRIDHACHALA REDDI, 37 M. 270 **888**

——— ——— ——— Joint property—Alienation by guardian of minor co-parcener with permission of Court—Suit by minor to have sale set aside and to get possession of his share by partition—Guardian not made party—Court's discretion to grant equitable relief **876**

——— ——— ——— Landlord and tenant—*Benami* transaction **721**

——— ——— ——— Mortgagors accepting certain benefits of mortgagee in full settlement of all their claims, effect of **816**

Estoppel - concld.

——— ——— Occupancy holding—Non-transferable—Purchaser, rights acquired by—Landlord recognising subsequent purchaser as tenant - Representative-in interest **300**

——— ——— Suit dismissed - Fresh suit - - Illegal order, effect of **597.**

——— ——— Vague general inferences — Conduct against pre-emptor **68**

Estate—*Inam* village - Presumption that land revenue alone has been granted - No presumption as to ownership of *Kudivaram*—Party seeking to oust jurisdiction of ordinary Civil Court—Burden of proof **891**

Evidence—Admissibility—Claim withdrawn in mutation proceedings - Estoppel **34**

——— ——— Admission of evidence, whether question of law or of jurisdiction—Exclusion of document from evidence **204**

——— ——— of alienations not contested, value of **556**

——— ——— Boundaries, determination of **534**

——— ——— Burden of proof shifted in appeal—Opportunity to produce fresh evidence when to be granted **648**

——— ——— ——— *Gift - Secondary evidence - Agent, authority of - Presumption - Declaratory suit - Title, proof of* - Onus.

Petitions presented to the Collector by a donor, admitting and recognizing a gift of his property in favour of his wife, are secondary evidence of the strongest character of the gift.

Where a petition purporting to have been signed by the agent of a party on whose behalf the same was filed, comes out of a public office like the Collectorate, the presumption is that, before the signature of the agent was accepted, the Executive Officer was satisfied that the agent had the authority of his principal to sign his name.

In a suit for declaration of right to immoveable property it is not for the defendant to show that he has got a title to the property, but the plaintiff has to make out his title to the property. **C.** BASIR-UD-DIN AHMAD *v.* HIMMAT ALI MONDAL **852**

——— ——— *Handwriting, similarity of, how far evidence of forgery - Several offences, whether forming same transaction, substantial test to determine — Conviction whether can be based on suspicion.*

Similarity of handwriting affords some assistance in determining whether the evidence adduced to connect a certain person with the forgery can be believed but the test is by no means safe or certain, the prosecution should show that the accused was the only person who could have written the forged document.

The real and substantial test by which to determine whether several offences are so connected as to form the same transaction, depends on whether they are so related to one another in point of purpose, as cause and effect or as principal and subsidiary acts as to constitute one continuous action, irrespective of the persons by whom the same may have been committed.

No conviction can be based on mere suspicion, and the indication afforded by the interest of the party concerned may in cases, where a trap is laid

Evidence—concld.

by the other, lead to misleading results. **O.** ABBAS QULI KHAN *v.* EMPEROR, 17 O. C. 276; 15 CR. L. J. 643 **843**

——— ——— Intention **629**

——— ———Intention, proof of **680**

——— ———Kabuliat *unregistered, inadmissible in evidence—Oral evidence as to rent agreed upon, admissible.*

Where the *kabuliat* executed by a tenant is inadmissible in evidence for want of registration, oral evidence can be given to prove the rent which was agreed upon by the parties. **C.** AMIR ALI *v.* AYKUP ALI KHAN, 19 C. L. J. 428; 41 C. 347 **509**

———————Land held at fixed rates for 20 years—Enhancement of rent—*Kabuliyat* **228**

———————Memorandum of arrangement, whether admissible in evidence without registration **274**

———————Oral evidence on question of custom, when sufficient **710**

———————Oral evidence, whether to be regarded in suspicion **660**

——— ——— ———Pre-emption—Price alleged to be paid fictitious **403**

———————Privy Council Practice—Established rules not to be superseded unless unjust—Foreign rules, considerations to be borne in mind in applying English tenures and Bengal *zemindari* rights, whether identical—Analogy of English Law, whether should be resorted to when Indian Law is clear—*Julkar* right classified in English Law as a *profit a prendre*, effect of **467**

——— ——— Secondary evidence—Original mortgage deed or its copy not produced—Existence of mortgage admitted in certain document, whether secondary evidence **816**

——— ——— Special custom, proof of **869**

——— ———Statement of parties in previous litigation, if relied on, must be regularly proved **571**

——— ——— ——— Temple trusteeship—Hereditary right—Descent from father to son conclusive when supported by corroborative evidence **74**

———————Trust—Dedication of property what constitutes—Charge on family property **399**

———————Unregistered sale-deed, whether admissible to prove nature of possession held thereunder **772**

Evidence Act (I of 1872), ss. 3, 157——*"Fact," meaning of.*

The word "fact", used in section 157 of the Indian Evidence Act, does not mean merely "event" but also a continuing fact such as possession.

Documents proving possession are admissible in evidence under that section. **M.** MUTHALAGIRI REDDY *v.* PAPPI NAICKEN **510**

——— ——— **s. 18** **144**

——— ——— **s. 32**—Oral or documentary—Statement of deceased as to custom, when admissible **417**

——— ——— **s. 32 (5)** **823**

——— ——— **s. 34**—*Mere entry in book of account not sufficient to charge a person with liability—Contract Act (IX of 1872), ss. 59, 60, 61, 74—Appropriation of payments—Compound interest—Not at enhanced rate—Not penalty—Plaintiff cannot ask Court to go behind his plaint—Set-off—Value of building work done—Pleadings.*

Evidence Act—contd.

In order to charge a defendant with liability something more is required than mere entry in a book of account, however well and regularly kept.

Where a defendant has failed to prove that he intimated appropriation against a particular account and also fails to show that the circumstances point to such an appropriation having been intended, under section 60, Indian Contract Act, the option rests with the plaintiff to make such appropriation against debts legally due as he might please.

Compound interest not at an enhanced rate is not a penalty within the meaning of section 74 of the Contract Act.

The plaintiff cannot ask the Court to go behind what he himself admitted in his own plaint.

Where the defendant claims to set-off against pro-notes and cash account the value of building work done by him, the matter stands to be adjudicated according to equity and common sense apart from the provisions of the Contract Act contained in sections 59, 61, which have no application to the case. **P.** ABDUL ALI *v.* PURAN MAL, 82 P. R. 1914; 277 P. L. R. 1914 **560**

——— ——— ——— **s. 44** **87**

——— ——— ——— **s. 65 (b)**—Unregistered lease—Essential term of tenancy—Proof **661**

——— ——— ——— **s. 74**—*Public document*—Dakhalnama, *copy of, whether admissible in evidence without proof.*

As a *dakhalnama* is a public document its copy is admissible in evidence without proof. **A.** MUHAMMAD NASIR *v.* RAM KARAN SINGH **529**

——— ——— ——— **s. 90**—*Document not 30 years old when produced, but 30 years old when evidence taken—Genuineness, presumption of.*

There is no presumption as to the genuineness of a document which was not 30 years old at the time when it was produced, though it was 30 years old when the case was tried and the evidence was recorded. **A.** CHIRAUNJI LAL *v.* KALLO, 12 A. L. J 507 **412**

——— ——— ——— **s. 91**—*Statement made by accused at departmental inquiry—Proof.*

A statement made by an accused person at a departmental inquiry confessing his guilt is not a matter required by law to be reduced to the form of a document and hence section 91 of the Evidence Act does not apply. Such confession, however, can be proved at the time of his prosecution. **A.** HAIDAR RAZA *v.* EMPEROR, 12 A. L. J. 306; 36 A. 222; 15 CR. L. J. 569 **321**

——— ——— **ss. 91, 92**—*Vendor and purchaser—Estoppel—Sale—Consideration, receipt of acknowledged—Non-receipt, whether can be proved.*

After acknowledging the receipt of consideration in the deed of sale a vendor is not estopped from showing that he had not actually received the consideration stated in the deed. **A.** PUTHI *v.* NAND KISHORE **27**

——— ——— **s. 92** **27**

——— ——— **s. 114A**—Possession of stolen property—Presumption **330**

——— ——— **s. 115**—Estoppel—Attestation **724**

——— ——— ——— **s. 115**—Estoppel—Mortgagor condoning defects in mortgage, effect of Letter, when it will not require registration **480**

Evidence Act – concld.

——— **s. 116**—*Landlord and Tenant—Estoppel—Civil Procedure Code (Act V of 1908), s. 11, Expl. IV—Plea which might have been made ground of defence, not adjudicated upon, whether operates as* res judicata.

Section 116 of the Evidence Act applies not only to tenants let into possession at the beginning of the lease but also to tenants who are already in possession and continue in it.

The mere failure to have adjudicated upon, in a suit, a plea which *might* have been made a ground of defence but should not necessarily have been so made a ground, does not always and necessarily operate as *res judicata*. **M.** ADATRAO GAVAYAYYAMMA *v.* DANDI SEETHARAMASWAMI, 1 L. W. 821 **615**

——— **s. 116**—Unregistered deed when admissible in evidence—Landlord and tenant—Estoppel **721**

——— **s. 122** – *Wife charged with murdering her step-son—Confession made to husband—Husband's evidence inadmissible—Offence 'against' a person—Confession in Police custody, retracted, value of.*

Where a woman is charged with the murder of her step-son, her husband's evidence, in so far as it relates to the alleged confession by her to him and to the alleged pointing out of the body by her to him alone, is inadmissible in view of section 122, Indian Evidence Act, and of the interpretation put upon it in *Milkhi* v. *Emperor*, 19 Ind. Cas. 705; 14 Cr. L. J. 273; 218 P. L. R. 1913; 24 P. W. R. 1913 Cr. An offence 'against' a person within the meaning of the section is an offence calculated to injure his person or property or reputation—as in cases of defamation—and does not include an offence against a son, though such offence may cause to the father grief of mind.

A confession by a woman in Police custody, to which she has been relegated by her own husband and to which she was remanded after the confession was made, is of little value when it is found to have been retracted only five days later before the same Magistrate. **P.** FATIMA *v.* EMPEROR, 10 P. R. 1914 CR.; 261 P. L. R. 1914; 15 CR. L. J. 613 **525**

——— **s. 144 (b)** – *Presumption—Account books summoned but not produced to rebut plea of payment, effect of – Money-lender taking no steps to recover money due on mortgage-bond even after it rose considerably above value of mortgaged property, whether believeable.*

Where in a suit upon a mortgage-bond, which referred to the existence of account books kept by the mortgagee, the mortgagor pleaded payment and summoned the mortgagee to produce the account books, but the mortgagee denied the keeping of any such books and did not appear as a witness to support that denial:

Held, that the non-production of the account books justified the presumption under section 114 (*b*) of the Evidence Act of the fact that, if produced, they would have been unfavourable to the mortgagee.

The fact that a careful money-lender took no steps during his lifetime for the recovery of his money after the amount due rose considerably above the market-value of the mortgaged property and left it for his successors-in-interest to realise after his death the money so due, cannot be believed. **O.** LALTA PERSHAD *v.* MAJID-UN-NISSA – **749**

Execution. *See* CIVIL PROCEDURE CODE, 1908, O. 21.

——— Attachment—Claim petition—Judgment-debtor party to claim—Claim allowed—Judgment-debtor, whether competent to sue for declaration of his title to property attached and for cancellation of attachment **700**

——— ——— *Award decree—Ordering ejectment after payment of certain sum within certain time, whether executory or mere declaratory.*

An award decree directing plaintiff to pay defendant Rs. 500 within three months and thereupon to eject him from a certain house, is not merely declaratory but is also capable of execution. **S.** HOONDRAJMAL CHATOMAL *v.* DHANOOMAL CHATOMAL, 8 S. L. R. 58 **932**

——— ——— Benamidar *decree-holder, application for execution by son of—Step-in-aid of execution—Limitation—Compromise—Assignment by* benamidar, *effect of.*

A *benamidar* decree-holder cannot apply for execution of the decree.

Therefore, an application for execution of a decree by the son of a *benamidar* decree-holder which was disallowed, is not a step-in-aid of the execution and does not extend the period of limitation so as to include within it an application of the real decree-holder.

A compromise with a person owning no beneficial interest in the subject of the compromise cannot operate as an assignment, as he has no interest to assign. **C.** RAM LAL PAHARI *v.* BABULAL BARIK **555**

——— ——— Outerdo or closed – Opening by getting over roof—Subsequent entry by *amin* – Attachment, legality of—Cattle and seed – Grain of agriculturists, how far exempt from attachment **117**

——— Sale in execution, stay of **9**

——— ——— Step-in-aid of execution—Application for continuance of sale **58**

——— **of decree**—*Application, suspension or postponement of, by an order—Application for continuation of suspended proceeding—Execution proceeding struck off by an order, effect of.*

An application which is in substance an application made with the object of moving the Court in the matter of a former application which has been postponed, suspended or otherwise stayed by reason of some order, is an application to continue the suspended proceeding from the point where it was stayed and may be made at any time within three years from the date when the right to apply accrued, that is, when the order for postponement, suspension or stay was withdrawn or became inoperative, even though the execution proceeding may have been struck off by that order. **O.** GIRDHARI LAL *v.* DAMODAR DAS, 17 O. C. 169 **160**

——— ——— ——— ——— Court of Wards made party—Competency of Court to proceed in execution **406**

——— ——— ——— ——— *Decree, application of, to description of property—Conflicting description of same property, grounds for selection out of.*

Where a decree describes the mortgaged property in more ways than one and one description applies to one set of existing facts and another to another set of existing facts, the duty of the Court executing the decree is to ascertain by a reference to the record or other evidence to which property the decree was intended to apply.

Execution of decree—concld.

Where two descriptions of the same subject-matter conflict with each other or where two parts of the same description are in conflict, that which is more certain, stable, and the least likely to have been mistaken or inserted inadvertently must prevail, if it sufficiently identifies the subject-matter. **O.** GANGA PRASAD *v.* SUBHAG CHAND, 17 O. C. 256; 1 O. L. J. 564 **704**

Ex parte decree—Status as reversioners declared—Alienation after decree **224**

Ex-proprietary tenant, right of, to pre-empt **718**

Favourable rent, enhancement of **644**

Fishery rights, Government's right to grant **467**

Foreclosure suit—*Decrees, preliminary and final—Payment into Court of amount due under preliminary decree, mortgagor's right as to, at any time until final decree is passed—Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 2 and 3 (2)—Application to deposit money into Court, no limitation for—Continuing right—Limitation Act (IX of 1908), Sch. I, Arts.* 181, 182 *and* 183*—Redemption, mortgagor's right as to—Possession of mortgaged property obtained through Court without order absolute having been passed, effect of—Adverse possession.*

In a foreclosure action the mortgagor is entitled to pay in the amount due under the decree *nisi* (passed under Order XXXIV, rule 2, Civil Procedure Code) at any time until an order absolute is passed (under Order XXXIV, rule 3 (2), Civil Procedure Code), and his application to pay that amount is not time-barred inasmuch as it cannot be treated as one under Articles 181, 182 or 183, Schedule I, of the Limitation Act, and as the right to apply is a continuing right.

A mortgagee in possession of the mortgaged property sued for and obtained a preliminary decree for foreclosure. The mortgagor failed to deposit the amount due under the deed of mortgage and to redeem the mortgage within the time fixed by this decree. The mortgagee then did not apply for a decree absolute, but for formal possession and got it, the mortgagor receiving no notice of this application. Twenty-seven years after this the mortgagor applied for permission to deposit the mortgage-money found due and for a re-transfer of the property, the mortgagee's name having continued to be recorded as such, and not as a proprietor, in the revenue papers:

Held, that the mortgagor was entitled to deposit the money due and his right to redeem subsisted until an order absolute for foreclosure had been passed.

Held, further, that no question of limitation could arise in respect of the mortgagor's application.

Held, also, that no question of adverse possession arose in the case. **O.** VIDYASAGAR *v.* RATIPAL, 1 O. L. J. 433; 7 O. C. 347 **752**

Forfeiture of lease—Denial of landlord's title—Overt act not essential—Setting up third persons's title **944**

Forfeiture of property. *See* PENAL CODE, s. 62.

Fraud and collusion—Revocation—Probate **37**

Fraud—concld.

——— *Decree obtained by fraud—Contract Act (IX of 1872), s.* 17.

A Court shall not declare a decree to be a nullity on the ground of fraud, unless it can define in clear terms the fraudulent act or acts by which the decree was obtained. But it will not take "fraud" in the narrow sense in which it is defined in section 17 of the Contract Act. **S.** SHINHOMAL *v.* MANAGER, ENCUMBERED ESTATES IN SIND, 8 S L. R. 3 **789**

——— Suit to set aside decree—Party what to prove **946**

Fraudulent transfer—*Intention to defraud future creditors—Presumption—Onus.*

Where a donor had no debts to pay at the time of gifting his property but contracted some debts afterwards:

Held, that no presumption could be made that the donor intended to defraud his future creditors and that it was for the future creditors to prove that he had such an intention when he made the gift. **A.** CHANDAR BHAN *v.* HAR GOPAL, 12 A. L. J. 1098 **183**

——— ——— ——— Preference given to one creditor over another, effect of—*Data* for determining intention of parties and nature of interest sought to be created **164**

——— ——— ——— Value of suit for purposes of jurisdiction—Right of appeal governed by Act in force at time of filing appeal—Alienation made pending temporary injunction not void—Sale by debtor to defeat creditor—Purchaser aware of fraudulent intention of vendor **180**

Gadaba service, whether private or public **878**

Garnishee—Attachment of debt—Objection proceedings **375**

Gift. *See* HINDU LAW.

———Evidence—Secondary evidence **852**

Good faith, finding of **331**

Government Revenue, engagement of, right as to **646**

Grant on *jeroyiti pattah*—Suit by *zemindar* for possession **878**

Mogoli Brahmottar—*Ancient and permanent—Mines unopened at date of grant, right in, whether also passes.*

A *Mogoli Brahmottar* grant, more than 100 years old, though permanent, does not pass the mines unopened at the date of the grant. **C.** KUNJA BEHARI SEAL *v.* RAJA DURGA PRASAD SINGH, 20 C. L. J. 304; 19 C. W. N. 203 **819**

Grove land. *See* AGRA TENANCY ACT.

Guardian and Ward—*Suit against minor—Appointment of guardian* ad litem*—Practice—Father, a fit person to act as guardian of his son where no question of immorality is raised—Confession of judgment, whether compromise—Civil Procedure Code (Act XIV of 1882), s.* 462, *application of.*

The mere absence of a formal order of appointment of a guardian is not of itself fatal to a suit against a minor if it appears from the record that the minor was effectively represented in the suit by his father with the sanction of the Court.

Guardian and Ward—concld.

If a loan, which is the subject-matter of a suit was advanced for purposes which made it binding upon the son and there is no basis for the suggestion that the debt was incurred for immoral purposes, there can be no objection to the father acting as guardian *ad litem* of his son and filing a confession of judgment.

The confession of judgment in a case where the defendant has no defence to make is no compromise to which the provisions of Order XXXII, rule 7, (section 462 of the Code of Civil Procedure, 1882), apply. **A.** RAM NAIN SHUKUL *v.* GANGA SHUKUL **620**

Guardians and Wards Act (VIII of 1890)—Order by Deputy Magistrate making over minor to lawful guardian, whether legal **840**

——— ——— ——— **s. 17** — *Guardian of minor, appointment of—Considerations for Court—Discretion of first Court—Interference by Appellate Court.*

In selecting a guardian of the person of a minor, the interest, well-being and happiness of the minor ought to be the main and paramount consideration for the Court.

In the interest of the true welfare of the minor the recognized rights of guardianship under the law to which the minor is subject must, if necessary, be assigned a relatively subordinate position.

In making the selection of a guardian for a minor the Court should also have regard to the wishes of the deceased parents, unless such a course would be disadvantageous to the minor, and also to the wishes of the minor himself when of years of discretion.

Unless the Court of Appeal is of opinion that the order of the first Court was not for the true welfare of the minor, it will be reluctant to interfere with its discretion in the matter of the appointment of a guardian of the person of a minor.

In the circumstances of the present case the maternal aunt was preferred to the paternal uncle. **C.** FULKUMARI BIBEE *v.* BUDH SINGH DHUDHURIA, 18 C. W. N. 1198 **112**

——— ——— ——— **ss. 24, 25, 26 229**

——— ——— ——— ——— **s. 29**—*Joint property—Alienation by guardian of minor co-parcener with permission of Court—Suit by minor to have sale set aside and to get possession of his share by partition—Guardian not made party—Estoppel—Court's discretion to grant equitable relief.*

A minor co-parcener on attaining majority sued the alienee in possession for partition and possession of his share, alleging that his cousin, a member of a joint Hindu family, having got himself appointed guardian of his person and property and having obtained the permission of Court to sell the property, had alienated it to discharge his own personal debts:

Held, (1) that the guardian not having been made a party to the suit, the Court could not adjust the equities between him and the alienee and would not deprive a *bona fide* purchaser for value without notice;

(2) that the plaintiff having relied on the Court's order of appointment to support a part of his claim, was estopped from repudiating it to support another part. **S.** VALJI JASRAJ *v.* TAYABJI MULLA MAHMEDBHOY, 8 S. L. R. 44 **876**

Guardians and Wards Act—concld.

——— ——— ——— ——— **s. 29**—*Sale of ward's property by guardian with Court's permission, validity of*—Pardanashin *lady, capacity of, to execute documents—Purchase of infant's property under authority of Court from female guardian, whether fraud—Presumption—Transfer of Property Act (IV of 1882), s. 41* - Bona fide *purchaser for value.*

Ladies in this country, *pardanashin* or otherwise, are under no such disability that they cannot execute any document.

A sale by a guardian of the property of his minor ward with the permission of the Court, transfers a good title to the vendee unless the Court's permission was obtained by fraud.

The mere fact that the guardian of an infant, who obtained leave of the Court to sell the infant's property, was a female, does not raise any presumption that fraud was practised on the Court.

A person who purchases property from such a purchaser and pays consideration, is a *bona fide* purchaser for value without notice of fraud. **C.** JADU NATH ACHARJYA *v.* TARAK CHANDRA CHATTERJEE **810**

——— ——— ——— ——— **ss. 25, 26, 43 (1), 47 (1) 229**

Gujarat Talukdars' Act (Bom. Act VI of 1888), s. 29B—*'Unable', meaning of—Claim not submitted within six months—Claimant prosecuting his claim in Court.*

A asserted that he was entitled to exercise the rights of a mortgagee in respect of certain property. The claim was negatived in the Subordinate Judge's Court. *A* appealed. After the appeal was filed the property passed under the management of the Talukdari Settlement Officer under the Gujarat Talukdars' Act, who issued a notification under section 29B of the Act calling upon claimants to submit their claims within six months. *A*'s appeal did not come on for hearing until some months after the notification but when heard it was decided in his favour. After the period of six months from the date of the notification had expired, the officer, as representing the estate to which the property belonged, appealed against the appellate decree. That appeal failed. *A* thereafter applied under section 29E of the Act for a certificate in order that he might proceed with the execution of the decree.

Held, that *A* was unable to put forward his real claim at the date of the notification, that at the date of the notice he was unable to comply with it within the meaning of section 29 B (3) and that the inability continued during the period of six months from the date of the notification.

The word 'unable' in section 29B (3) is not confined to physical inability on the part of the claimant. **B.** MANI LAL *v.* KHODABHAI, 16 BOM. L. R. 511; 38 B. 604 **365**

Heirs—Personal liability of heirs-at-law—Heirs, right of, to profits **384**

Hindu Law—Adoption *of Brahmin boy by person of lower caste, whether valid.*

A *Brahmin* boy cannot be adopted by a person of lower caste. **O.** NARAIN SINGH *v.* SHIAM KALI KUNWAR, 17 O. C. 186 **45**

——— Adoption—Sapindas — *Consent indefinite, effect of*—Sapindas *of various grades—Consent of remote and interested* sapindas—*Long interval between authority given to adopt and date of adoption, effect of—Adoption on personal caprice or advantage—Intervention of other circumstances—Power invalid.*

Where a *sapinda*, though welcoming the desire in a widow to adopt, reserves the consent to a particular adoption being made to a future date, until he obtains details, it cannot be said that the consent of the *sapinda* is so specific and clear as to amount to an authority to a widow to make the particular adoption.

Where there are five grades of reversioners to the estate of the last male-holder and the widow contents herself with obtaining the consent of the third grade and that of only two *sapindas*, both of whom are interested in making the adoption, it cannot be said that there is such a consent by a majority of the *sapindas* as to amount to an authority to the widow to make the adoption.

Where a widow out of mere personal caprice and with a view to her own personal advantage makes an adoption on the strength of a power to adopt given thirty years ago, it cannot be said that the adoption was made in the performance of a *bona fide* religious duty either to secure spiritual benefits to her husband or to herself.

Where between the date of the power to adopt and the actual making of the adoption a long time elapses and other circumstances intervene and the estate becomes vested in other persons the power becomes ineffective and cannot be acted upon.

Where a *sapinda* refuses to give his consent, he is not bound to state his reasons for such refusal, especially when the widow does not ask for them. **M.** KANDUKURI VEERA BASAVARAJU *v.* KANDUKURI BALASURYA, (1914) M. W. N. 502 **3**

——— Alienation by father—Mitakshara—*Suit by son for possession—Limitation to run from possession by vendee—Possession, how taken.*

In a suit under the *Mitakshara* Law for possession of land by annulment of illegal sales by his father, the son's only cause of action is the taking of possession by the vendee of what was the son's joint share of the family property, and his suit ought to be brought within 12 years of such adverse possession.

It is not necessary in order to obtain possession that the purchaser should step on to the land at all. The physical possibility of the buyer dealing with the thing exclusively as his own is all that is necessary. **P.** BAHADUR CHAND *v.* NAINA MAL, 231 P. L. R. 1914; 133 P. W. R. 1914 **35**

——— ——— ——— Property fraudulently alienated by one member—That member cannot recover his share by setting up other members to challenge transfer—Fraudulent transfer by father—Son cannot recover more than his own share—Pleadings—Issue clearly raised—Form of pleadings immaterial **123**

——— ——— ——— ——— *Purchaser of co-parcener's interest, whether entitled to mesne profits from other members.*

A purchaser of a co-parcener's interest in a joint undivided Hindu family has no right to claim past

mesne profits from the other members of the family from the date of purchase to the date of suit, as he cannot be in a higher position than his alienor who can claim no account of past profits. His remedy is a suit for partition immediately after such purchase.

Such alienee does not obtain a vested interest in the properties purchased by him; his right is only an equity to compel his alienor to sue for partition. **M.** MAHARAJA OF BOBBILI *v.* VENKATARAMANJULU NAIDU, 16 M. L. T. 181; 27 M. L. J. 409 **585**

——— ——— **Alienation by widow**—*Mortgage of whole estate—Consent of next reversionary heir—Sale of estate under mortgage-decree before widow's death—Reversioners, right of.*

A complete alienation by a Hindu widow of her entire interest in her deceased husband's estate with the consent of the whole body of persons entitled to succeed as immediate reversionary heirs, passes a good title to the transferee as against the actual reversionary heirs. Similarly, an alienation by a widow by way of mortgage of a portion of the estate of her deceased husband, without proof either of legal necessity or of reasonable inquiry and honest belief as to its existence but with the consent of the next reversioner for the time being, will be valid and binding on the actual reversioner, if the presumption of legal necessity or reasonable inquiry and honest belief raised by such consent is not rebutted by cogent proof.

Therefore, where a conditional alienation by way of mortgage, by a Hindu widow, of her entire interest in the estate is made with the consent of the next reversioner and that alienation becomes complete by operation of law by the sale of the mortgaged property before the right to object to the alienation accrues to the actual reversioner, he cannot impugn it afterwards. **C.** SHIBA SUNDARI DASI *v.* RAM GOBINDA DAS **90**

——— ——— ——— ——— **by widow** *of whole estate—Consent of next reversioner—Validity.*

A Hindu widow can alienate the whole estate with the consent of the next reversioner. **M.** ADAIKKA MAISTRY *v.* MUTHUSAMI AMBALAGARAN, 27 M. L. J. 24 **144**

——— ——— ——— ——— **by widow** *of whole or part of husband's estate—Reversioner's consent*, nature *of*– Bona fide.

The consent of the next reversioner to an alienation made by a Hindu widow should be *bona fide* whether the alienation is of the entire estate of her husband or only a part of it. **M.** RAMA KAVUNDEN *v.* KURUTHASAWMY NAICK, 16 M. L. T. 251; (1914) M. W. N. 797 **951**

——— ——— **Debt**—*Father's debts—Suit against father and son—Decree against father alone—Attachment of family property—Son's share, liability of—Civil Procedure Code (Act V of* 1908*), s.* 11, *Exp. V.*

In a suit for mesne profits against a Hindu father and his son, the decree was given only against the father. In execution of that decree a house belonging to both father and son was attached. The son objected that his undivided share in the house was not liable to attachment inasmuch as the decree was only against the father:

Held, that, as under the Hindu Law the liability of a son to pay his father's debts to the extent of his

Hindu Law--contd.

share in the family property is based on religious and moral considerations and not on some direct liability to his father's creditor, the decree in the suit for mesne profits left the son exactly in the position in which he would have been if he had never been impleaded at all, and that, therefore, his contention against attachment was untenable. **M.** ZENAMANDRA PAPIAH *v.* LANKA SUBBASASTRULU, (1914) M. W. N. 616; 27 M. L. J. 276 **396**

——— **Debt**—Father's debt time-barred, son's duty to discharge—Will not acted upon—Family arrangement—Son's right to object to father's alienation—Unfriendliness on part of father does not destroy son's right as co-parcener **480**

——— **Gift**—*"Affiliation", meaning of—Gift to affiliated son Subsequent adoption by affiliator's widow, whether valid.*

By the term "affiliation" is meant the act of taking another into one's family without performing the ceremony of adoption.

A gift to the affiliated son of an undivided moiety of the affiliator's property is quite valid and is not affected by any subsequent adoption by the affiliator's widow. **M.** CHALLA NARSI REDDI *v.* VUDUMULA VIRAREDDI, (1914) M. W. N. 919 **893**

——— ——— Paramparyamai, *limitation of—Deed, construction of—Intention—Life-estate.*

The rule of Hindu Law that "a gift to a man and his sons and grandsons or to a man and his son's sons would, in the absence of anything showing contrary intention, pass a general estate of inheritance," does not apply where there are words in the deed expressly or impliedly limiting that right.

Therefore, where different words are used to convey an absolute interest and a partial interest and where the donee is himself 70 years old, the intention is rather to confine the estate to his life and not to grant an estate of inheritance. **M.** SEETHAI AMMAL *v.* MAHADEVA IYER **936**

——— ——— **by widow** *in favour of her daughter having sons—Relinquishment—Suit by reversioner, whether maintainable.*

A gift by a Hindu widow to her daughter having sons amounts to relinquishment by the widow of her interest in her husband's property and a reversioner's suit to set aside the gift is not maintainable. **A.** *Musammat* GOURI *v.* GOPAL **503**

——— **Inheritance**, *exclusion from—Leprosy, what type of—Tests—"Incurable", what is.*

Under the Hindu Law it is only the agonising, sanious or ulcerous type of leprosy that can be regarded as a ground of exclusion from inheritance. It is not safe to adopt the test whether the disease is curable or not. Deformity and unfitness for social intercourse, arising from the virulent and disgusting nature of the disease, are the most satisfactory tests.

In order that leprosy may be considered incurable there must be worms on the body, the ulcer must discharge offensive matter, the nails should drop off and the eyes should be blood-red. **M.** RAJU *v.* RAMASWAMY NAICKEN, 1 L. W. 715; 16 M. L. T. 254 **968**

Hindu Law—contd.

——— ——— **Inheritance**—Mahant *dying without validly nominating his successor, effect of—Appointment, power of, reverting to family of founder of trust U. P. Land Revenue Act (III of 1901), s. 34—Mutation of names—Possession to be by virtue of succession.*

Where a *mahant* makes no vaild nomination of his successor, the power of appointment reverts to the author of the trust or to his successors.

In mutation cases, the question of possession does not arise unless there is evidence of succession. **U. P. B. R.** SHIAM BIHARI *v.* BHAGWATI SINGH, 1 O. L. J. 440 **758**

——— ——— ——— ——— Mitakshara — Bandhu — Sapinda—Bhinna-gotra sapinda *beyond 5th degree, whether entitled to inherit—Interpretation of Hindu Law.*

The *sapinda* relationship (according to the *Mitakshara* school), on which the heritable right of collaterals is founded, ceases in the case of the *bhinna-gotra sapinda* with the fifth degree from the *propositus* and in order to entitle a man to succeed to the inheritance of another, he must be so related to the latter that they are *sapindas* of each other.

In the *Mitakshara* the word *bandhu* signifies the *bhinna-gotra sapindas, i. e.*, the *sapindas* belonging to a different family *gotra.*

Sapinda-relationship explained

The Hindu Law contains its own principles of exposition. Therefore, the questions arising under it cannot be determined on abstract reasoning or analogies borrowed from other systems of law, but must depend for their decision on the rules and doctrines enunciated by its own law-givers and recognised expounders. **P. C.** RAMCHANDRA MARTAND WAIKAR *v.* VINAYAK VENKATESH KOTHEKAR, 18 C. W. N. 1154; 27 M. L. J. 333; 1 L. W. 831; 10 N. L. R. 112; 16 M. L. T. 447; (1914) M. W. N. 835; 16 BOM. L. R. 863; 12 A. L. J. 1284; 20 C. L. J. 573 **290**

——— ——— ——— *Widow gifting property of husband to daughter—Nature of estate—Daughter when succeeding does not form stock of fresh descent—Sons of brother's son preferred to daughter's daughters—Resumption of* muafi—*Settlement with particular person does not alter position of settlee with regard to property—Arguments opposed to plaint and pleadings, whether allowed in second appeal.*

A Hindu widow in possession of her husband's property cannot, by any act of donation on her part, confer on the next heir, her daughter, any greater or more extensive rights than she herself possesses.

In the ordinary way a daughter who is under Hindu Law the heir of her father cannot, when succeeding as such heir to her father, form the stock of a fresh descent, and as a result the sons of her father's brother's son (who were the *sapindas* of her father) would be entitled to succeed in preference to her daughters who can claim only as *vandhus* of their deceased grandfather.

In a case where a *muafi* is resumed, and a Settlement is thereafter made with a particular person, the action of the Settlement Authority does not

affect or alter the position of the settlee with regard to the property.

The Chief Court will not accept at the late stage of a case an argument which is opposed to the plaint and pleadings and was not so much as hinted at in the Courts below. **P.** KRISHNA DEVI *v.* SHIB SARAN, 77 P. R. 1914 **697**

———— **Joint family**—*Debt taken by managing member of family to purchase property for and with consent of adult members, whether binding on family.*

Where with the consent of all the adult members of a joint Hindu family the managing member of the family purchased a property for the benefit of the family and in order to secure money for the purpose of paying the price of that property he alone mortgaged a joint property:

Held, that the mortgage was a debt for which the family property was liable. **A.** PITAMBAR LAL *v.* SITAL, 12 A. L. J. 641 **263**

———— ———— ———— *Disruption of unity of joint Hindu family—Presumption as to date of disruption —Presumption as to unity of other members where one member separates.*

Where a disruption of the unity of a joint family has once taken place and is proved or admitted to have taken place, no presumption can be raised as to the date of that disruption.

Where one co-parcener separates himself from the others, there is no presumption that the remaining members remain united. **O.** *Musammat* MENDANA *v.* JAGAN NATH BAKHSH, 17 O. C. 235 **689**

———— ———— — *Joint family property, disposal by Will of—'Married woman' as used in Civil Procedure Code, meaning of—Burden of proof—Decree against Hindu father, sons' liability to satisfy.*

A member of a joint Hindu family is not competent to dispose of the joint family property by Will.

The word "married woman" as used in the Code of Civil Procedure, 1882, refers to *femme covert* as opposed to *femme sole* and, therefore, does not apply to a widow.

Where a decree has been obtained against a Hindu father whose children are minors upon a mortgage executed by him of joint family property, whether or not there has been a sale of the property in execution of the decree, it is for the sons who come into Court to escape liability thereunder to prove that the debt was contracted for an immoral or illegal purpose or that the debt was of an illusory character. **O.** GUR NARAIN *v.* GULZARI LAL, 17 O. C. 368; 1 O. L. J. 503 **917**

———— ———— ———— *Litigation — Father represents sons—Agreement by father to be bound by oath, how far binding on sons.*

A father fully represents the whole family consisting of himself and his undivided sons in a litigation which he conducts in the interests of the family. Unless the decree in such a litigation is passed owing to the fraud or collusion on his part directed against his sons, the decree and the findings of the Court are binding on the sons.

An agreement by father to be bound by an oath taken under the Oaths Act cannot, by the mere fact that it is based on the special provisions of the Oaths Act, be said to be an agreement made to defraud his sons. **M.** SAMI *v.* SWAMINATHA IYER, 16 M. L. T. 163; 1 L. W. 643 **221**

———— **Joint family** — *Maintenance — Widow of brother—Maintenance to be fixed with reference to family income at date of suit—Waiver, effect of—Charge upon property—Personal decree.*

The widow of a deceased member of a joint Hindu family is entitled to have her maintenance fixed with reference to the family income at the date of suit and not at the date of her husband's death.

In the absence of waiver by her of her claim a widow is entitled to arrears of maintenance.

The maintenance awarded need not be a charge on the entire family property and unless some reason is shown for it, a personal decree should not be passed against the defendants.

A daughter-in-law may not be entitled to claim any maintenance out of the self-acquired property in the hands of her father-in-law if her husband dies before his father, but she would be entitled to claim it out of the same property after it descends to her brothers-in-law as ancestral property. **M.** MANIKKA MUDALIAR *v.* SOUBAGIA AMMAL, 27 M. L. J. 291 **897**

———— ———— ———— *Managing member can sue or be sued on behalf of family—Decree binding on other family members - Compromise in interest of family, manager competent to enter into - Fraud or undue influence as ground of avoiding compromise — Karta plaintiff or defendant not to be distinctly stated as such— Residence of joint family members at different places—Business on behalf of family carried on in local manager's name alone— Local manager, decree against, binding on whole family—Alienation —Pre-emption suit decreed - Property pre-empted lost by operation of law.*

A managing member of a joint Hindu family can sue and be sued on behalf of the family, and a decree in such a suit binds the other members of the family of which he is the manager.

When a defendant is competent to defend a suit relating to a joint family transaction carried out by him as manager, he is entitled as such to enter into a compromise in the course of that suit if he considers it in the interest of the family to do so, although other members of the family may be entitled in certain circumstances to avoid the decree on the ground of fraud or undue influence.

Apart from special circumstances, it is not essential in suits by or against the manager of a joint Hindu family that a plaintiff should state in distinct terms that he is suing as manager or that the defendant is being sued as manager.

Where the members of a joint Hindu family reside at different places, but certain business transactions are carried on at the principal place of residence in the name of one member alone acting as local manager on behalf of the family, and upon a purchase having been made by the local manager in his name but on behalf of the family and out of joint family funds, a suit for pre-emption is brought and decreed against him alone, the suit is rightly brought against

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him alone and the decree is in ordinary circumstances binding on the other members of the family, although the pre-emptor knows that the purchase is made out of joint family funds and on behalf of the family and does not sue the local manager as *karta* of the family.

Where a pre-emption suit is decreed on a reasonable compromise being filed in the suit, the vendee cannot be said to have alienated the property in suit, but to have lost it by operation of law. **O.** SHEO DULARE MISRA *v.* BRIJ BHUKHAN LAL, 1 O. L. J. 456 **849**

——— *Mitakshara* - Mithila School —Separation—Partition — Co-parcenary rights — Exclusion of females—"*Auras putra poutradik*," meaning of —Custom not enforced in one instance, effect of—Accretions to *babuana* grant **417**

——— *Promissory note in adoptive father's name —Suit by adopted son —Whether adopted son can sue on note without succession certificate—Succession Certificate Act (VII of 1889), s. 4.*

An adopted son is not entitled to obtain a decree in respect of a promissory note executed in favour of his deceased undivided adoptive father without the production of a succession certificate. **M.** PERAYYA *v.* AHMAD ABDUL RAHIMAN SAIT, 1 L. W. 612; 27 M. L. J. 236; (1914) M. W. N. 671 **206**

——— **Kumhar,** whether bound by strict Hindu Law **839**

——— **Prostitutes**—*Fanning service, whether can be performed by males—Service inam—Alienation—Adverse possession of office, if confers title to emoluments.*

By reason of his sex a Hindu male is incapacitated from performing 'fanning' service in a temple, which is usually done by dancing girls.

An alienation of an *inam* granted for the performance of fanning service in a temple in favour of a person not next in succession is invalid, even though it is made in favour of a member of the family to which the *inam* belongs.

Joint possession of an office, even if adverse, does not confer a title to a share of the income of the lands attached thereto. **M.** VUSA CHANDRAKANTAM *v.* VUSA SUBBARAYUDU, 1 L. W. 827; 16 M. L. T. 347; 27 M. L. J. 745 **685**

——— *Inheritance—Succession to woman living in adultery*- Stridhanam—*Legitimtea son and illegitimate daughter, contest between—Prostitution, effect of—Words, interpretation of—Custom.*

Under the *Mitakshara* Law the illegitimate children have no right of succession except in the case of illegitimate sons of *Sudras.*

According to the Hindu Law as obtaining in the Madras Presidency, the illegitimate daughter of a woman who lived in adultery has no right to inherit her mother's *stridhanam* and a legitimate son is entitled to succeed to it in preference to the illegitimate daughter.

Prostitutes are governed by the ordinary Hindu Law. The unchastity of a married woman does not bring her within the class of dancing girls and she is not governed by the law which by custom and precedent applies to them.

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Prostitution does not sever the tie of kindred between a degraded woman and her relations before degradation.

It is a well-recognised canon of interpretation, both under the English and the Hindu Law, that words ought to be construed in their primary sense and multiplicity of sense ought not to be attributed to them.

Per *Seshagiri Iyer, J.*—A custom is not immoral merely because it regulates rights of property among dancing girls:

Quære:—Whether the illegitimate children can come in to intercept the escheat to the Crown? **M.** MEENAKSHI *v.* MUNIANDI PANIKKAN, 1 L. W. 704; (1914) M. W. N. 672; 16 M. L. T. 270; 27 M. L. J. 353 **957**

——— **Restitution of conjugal rights**—*Legal cruelty, what amounts to—Desertion by Hindu wife, when justified.*

Where a Hindu husband starves his wife, does not give her proper clothing, shuts her up every time he goes out of the house and frequently uses personal violence to her and is proved to have turned her out more than once from his house, there is legal cruelty inasmuch as the facts are of such a character as to endanger the personal health, if not the safety, of the wife.

One of the circumstances which justifies desertion by a wife under the Hindu Law is cruelty in a degree which renders it unsafe for the wife to return to her husband. **A.** BHAWANI PRASAD *v.* SUBHAGI, 12 A. L. J. 995 **728**

——— Reversioners to prove their nearest reversionary relationship to deceased - Pedigree filed in Settlement proceedings **823**

——— **Stridhanam**—*Order of Succession —Husband's* sapindas—*Widow's blood relations—Mother preferred to brother - Brother's widow not entitled—Suit against trespasser—Plaintiff to prove his own title.*

The *stridhanam* of a Hindu female, married according to an orthodox form and dying without issue, devolves on her husband, and failing her husband, on his *sapindas* in the order laid down in the *Mitakshara* with reference to the succession to the property of a male.

On failure of the husband's *sapindas* qualified to succeed, the widow's blood relations would succeed to the exclusion of the Crown. As between the mother and the brother, the mother is the preferential heir.

A brother's widow is no doubt a *gotraja sapinda*, but she is not entitled to succeed as an heir under the Madras system of inheritance.

A plaintiff seeking to oust a trespasser in possession must prove his own title. **M.** KANAKAMMAL *v.* ANANTHAMATHI AMMAL, 37 M. 293 **901**

——— **Trust**—Trust deed—Trustee's alien in race and religion, when valid **480**

——— **Widow**—*Decree fairly and properly obtained against widow—Reversioners bound by decree —Confession of judgment—Rights of reversioners not in question—Widow,* bona fides *of.*

A decree fairly and properly obtained against a Hindu widow binds the reversioners.

Hindu Law—contd.

A Hindu widow's confession of judgment binds the reversioners where their rights to the estate are not in question and she believes the claim to be just and acts *bona fide*. **U. P. B. R.** MANGAL DAS *v.* MAHENDRA DATTA SINGH, 1 O. L. J. 490 **921**

——— **Widow's estate** — *Permission given by widow to plant grove, whether binding on reversioner—Pleadings—Relief.*

In a plaint one of the reliefs was for possession. Both parties understood perfectly well the point in dispute and gave evidence accordingly.

Held, that the plaintiff was entitled to possession and the fact that the pleadings subsequent to the filing of the plaint and the evidence in the case disclosed facts at variance with those mentioned in the plaint was immaterial.

The permission given by a Hindu female, having life-estate in a property, to plant groves upon a piece of land without fixing the rent of the land, is not binding on reversioners. **A.** JUGAL KISHORE *v.* GOMTI KUAR **280**

——— **Widow**—Jat *widow — Re-marriage, effect of—Property of husband, whether divested—Custom.*

Where the rules of caste allow a Hindu widow to re-marry, her second marriage does not under the Hindu Law divest her of the property of her first husband; but a custom to the contrary may, of course, be proved.

Where the *Wajib-ul-arz* of the village in which the property in suit lies is silent as regards the custom:

Held, that the *Wajib-ul-arz* of other villages in which the parties to the suit have no connection whatsoever, does not prove the custom. **A.** *Musammat* NIHALI *v.* KANAK SINGH **617**

——— ——— *Land granted as maintenance to widow, whether resumable on her death—Succession—Reversioner's widow's right to claim share in deceased member's estate.*

The property given to a widow for maintenance is resumable at her death. A widow of a reversioner can succeed only to the property which was actually vested in her husband at the time of his death. No fresh right can accrue to her as widow in consequence of the subsequent death of a person to whom he would have been heir, if he had lived. **M.** GOVINDAMMAL *v.* MARIMUTHU PILLAI, (1914) M. W. N. 782 **582**

——— ——— *Maintenance, whether charge on whole family property or on husband's share only—Charge, when and how arises—Alienee of property, liability of—Attachment, right created by—Suit by one widow for declaration of charge—Co-widow, whether necessary party.*

A Hindu widow has a right to get her husband's estate charged with her maintenance, but she must make a formal assertion to obtain recognition. Waste or improper alienation of her husband's estate with the very object of depriving her of her subsistence is invalid, and the purchaser who joins in the effort to defeat her rights is under certain circumstances himself liable to the charge.

The right of maintenance of a Hindu widow against persons other than her husband or son rests upon their possession of family property in which her husband had a share.

The mere attachment of a property before it is charged for maintenance creates no right or title in the attaching creditor.

In a suit by a widow for declaration that she has a charge for maintenance on certain property, the co-widow is not a necessary party.

Per *Tyabji, J.*—The Court has power to charge the whole of the joint family property for a widow's maintenance, though her deceased husband's share in the property in fixing the amount of maintenance will naturally be taken into consideration.

Per *Spencer, J.*—The whole family property remains liable for the widow's maintenance, provided that the portion charged does not exceed her husband's interest therein.

Where the estate of the husband of a Hindu widow was attached in a simple money-decree prior to her decree for maintenance, but was sold after the decree was passed:

Held, that the decree was binding on the purchaser and created a charge on the estate. **M.** KRISHNA PATTER *v.* SINNAPONNU, 16 M. L. T. 551 **759**

——— **Widow**—*Property given to Hindu widow by husband's relations without retention of reversionary interest—Succession—Descent, mode of.*

Where a document executed by a widow's husband's brother's sons recites that "neither we nor our heirs will have any objection to your dealing as you please with the one-third share allotted to you," it clearly indicates that the executants do not intend to retain anything in the nature of a reversion in the property given.

Such property passes on the widow's death to her daughters, and on the death of a daughter, passes on to the survivor, and a suit for possession by a granddaughter during the life-time of the other daughter will not lie. **M.** GADIPARTHI PEDA SUBBAYYA *v.* CHIRUMAMELLA LAKSHMIDEVAMMA, 16 M. L. T. 297; (1914) M. W. N. 875 **412**

——— ——— ——— *Suit to restrain waste—Receiver—Power to carry on business—Immoveable property vested in administrator—Handing of keys, whether divestment—Property purchased in name of wife and son—Benami purchase—Presumption.*

One *A* died leaving him surviving *B*, his widow, and *C*, his son, and considerable property which comprised also a share in a partnership firm. *C* died two months thereafter leaving *D*, his widow, as his heir. At the instance of *B* the Administrator-General was ordered by Court to take possession of, and obtain Letters of Administration to, the estate of *A*. He did accordingly and instituted a suit against the surviving partner of the firm in which *A* was a partner to realise *A*'s share therein. A Commissioner was appointed in the course of the proceedings to sell certain assets of the firm between the parties to the suit, one of which was the good-will of the business. The Administrator-General bid for and purchased the same. In the final decree in the suit it was ordered and declared that the Administrator-General do retain as and for his share the good-will of the business. *D* then entered into a partnership under the said firm's name with

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three persons under a deed of partnership, gave them three-annas share and threw the good-will into the common stock. The Administrator-General gave her Rs. 12,000 and handed to her the keys of the business premises which also fell to his share in the final decree. In a suit brought by the next presumptive male reversioner to restrain *D* from committing waste it was found that the partners were not persons whose services it was necessary for her to secure to carry on the business, that she exercised no real supervision and had no control over the same, that everything was done by her partners and two other persons to whom she delegated the power of supervision, that the account books of the firm were not kept in the course of the business and they were written up pending trial:

Held, that a proper case for the appointment of a Receiver was made out and the Court was bound to appoint one in the interests of the reversioners, that her conduct in taking three persons as partners was *prima facie* an act detrimental to the reversion and that the alienation of 9/16ths share of the good-will to them was quite unnecessary in the interest of the business;

that as the final decree passed in the suit for dissolution of partnership contemplated the carrying on of business for the benefit of the estate, it was not an act of waste on the part of the widow;

that by the handing over of the keys of the business premises, the Administrator-General did not part with his interest therein.

Where a person purchased certain immoveable property in the name of his wife and minor son and after his son attained majority, took a release from him and then he and his wife effected a mortgage over the same:

Held, that in the absence of some explanation to account for his taking the property in the name of his wife and son, *prima facie* the presumption was that he intended it for both. **M.** TANIKACHALA MUDALIAR *v.* ALAMELU AMMAL, 16 M. L. T. 26 **153**

———**Wife's** *right to remain in husband's house if he sues to eject her.*

A Hindu wife cannot insist upon living in a house belonging to her husband so as to be able to resist successfully a claim on his part for her removal from the house occupied by her. The questions of her unchastity and immorality and residence and maintenance are irrelevant when her husband asserting his proprietary right sues to eject her from his property. **A.** GANPAT MALLAH *v.* SUNDRI, 12 A. L. J. 1039 **192**

———**Will**—*Maintenance provided to widow for life—Terms clear and unambiguous - Unchastity not to affect right to maintenance.*

Unless there is an ambiguity in the terms of the Will of a Hindu testator, the rule that the Will of a Hindu must be construed with due regard to Hindu habits and notions has no application.

There is no certain and necessary implication that a Hindu, who by Will provides for the maintenance of his wife after his death, intended to deprive her of the maintenance if she becomes unchaste.

Where a Will gave the testator's widow a clear right to receive till her death a certain amount as

Hindu Law—concld.

maintenance, she could not be deprived of such right by adding to the Will certain words and terms which the testator might be presumed to have intended to add if certain future contingencies had been in his mind when he made the Will. **M.** BOMMAYA HEGADE *v.* SRINIVASA HEBBARA, 27 M. L. J. 305 **900**

Hindu widow, right of, to compromise—Legal necessity **377**

———, transfer by, allowed to pass unchallenged, presumption in case of—Next reversioners, transfer in favour of, effect of—Transfer still open to challenge, effect of **869**

———, *transfer by, for legal necessity—consideration-money left with transferee—Transferee to satisfy necessity—Legal necessity otherwise discharged—Transfer void—Next reversioners entitled to recover property—Application of money to be seen by transferee—Transfer not entirely for legal necessity—Voidable transfer—Purchaser entitled to money paid by him to meet legal necessity.*

Where a Hindu widow transfers a property for legal necessity and the consideration-money is left with the transferee to satisfy that necessity, but owing to his failure to do so it is otherwise satisfied, the transfer becomes void and the next reversioners are entitled to recover property without paying him anything; for he, having the control and application of the consideration-money, is bound not only to satisfy himself as to the existence of the necessity but also to see that the money is properly applied.

Where a sale by a Hindu widow is not entirely for legal necessity, it is voidable at the instance of the next reversioners. But where the purchaser has *bona fide* parted with some money to meet a legal necessity, that money should be refunded to him with interest. **O.** KANCHAN KUNWAR *v.* AMAR SINGH, 1 O. L. J. 475 **806**

Hundi—Notice of dishonour—Indorsers—Delay of six months—Drawer to be co-defendant **881**

———Shahjog hundi—*False, fraudulent, stolen or forged* hundi *Responsibility of* Shah *to produce drawer or refund—Solvency of drawer not guaranteed but genuineness guaranteed—Person sending* hundi *for collection not person from whom* hundi *bought—Claim for refund to be made directly and without delay.*

According to the custom among Shroffs relating to *shahjog hundis* the *Shah* who obtains payment of a *shahjog hundi* is, in the event of the *hundi* turning out to be a false, fraudulent, stolen or forged *one*, bound to refund the amount of the *hundi* with interest unless he produces the actual drawer or the person who committed the fraud.

According to the actual practice of Shroffs when dealing with *hundis*, whether *shahjog* or not, the *Shah* does not guarantee the solvency of the drawer, but guarantees the genuineness of the *hundi*. A drawee will not pay a *hundi* unless he has funds in his hands belonging to the drawer, or is willing to give him credit, and he will not pay on presentation of a *shahjog hundi* to a *Shah* unless he is satisfied as to the respectability of the *Shah*, as he looks to him in case of anything afterwards going wrong with the *hundi*. The respectability of the *Shah* is a matter only for the drawee to consider.

Hundi—concld.

The person who sends a *hundi* for collection is not the person from whom the *hundi* is bought.

The claim to a refund against a *Shah* who has received payment of a *hundi* on the ground that the *hundi* is a forgery, must be made as soon as possible after the forgery has been discovered so as to enable the *Shah* to protect himself. Delay in making the claim over a month without any reasonable excuse will disentitle the claimant from recovering. The fact that the Police in their investigation regarding the forgery visited the shop of the *Shah* cannot be considered as a communication by the claimant to the *Shah* of the forgery, and certainly cannot be taken for a claim to a refund.

It is necessary that all notices involving responsibility on mercantile documents should be clearly, precisely and directly given. **B.** BANSIDHAR LACHHMINARAYEN *v.* JAWALAPRASAD GAYAPRASAD, 16 BOM. L. R. 434 **52**

Iddat. *See* RESTITUTION OF CONJUGAL RIGHTS.

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Income-tax Collector, whether Revenue Court **333**

Inherent power. *See* CIVIL PROCEDURE CODE, s 151.

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Insurance policy effected by Hindu husband on his own life for benefit of wife and children, effect of—Money due under such policy, whether available for creditors of assured—Married women—Children—Application of Act to Hindus, Muhammadans and Buddhists—Policy effected under the Act, effect of—Surrender of policy, whether permissible—Powers of Governor-General in Council under section 2 of Act—Terms 'race,' 'sect' and 'tribe,' refer to what communities **236**

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———— Legislature, intention of' to be discussed only in case of ambiguity in words of law **594**

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Irregularity—Amendment of charge by Sessions Judge—No prejudice and no objection **630**

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Jat widow. *See* HINDU LAW.

Joint family. *See* HINDU LAW.

———— , *Muhammadan—No presumption of joint funds—Second appeal—Concurrent findings of fact—Power of High Court to interfere—Findings not based on evidence.*

In a Muhammadan joint family there is no presumption as to the jointness of funds and in this connection Hindu and Muhammadan joint families are quite different.

The rule that the High Court will not interfere to upset concurrent findings of fact is inapplicable to a case where the findings are not based on evidence but on a wrong presumption. **P.** IMAM DIN *v.* DULO, 239 P. L. R. 1914 **278**

Joint land—*Separate use of joint land by co-sharer—Right of such co-sharer to build permanent structure on land without consent of other co-sharers.*

The fact that one of the co-sharers in a village has been in separate use and occupation of a land does not entitle him to erect permanent structures on it against the wishes of other co-sharers. **A.** JADUNATH LAL *v.* BACHHU LAL **43**

Joint tort-feasors—*Contribution — Decree for mesne profits—Liability of several defendants not discriminated—Meaning of decree—Plea that plaintiff alone was real wrong-doer, when and how to be raised.*

The reasonable meaning of a decree for mesne profits which treats all defendants as on the same footing and in no way discriminates between them, is that they are liable in proportion to their interests in the property of which they were in wrongful possession.

Therefore if one of the defendants in such a decree satisfies the whole decree, he is entitled to contribution from the remaining defendants to the extent of their several shares, and the plea that the plaintiff is entitled to no contribution because he alone was in possession of the land in respect of which a decree for mesne profits was given, is of such a special nature and requires such special

Joint tort-feasors—concld.

consideration that it should be distinctly pleaded and made the subject of a distinct issue.

The principle that one of the joint tort-feasors is not entitled to contribution from the rest, does not apply where all of them were not wilful tort-feasors. **C.** BISHNU CHARAN ROY *v.* BIPIN CHANDRA ROY, 18 C. W. N. 622 **729**

Judgment of Appellate Court, what it should contain **586**

——————*based upon evidence not on record set aside in second appeal—Statement of parties in previous litigation relied on must be regularly proved.*

The High Court would set aside a judgment based upon evidence which is not on the record.

If the plaintiff relies upon any statement by the defendant or his Pleader made in a previous litigation between the parties, that statement must be regularly proved. **C.** MONI LAL KAR *v.* UMA CHARAN, 19 C. L. J. 541 **571**

——————*Lower Appellate Court setting aside judgment of first Court not bound to dispose of all reasons given by first Court.*

A lower Appellate Court is not bound to dispose *seriatim* of all the reasons given by the first Court, if it gives special reasons of its own for coming to an opposite conclusion. **C.** JATRA MOHAN NANDI *v.* PITAMBIR MISTRI, 19 C. L. J. 385 **543**

——————*Meaning uncertain—Set aside for uncertainty.*

Where the first Court formulated the question for trial in a compound sentence eminently calculated to lead to an uncertainty in the judgment, as to what the view of the Court was on each of the parts of which that compound was made up, the High Court set aside the judgment on the ground that it did not know what the judgment meant. **C.** DEVENDRA NATH *v.* ANNADA HADI, 19 C. L. J. 543 **576**

Julkar rights—*Tidal and navigable rivers—Fishery rights, Government's right to grant—Change of river course—Right of owner or grantee to follow the river—Bengal Law—Government grant—Evidence—Privy Council Practice—Established rules not to be superseded unless unjust—Foreign rules, considerations to be borne in mind in applying—English tenures and Bengal* zemindari *rights, whether identical—Analogy of English Law, whether should be resorted to when Indian Law is clear*—Julkar *right classified in English Law as a* profit a prendre, *effect of.*

The right of the Government of India to grant a several fishery in a tidal navigable river exists apart from the ownership of the bed of the river, and the right of fishery follows the river whatever course it may take. In other words, the grantee of *julkar* rights in the old channel can continue to enjoy them in the new one, whether the change in the river's course is a sudden or a gradual one. Therefore, in Bengal the Government's grantee can follow the shifting river for the enjoyment of his exclusive fishery so long as the waters form part of the river system within the upstream and downstream limits of his grant, whether the Government owns the soil subjacent to such waters as being the long-established bed, or whether the soil is still in a riparian proprietor as being the site of the river's recent encroachment.

Julkar rights—concld.

Case-law on the subject reviewed.

The mere fact that the *julkar* right is classified in the language of the English Law of real property as a *profit a prendre in alieno solo* does not prevent its proprietor from being entitled to follow the river in its natural change.

The evidence of a Government grants of an exclusive fishery in navigable waters ought to be conclusive and clear.

In the case of *julkar* grant made by Government prior to the Decennial Settlement, as *pattahs* or other muniments evidencing the grants are rarely forthcoming, resort must be had to secondary evidence of them, or to the inference of a legal origin to be drawn from long user.

In proposing to apply the juristic rules of a distant time or country to the conditions of a particular place at the present day, regard must be had to the physical, social and historical conditions to which that rule is to be adapted.

The analogy of an English rule can hardly be prayed in aid when Indian Legislature has an established and different rule on the same subject

English tenures and Bengal *zemindari* rights do not fully correspond to one another.

The Judicial Committee would be slow to disturb decisions by which rules, governing extensive and important rights, have been established, and unless they could be shown to be manifestly unjust or flagrantly inexpedient, their Lordships would not supersede them **P. C.** SRINATH ROY *v.* DINABANDHU SEN, 18 C. W. N. 1217; (1914) M. W. N. 654; 1 L. W. 733; 16 M. L. T. 319; 12 A. L. J. 1193; 20 C. L. J. 385; 16 BOM. L. R. 901 **467**

Jurisdiction. *See* CIVIL PROCEDURE CODE, S. 151; SUITS VALUATION ACT.

——————Appeal—Order under section 43, Provincial Insolvency Act—Nature of appeal—Jurisdiction **986**

——————Application to be adjudged insolvent—Applicant working as domestic servant in one district and having agricultural holding in another **41**

——————Consent or contract whether can give jurisdiction to Court **451**

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——————Suit to enforce award **826**

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——————Summons to defendant for settlement of issue—Suit finally disposed of **9**

——————*Title, objections relating to, raised*

Jurisdiction—contd.

in course of partition in Revenue Court—Civil Courts to satisfy themselves if conditions and qualifications annexed to grant of jurisdiction complied with—U. P. Land Revenue Act (III of 1901), s. 111.

When a Statute confers jurisdiction upon a tribunal of limited authority and statutory origin, the conditions and qualifications annexed to the grant must be strictly complied with.

The Civil Courts are invested with jurisdiction of a two-fold character in respect of objections relating to title which have been put forward in the Revenue Court within the time specified in the proclamation. In the cases specified in clauses (*a*) and (*b*) of sub-section (1) of section 111 of the Land Revenue Act the jurisdiction conferred is original.

In cases under clause (*a*) there is no rule of limitation other than that which would apply under the ordinary law relating to civil suits.

In cases under clause (*b*) the jurisdiction must be invoked within the period of three months from the date upon which the objector is referred to the Civil Court. In cases under clause (*c*) the Civil Court has an appellate jurisdiction only.

The jurisdiction being conferred on the Civil Courts by Statute and not by the Revenue Court order, the Civil Courts, when their jurisdiction is invoked, must satisfy themselves that all the conditions and qualifications annexed to the grant of jurisdiction have been strictly complied with. **O.** MUKHTAR AHMAD *v.* BARATI LAL, 17 O. C. 224, 1 O. L. J. 335 **316**

— — — Valuation of shares as between co-sharers **366**

— — Valuation of suit—Court Fee—Suit for possession of colony land **24**

— — Value of suit for purposes of jurisdiction **180**

— — **of Civil Court**—*Lambardar's* power to grant leave—Declaration **61**

— — **of Civil or Revenue Court**—*Claim by reversioners of sonless landowner for possession of land on ground that he had no right to create occupancy rights—Adverse possession—Limitation Act (IX of 1908), Sch. I, Art. 144.*

A suit brought by the reversioners of a deceased sonless proprietor who had given occupancy rights in his plots of land to another, on the ground that he had no right to alienate the land in that way, is cognizable by a Civil Court.

Article 144 of the Limitation Act, IX of 1908, is applicable to such a case and a suit brought 30 years after the alienation is clearly barred. **P.** BADHAWA *v.* JALLU, 112 P. W. R. 1914; 228 P. L. R. 1914 **871**

— — — — *Lessees of village, perpetual or for term—Ejectment—Declaratory suit—Cause of action—Enhancement of rent, right as to—Enhanced rent, refusal to pay, right to eject in case of—Civil Courts not to express opinion on matters cognizable by Revenue Courts alone.*

The lessees of a village, whether perpetual or for a fixed period, cannot be ejected through a Civil Court: the landlord must, if he wishes to eject them, take proceedings in the Rent Court.

Where it was found that the lessees had merely put forward their rights as lessees and never set up any proprietary or under-proprietary rights:

Held, that there was no cause of action for the landlord to go to the Civil Court for a declaration that the lessees had no proprietary or under-proprietary rights.

A landlord's right to raise the rent of lessees-at-will and to eject them if they refuse to admit this right, cannot be decided by a Civil Court but by a Revenue Court alone.

A Civil Court ought not to express its opinion upon such matters as can only be decided by a Revenue Court, but ought to leave them open for decision by that Court. **O.** GUR SAHAI *v.* MUHAMMAD ABUL HASAN KHAN, 1 O. L. J. 512 **914**

— — **of Civil or Revenue Court**—Muafi—*Punjab Land Revenue Act (XVII of 1887), s. 158 (viii)—Return of plaint.*

The Civil Courts have no jurisdiction to question the authority of the Revenue Officers to settle, in case of resumption of *muafi*, the land with the heirs of the last *muafidar*, ignoring the representatives of another joint *muafidar* who died earlier.

Where it is found, after inquiry, that a suit is cognizable by a Revenue Court and not by a Civil Court the plaint may not be returned for presentation to the proper Court. **P.** HARCHARAN DAS *v.* DIWAN CHAND, 90 P. W. R. 1914; 198 P. L. R. 1914 **622**

— — — Suit for declaration of title to hold land rent free **206**

— — — — — Suit by occupancy tenant for possession of land as threshing floor **502**

— — — — *Tenancy—Determination of nature or terms—Permanent lessee not possessing heritable and transferable right, whether under-proprietor—Declaration that defendants neither proprietors nor under-proprietors, maintainability of suit for, where they simply claim to be perpetual lessees—Civil Courts not to declare whether decision of Revenue Court binding on party—Specific Relief Act (I of 1877), s. 42—Declaration discretionary—Mere question of law, whether justifies grant of declaration.*

A Civil Court can inquire into a proprietary or under-proprietary title but cannot inquire into the nature or the terms of a tenancy where the tenancy is admitted. They lie within the exclusive jurisdiction of the Revenue Courts.

A permanent lessee not possessing a heritable and transferable right is not an under-proprietor.

Where the plaintiff sued the defendants in the Civil Court for a declaration that they were neither proprietors nor under-proprietors, and the defendants simply claimed to be perpetual lessees as found by the Revenue Court:

Held, that the plaintiff's suit was without any cause of action.

A Civil Court ought not to grant a declaration as to whether a decision of the Revenue Court is binding upon a party, for the power conferred by section 42 of the Specific Relief Act is discretionary and no declaration can properly be granted on a mere question of law. **O.** PRAG *v.* MUHAMMAD ABDUL HUSAIN, 1 O. L. J. 344 **603**

Jury trial - *Verdict not unanimous—Re-consideration after delivery, whether legal—Questions to Jury—Procedure—Criminal Procedure Code (Act V of 1898), ss. 302, 303, 307.*

When a Jury has returned a clear and unambiguous, though not unanimous, verdict, the Sessions Judge

Jury trial—concld.

has no power to put questions to the Jury under section 303 of the Criminal Procedure Code. If he disagrees with the verdict of the majority, he should proceed under section 307. **L. B.** KYA NYUN *v.* EMPEROR, 7 L. B. R 140; 15 CR. L. J. 670 **1006**

Kabuliat. *See* BENGAL TENANCY ACT, s. 50; LANDLORD AND TENANT.

——— ——— , *stipulation in – Suit to enforce stipulation after expiry of term – Waiver – Restrictions on enhancement of rent – Bengal Tenancy Act (VIII of 1885), s. 30 – Court's duty – Civil Procedure Code (Act V of 1908), O. XLI, r. 11, O. XLVII, r. 4 – Appeal dismissed under O. XLI, r. 11, revival of, by Division Bench, whether can be questioned.*

An order of a Division Bench of the High Court reviving an appeal dismissed under Order XLI, rule 11, cannot be questioned by the Bench hearing the appeal.

If a tenant holds over after the expiry of the *kabuliat*, the landlord is not entitled to enforce a stipulation contained in it, which he had waived during the term itself.

Obiter.—Under the Bengal Tenancy Act enhancement of the rent of *raiyats*, whether occupancy or non-occupancy, is greatly restricted. These restrictions constitute a valuable protection for the tenants and the Courts should always be very careful to prevent landlords from evading these restrictions by inducing improvident tenants to take lands at low rates with a stipulation for future enhancement. **C.** HALDHAR JHA *v.* SHAH MAHAMMAD ASHRAF **820**

——— ——— unregistered, inadmissible in evidence —Oral evidence as to rent agreed upon, whether admissible **509**

Khazis' Act (XII of 1880), ss. 2, 4—*Appointment as Khazi confers no exclusive right to perform functions of office.*

The object of the Khazis Act of 1880 was merely to appoint a person whose duty it would be to render certain services to such Muhammadans as may choose to resort to him for certain purposes, and does not confer on him any exclusive right to perform the functions which his office requires him to discharge.

An office which requires the holder to perform duties in connection with an institution would ordinarily carry with it rights of an exclusive character, and does not interfere with the right possessed by all persons to exercise any profession or calling they might choose to adopt. **M.** KATEL SHEIK UMMAR SAHEB *v.* KHAZI BUDAN KHAN SAHEB, 37 M. 228 **898**

——— ——— **s. 4** **898**

Kidnapping. *See* PENAL CODE, s 361.

Labourer. *See* WORKMANS BREACH OF CONTRACT ACT, s. 2.

Land Acquisition Act (I of 1894), ss. 18, 30—*Apportionment of compensation—Reference on* zomindar's *application—Tenant's right to dispute apportionment.*

Where definite apportionment was made by the Collector between the *zemindar* and his tenant, and the matter was referred to the Court on the application of the *zemindar* and not of the tenant:

Held, that the tenant could not dispute the Collector's award before Court. **S.** MAHARALI *v.* *Diwan* MUSHTAKSING, 8 S. L. R. 18 **803**

Land Acquisition Act—contd.

——— ——— **s. 18** — *Circumstance affecting compensation not put forward before Land Acquisition Officer, whether can be urged in Civil Court—Pleader's fees, assessment of—Civil Digest (Oudh), para. 272, r. 9.*

It is the business of the applicant in a Land Acquisition case to put forward before the Land Acquisition Officer every circumstance which might affect the amount of compensation which he demands, and if he fails to do so, the Civil Court is justified in ignoring it.

For the purpose of taxation of Pleader's fees proceedings taken on reference under section 18 of the Land Acquisition Act should not be treated as a suit within the meaning of the rules contained in paragraph 272 of the Oudh Civil Digest. Pleader's fees in such cases should be assessed under rule 9 of the latter paragraph. **O.** SAJJAD ALI KHAN *v.* SECRETARY OF STATE, 17 O. C. 284 **732**

——— ——— **ss. 18, 19**—*Petition to Collector to review award—Petition rejected as time-barred, but sent to Divisional Judge to be put up with cases before him dealt with as order of reference —Appeal—Objection taken to jurisdiction of Divisional Judge at a late stage—Objection allowed to be taken—Divisional Judge incompetent to deal with application—Extension of time—Minority.*

The award of the Collector was made on the 7th June 1912, and on the 11th July 1912, a somewhat vague petition on unstamped paper was presented to the Collector by all the respondents. This petition was returned on the ground that it was unstamped and did not specify the field areas to which it related.

On the 23rd July 1912, *H*, one of the respondents, presented a written objection to the award, but in it he merely asked the Collector to review his award and grant him further compensation. The Collector rejected the application as time-barred. On the 14th August 1912, *G*, another respondent, applied to the Collector practically for a review of his award. This application was also rejected as time-barred. The remaining respondents, *M* and *A*, said to be minors whose mother had been acting as their guardian, made no application after the unstamped petition of the 11th July.

The Collector, after rejecting the various petitions made to him, directed that the applications should be forwarded to the Court of the Divisional Judge "to be put up with the cases before him". This was regarded as an order of reference by the Collector, and the Divisional Judge dealt with it as such. On appeal from the order of the Divisional Judge, the Chief Court remanded the case, and subsequent to the date of return to the order of remand, the Government Advocate filed certain additional grounds of appeal taking exception to the jurisdiction of the Divisional Judge to adjudicate upon the claims of the respondents. Admittedly the objections had not been taken in the Court of the Divisional Judge when he was originally adjudicating upon the respondents' case:

Held, that the objection could be taken even at that stage of the case;

that under section 18 of the Land Acquisition Act, no extension of time is allowable on the ground of minority;

Land Acquisition Act—concld.

that the Divisional Judge had no jurisdiction to deal with the case of the respondents:—

(1) because there was no application by any of the respondents asking the Collector to take action under section 18 of the Act;

(2) because even the petitions made by the respondents were time-barred;

(3) because the Collector rejected the petitions and did not refer them under section 19 to the Divisional Judge, and

(4) because so far as *M* and *A* were concerned, there was no application at all before the Collector. **P.** SECRETARY OF STATE *v.* HAKIM, 64 P. R. 1914; 244 P. L. R. 1914; 158 P. W. R. 1914 **448**

——— **s. 19** **448**

——— **ss. 23, 38**—*House, market-value of—Twenty years annual rental—Annual rental, how found in growing towns—Fruit-bearing trees, valuation of.*

In computing the value of a house in a town of growing importance twenty times the annual rental value, and not what it would cost to build a house of that description, should be allowed, and the annual rental should not be merely the rent which the house is commanding at the time, but what it is likely to fetch in future, *minus* the cost of ordinary repairs which a tenant would be likely to ask for and get from a landlord.

Fruit-bearing trees likely to bear fruit for a number of years, *e. g.*, mango trees, should also be valued at twenty years annual rental. **M.** RAJAMMAL *v.* HEAD QUARTERS DEPUTY COLLECTOR, VELLORE **393**

——— **s. 30** **803**

——— **ss. 31 (2), 32 (1)**—*Unenfranchised service* inam, *owner of, whether competent to alienate.*

A service *inam* unless enfranchised, is land which the owner is incompetent to alienate within the meaning of sections 31 (2) and 32 (1) of the Land Acquisition Act. **M.** GOVINDA GOUNDAR *v.* RAMIEN **600**

——— **s. 38** **393**

Landlord and tenant—*Acquisition of proprietary rights by tenant—Status of tenant not changed* qua *holding.*

A purchase by a tenant of land or of a fractional share in a village does not convert him into a proprietor of that land or abolish the proprietary right therein of the other co-sharers. **A.** SRI RAM *v.* MUHAMMAD-UD-DIN **40**

——— *Adverse possession—Tenant by sufferance—Agricultural leases not governed by Transfer of Property Act (IV of 1882)—Presumption of tenancy by sufferance—Lease by conduct of parties—Limitation Act (IX of 1908), s. 28, Sch. I, Art. 139—Construction—Usufructuary mortgagee.*

Per *Miller and Sadasiva Iyer, JJ.*—A usufructuary mortgagee cannot eject a tenant already on the land unless the tenant actually attorns to him, but he can only claim profits of the land.

Per *Sadasiva Iyer, J.*—A subsequent trespasser whose title has not been perfected by twelve years' possession cannot successfully resist a suit in ejectment brought by a plaintiff who had been *in lawful possession* of the suit land for however short a time

Landlord and tenant—contd.

before the defendant's possession (which is proved or admitted to be unlawful) commenced.

Lawful possession, however short, is presumptive evidence of title as owner and of the title to possession, and in a suit for ejectment by such owner, the presumption should be rebutted by the defendant.

The fiction of a tenancy by sufferance after the expiry of a lease cannot be applied to agricultural leases not governed by the Transfer of Property Act.

In regard to such leases, a tenant continuing in possession after the expiry of the lease cannot be said to be in adverse possession, unless he actually surrenders possession to his landlord.

In such cases, the lease is created by the conduct of the parties, and there is no adverse possession unless there has been an actual surrender of possession to the landlord. **M.** GANAPATHI MUDALI *v.* VENKATALAKSHMINARASAYYA, (1914) M. W. N. 728 **109**

——— *Agreement to pay higher rate of rent executed before Madras Estates Land Act (I of 1908)—Without consideration—Void.*

An agreement without consideration is not enforceable as a contract.

Therefore a landlord is not entitled to the enhanced rate of rent from a tenant on the basis of an agreement executed before the passing of the Estates Land Act to pay enhanced rate without any consideration. **M.** ZAMINDAR OF GURUZA *v.* KONDURI CHINNA VENKAYYA, 1 L. W. 575 **57**

——— Decree for ejectment prior to Act—Tenant in possession without consent, whether can be convicted under section 212 **628**

——— *Ejectment—Trespass—Mortgage of ex-proprietary right—Position of mortgagee after ejectment of tenant.*

If an ex-proprietary tenant interferes with the possession of the landlord after ejectment, he does so as a trespasser without a shadow of title.

If an ex-proprietary tenancy is extinguished by virtue of ejectment, the interest of the mortgagee in respect of that holding also ceases from that date. **A.** RAM RACHA DUBE *v.* GOKUL RAI **201**

——— Kabuliat — *Stipulation to pay* tahwari *and* salami—Abwab—*Finding of fact, question of—Second appeal—Regulation V of 1812, s. 3.*

Where a tenant stipulates in a *kabuliat* to pay *tahwari* and *salami* in accordance with the *zemindari* practice but not as a part of the consideration for the lease, the charges are *abwabs* and not recoverable.

The finding of the lower Courts as to whether certain charges are parts of rent or not, is a finding of fact and cannot be interfered in second appeal.

The case of *Pudmanand Singh* v. *Baijnath Singh*, 15 C. 828, has been overruled and is no longer good law.

Section 3, Regulation V of 1812, refers to specific sums agreed to be payable to landlord as rent and not to indefinite impositions like *tahwari* and *salami*. **C.** KALANAND SINGH *v.* SAIRA **540**

——— Lambardar's *power to grant lease—Declaration—Jurisdiction of Civil Court—Agra Tenancy Act (II of 1901), s. 95.*

It is not in the power of a *lambardar* to grant a lease of co-parcenary land beyond such period as the circumstances of a particular year or particular

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season may require. But where he grants a lease which is beneficial to the general body of the co-sharers, it is not open to the latter to have it declared invalid, whatever be the period of lease.

A suit for a declaration that a Revenue Court's decree, whether based on a compromise or otherwise, is illegal or inoperative for want of jurisdiction or error of law, cannot be entertained by a Civil Court. **A.** UMRAO SINGH *v.* UMRAO SINGH **61**

——— ——— ———Malabar Law—Value of trees wrongfully cut by tenants, suit to set off, against improvements claimed by tenants—Landlord, rights of—Limitation Act (IX of 1908), Schedule I, Article 108, applicability of **704**

———*Occupancy tenant—Transfer of interest—Liability for rent subsequent to transfer.*

An occupancy tenant is not liable for rent after he has transferred his holding and given notice of the transfer to the landlord. **M.** RANGA RAMANUJACHARIAR *v.* SRINIVASA AIYANGAR, 16 M. L. T. 192; 27 M. L. J. 397 **804**

———Patwari's *papers, entry in interpretation of—Sub-tenant, nephew of* sir-*holder—Rent, non-payment of, effect of*—Shikmi *entry, meaning of.*

Mere entry of one's name in the *Patwari's* papers as a sub-tenant of another does not prove that the relationship of landlord and tenant exists between them, if there are, apart from the entry, other things supporting inference to the contrary, *e.g.*, non-payment of rent and relationship between the parties. The entry in such cases simply means that the *Patwari* finding a person as cultivating the land of another put the former down in his papers as a sub-tenant of the latter. **U. P. B. R.** HULAS SINGH *v.* JIT SINGH, 1 O. L. J. 154 **177**

———*Plot in* abadi—*Tenant's user for long time—Right of tenant to enclose and build upon it—Consent of* zemindar.

A tenant cannot enclose and construct a house upon a plot of open land in the *abadi* which has been in his use for a long time, without the consent of the landlord. **A.** CHATTERPAL *v.* GAJADHAR UPADHYA **59**

———*Rent paid to real owner—*Benamidar, *suit by—Tenant, liability of.*

Rent paid to the real owner absolves the tenant from liability to the *benamidar*. **M.** MUTHUSAMY AIYAR *v.* SOLAI KONAN, 26 M. L. J. 597 **679**

———Suit for ejectment—Valuation **975**

——— ——— ———Tenant setting up adverse possession in a Civil Court—Decision of Revenue Court and no bar **372**

——— ——— ———*Transfer by tenant-at-will—Transfer illegal—Sub-tenant and transferee, relation between.*

The relationship of landlord and tenant does not exist between the transferee of a tenant-at-will's holding and the sub-tenant of that tenant who does not admit the title of the transferee, inasmuch as there exists no contract between the transferee and the sub-tenant to hold land and pay rent therefor, and the transfer being illegal the transferee cannot be considered to be an agent or representative of the enant. **Q.** INDAL SAH *v.* BHABHUTI SINGH **6**

Lease *for definite term granted for general purposes—Heritable and transferable.*

A lease granted for general purposes and for a term of no less than 105 years is assignable, especially where the conduct of the parties points to its having been regarded on both sides as transferable and treated as such.

Where the interest under a lease is created for a definite term, it is heritable. **C.** KHITISH CHUNDER ROY *v.* BHIKAN MAMUD PRAMANIK, 19 C. L. J. 448 **530**

———Forfeiture of lease—Sub-lessee's position **183**

———, Interpretation of **675**

——— License—Fishery and collection of produce, right of, *thika* as to **666**

——— *Pattas* or leases of *birt sankalap* granting heritable and transferable rights—*Nazrana* or premium taken in advance—Rent reserved—*Birt, bai birt* and *birt sankalap*, meanings of—Proprietary or under-proprietary rights, sale of **855**

Legal necessity—Loan taken to pay rent to superior landlord **84**

Legal Practitioners Act (XVIII of 1879), s. 36—*District Magistrate ordering name of person to be included in list of touts—High Court's power of revising order—Punjab Courts Act (XVIII of* 1884), *s.* 13—*General power of superintendence and control.*

Proceedings under section 36 of the Legal Practitioners Act are neither civil proceedings governed by the provisions of the Code of Civil Procedure, nor criminal proceedings governed by the Criminal Procedure Code, and, therefore, neither the civil nor the criminal jurisdiction of the High or Chief Court can be invoked for the purpose of revising orders passed under that section.

The High Courts have, however, held that in the exercise of the general powers of superintendence and control vested in them under the provisions of section 15 of the High Courts Act they have jurisdiction to interfere with such orders, and in *Man Singh* v. *Emperor*, 3 Ind. Cas. 977; 11 P. R. 1909 Cr.; 115 P.L.R. 1909; 10 Cr. L. J. 443; 28 P.W R. 1909 Cr., a Division Bench of the Chief Court has also decided that it has similar jurisdiction under section 13 of the Punjab Courts Act in cases where an order under section 36 of the Legal Practitioners Act has been passed by a Civil Court. But section 13 of the Punjab Courts Act gives the Chief Court a power of superintendence and control only over Civil Courts and the provisions of that section are not relevant to a case where the Chief Court is asked to revise the order of a District Magistrate. **P.** SADR-UD-DIN *v.* EMPEROR, 18 P. R. 1914 Cr.; 51 P. W. R. 14; 266 P. L. R. 1914 Cr; 15 Cr. L. J. 601 **513**

Lessor and Lessee—Covenant for quiet enjoyment—Trespasser — Possession of, whether breach **812**

License, assignment of, whether valid—Presumption **42**

Limitation—*Adoption—Suit to recover possession of immoveable property as adopted son—Limitation Act (IX of* 1908), *Sch. I, Arts.* 118, 119, 144,

Limitation—contd.

When a person (Hindu or Muhammadan) sues for possession of immoveable property alleging that he is the adopted son of the last proprietor and his adoption is denied, his suit is governed, not by Article 119, but by Article 144 of the first Schedule of the Indian Limitaion Act, 1908. **P.** ARJAN SINGH *v.* LACHMAN SINGH, 104 P. W. R. 1914; 203 P. L. R. 1914; 81 P. R. 1914 **429**

——— *Alienation by childless proprietor—Suit by reversioner—Punjab Limitation (Ancestral Land Alienation) Act (I of 1900)—Knowledge of alienation not necessary—Evidence Act (I of 1872), s. 115—Estopped—Attestation*

In case of alienations governed by the Punjab Limitation (Ancestral Land Alienation) Act I of 1900, where time begins to run from the date of alience's getting possession of the property alienated, a reversioner's knowledge of alienation is immaterial.

A reversioner by attesting as a witness the deed of exchange of the property in dispute, is estopped from contesting the validity of its alienation. **P.** GANDA SINGH *v.* GULAB SINGH, 66 P. W. R. 1914; 159 P. L. R. 1914. **724**

——— ——— *Dekkhan Agriculturists' Relief Act (XVII of 1879), ss. 47, 48—Conciliation system abolished after grant of certificate and during vacation—Suit instituted on day of re-opening of Court—Plaintiff entitled to deduct time spent in obtaining certificate—Rule as to excusing plaintiff in questions of limitation.*

Where a Conciliator's certificate was obtained under the Dekkhan Agriculturists' Relief Act, and before the suit was filed, the Court was closed for the Summer Vacation, during which the conciliation system was abolished and the period of limitation expired:

Held, that the plaintiff was entitled to deduct the period between his application and the grant of certificate, and was within time in bringing his suit on the opening day after the vacation.

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. **B.** RUP CHAND *v.* MUKUNDA MAHADEV, 16 BOM. L. R, 444; 38 B. 656 **67**

——— ——— *Dekkhan Agriculturists' Relief Act (XVII of 1879), ss. 47, 48—Conciliation system abolished—Time between application to Conciliator and termination of system not allowed to be deducted—Extension of time allowed to give reasonable opportunity to file suit—Rule of law where party cannot conform to law of limitation without any fault on his part.*

In a suit on a bond in which it was necessary to file a Conciliator's certificate under section 47 of the Dekkhan Agriculturists' Relief Act, where no certificate is granted in consequence of the termination of the conciliation system in the District, section 48 of the Dekkhan Agriculturists' Relief Act has no application, and the period of limitation applicable, therefore, would be the period prescribed under the Limitation Act.

The plaintiff would not be entitled to deduct the time between his application to the Conciliator and the termination of the conciliation system, but he would be entitled to such extension of time as would be necessary to secure him a reasonable opportunity to file the suit in time.

Where 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 would ordinarily excuse him. **B.** SATYABHAMABAI *v.* GOVIND JANKU BADE, 16 BOM. L. R. 441; 38 B. 653 **66**

——— ——— Plea for recovery of unpaid purchase money **208**

——— ——— Suit for possession by co-sharer landlord **414**

——— ——— *Waste land*—Abadi *in village—Possession and dispossession within twelve years*—Onus *of proof—Limitation Act (IX of 1908), Sch. I, Arts.* 142, 144.

As possession goes with the title, the waste land allowed to remain so by the proprietor cannot be declared to be a discontinuance of possession and the onus is, in such a case, shifted on to the defendant to prove when his possession became adverse. **P.** NARAIN DEVI *v.* BILLA, 106 P. W. R. 1914; 204 P. L. R. 914 **82**

Limitation Act (IX of 1908), applicability of **738**

——— ——— ——— *application of—Appeals from decisions of Revenue Courts to District Judge—Oudh Rent Act (XXII of 1886), s. 119A, appeal under.*

The provisions of the Limitation Act apply to appeals from the decisions of Courts of Revenue to a District Judge.

Where the limitation for an appeal under section 119A of the Oudh Rent Act expired on a holiday and the appeal was filed on the day following:

Held, that the appeal was filed within a time. **O.** BINDA PARSHAD *v.* RAM BHAJAN, 17 O. C. 254 **703**

——— ——— ——— **S. 3**—*Limitation—Appellate Court can take cognizance of limitation when no further evidence required for decision.*

An Appellate Court can take cognizance of the question of limitation for the first time, if it arises upon the pleadings or upon the allegations and if upon the facts already on the record the suit is clearly barred by time and no question of fact has to be inquired into so as to enable the Court to decide the point of limitation. **P.** GULAB MAL *v.* SHUJAWAL, 259 P. L. R. 1914 **354**

——— ——— ——— ——— **S. 5**—*Appeal filed beyond time—Delay unexplained—Extension of period for filing appeal.*

An appeal was filed before a District Judge beyond time and the only explanation given of the delay was that the papers were made over to a Counsel who returned them after the time for filing the appeal had expired. The Judge admitted the appeal without subjecting the explanation to any scrutiny:

Held, on second appeal, that as the lower Appellate Court did not exercise its discretion upon proper materials the High Court was competent to exercise its discretion and that the explanation given of the delay was not sufficient within the meaning of section 5 of the Limitation Act. **A.** DEWAN *v.* BUDDHU, 12 GR. L. J. 837 **30**

Limitation Act—(1908)—contd.

s. 5 —*Extension of period —Appeal, sufficient cause for not preferring in time —Copying office, issuing wrong copies of judgment and decree, effect of—Contributory delay on appellant's part in showing mistake, effect of.*

Where an appeal could not be filed in time owing to the mistake of the office in not preparing correct copies of the judgment and decree appealed from:

Held, that the appellant was entitled, under section 5 of the Limitation Act, to an extension of time and that the appeal ought to be admitted, even if there was a contributory delay on his part. **O.** DALJIT *v.* RAM RATAN **26**

s. 5—Extension of time **48**

s. 5—*Judge provisionally admitting appeal as within time—Competency of Court at hearing to decide question of limitation—Practice.*

Where a Judge has provisionally admitted an appeal to the file in the absence of the respondent, there is no objection to the Judge entertaining and deciding at the hearing the question whether there was sufficient cause under section 5 of the Indian Limitation Act for extending time for filing the appeal. **B.** RAOJI KESHAV DESHMUKH *v.* KRISHNARAO, 16 BOM. L. R. 518; 38 B. 613 **369**

s. 5—*Time-barred appeal —Ex parte admission, if questionable at final hearing after notice.*

An *ex parte* order by a Judge admitting an appeal presented out of time can be questioned and set aside by his successor in office at the final hearing of the appeal after notice. **M.** MALLI REDDI *v.* PEDDAKKA, 1 L. W. 517; 27 M. L. J. 147; 16 M. L. T. 100; (1914) M. W. N. 619 **746**

s. 7 – "*Discharge*"—*Meaning of Malabar* tarwad—Karnavan's *act impugned—Right to give discharge.*

The term "discharge" in section 7 of the Limitation Act is not confined merely to pecuniary liability, but includes also "release of rights to immoveable property."

A suit to have a *karnavan's* alienation declared invalid, if brought ten years after the cause of action arose, is barred by limitation whether it falls under Article 91 or Article 120 of the Limitation Act.

Where no fraud is proved as against a *karnavan*, he sufficiently represents the *tarwad* and can give a valid discharge even on behalf of the minor members of that *tarwad*.

Where he can give such a discharge, section 7 (2) of the Limitation Act has no application.

Napier, J.—Where the act impugned is that of the *karnavan*, it is doubtful whether he could be said to be able to give discharge within the meaning of section 7, clause (2), of the Limitation Act. **M.** PARAMESWARAN NAMBUDRIPAD *v* SANKARAN NAMBUDRIPAD, 16 M. L. T. 241; (1914) M. W. N. 689 **755**

ss. 12, 29—*Provincial Insolvency Act (III of 1907), s. 22—Receiver's order, time requisite for obtaining copy of, whether excluded.*

In computing the period of 21 days prescribed in section 22 of the Provincial Insolvency Act the time requisite for obtaining a copy of the Receiver's decision cannot be excluded under section 12 of the Limitation Act. **M.** DURAISAMI AIYANGAR *v.* MEENAKSHI SUNDARA AIYAR, 16 M. L. T. 246; (1914) M. W. N. 831 **610**

s. 12 (2) **28, 67**

s. 14—*Under-valuation of property, if not deliberate, reckless or* mala fide, *whether ground for exclusion of time.*

The plaintiff instituted a suit for pre-emption in respect of a sale-deed executed for an alleged consideration of Rs. 2,000. The plaintiff valued his claim at Rs. 400, but subsequently admitted that the market-value of the disputed property was Rs. 1,000. The Sub-Judge, relying on the plaintiff's statement, returned the plaint for presentation to the proper Court and it was presented on the same day in the Court of the Munsif:

Held, that as there was nothing to show a deliberate or reckless under-valuation of the property in order to secure some improper advantage or a *mala fide* desire to institute the suit in a wrong Court, section 14 of the Limitation Act applied to the case and the plaintiff was entitled to the exclusion of the time during which he had been prosecuting the proceedings in the Court of the Sub-Judge. **O.** RAM DAYAL *v.* SARJU PRASAD, 17 O. C. 210 **403**

s. 18—*Exercise of right delayed through fraud, whether extends time—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 2, cl. (2).*

Section 18 of the Limitation Act applies only when a party is kept from his knowledge of right to do a certain thing by the fraud of the other party but not where he is so kept from exercising his right.

Where the period of limitation within which an application by the judgment-debtor under clause 2 of rule 2 of Order XXI of Civil Procedure Code is to be presented to the Court, has expired, it is not open to him to secure an investigation of the same matter by an application under section 47, Civil Procedure Code. **C.** GOLAM MUJAHAR CHOWDHERY *v.* GOLOKE CHARAN DAS **884**

s. 20, Sch. I, Art. 97 —*Taking profits of land in lieu of interest on money lent—Suit to recover money—Limitation.*

Where the plaintiff was put in possession of land by the defendants in consideration for a previous money debt on the understanding that no interest was to be charged on the money and no rent for the land and that the land was redeemable at any time, and on the defendant resuming possession of the land the plaintiff sued to recover the debt:

Held, that Article 97 of the Limitation Act applied to the suit.

Held, further, that as the plaintiff was in possession of the land and was to take the profits in lieu of interest under an admitted agreement, such taking of profits amounted to payment of interest within the meaning of section 20 of the Limitation Act. **L. B.** MAUNG KYAN *v.* MAUN PO, 7 L. B. R. 138 **933**

Limitation Act—(1908 —contd.

——— ——— ——— **s. 21 (2)**—*Acknowledgment by one of two joint promisors—Implied authority—Conduct of parties.*

Where one of two joint promisors made a series of endorsements on a promissory note executed by both of them:

Held, that the conduct of the parties was sufficient to warrant the conclusion that each of the two promisors had implied authority to bind the other. **M.** ANNAMALAI PATTAR *v.* NATESA IYER, (1914) M. W. N. 792 **927**

——— ——— ——— **s. 22** **11**

——— ——— ——— **s. 22**—*Adding new party—Suit by Managing Director of Company in private capacity—Application for amendment of suit as Managing Director—Amendment, effect of—New plaintiff, addition of.*

Where a plaintiff originally sued in his private capacity but later on applied for the amendment of the relief, asking that a decree in the alternative might be passed in his favour as the Managing Director of a Company:

Held, that the amendment asked for did not amount to adding a new plaintiff within the meaning of section 22 of the Limitation Act.

Held, further, that the amendment had merely the effect of altering the ground on which the plaintiff already on record could recover the amount. **M.** RAJAM AIYANGAR *v.* MUTHUKRISHNA PILLAI, 16 M. L. T. 251 **945**

——— ——— ——— **s. 23, Sch. I, Art. 120**—*Recurring cause of action—Injunction.*

The defendants opened a door in their wall for passage through the land of the plaintiff to their house and used it for that purpose, and when the plaintiff sued for injunction they pleaded limitation:

Held, that each time the defendants trespassed upon the plaintiff's land they were committing a fresh act of trespass and on each occasion a new cause of action arose to the plaintiff to restrain the trespass complained of. **A.** SHEO PRASAD SONAR *v.* MANGAR MANHAR, 12 A. L. J. 1150 **185**

——— ——— ——— **s. 26**—*Filling up water channel, when obstruction.*

The mere filling up of a water channel would not necessarily constitute an obstruction of the plaintiff's enjoyment of his right within the meaning of explanation to section 26 of the Limitation Act of 1908, if no water for purposes of irrigation was required at that time and there was no refusal by the defendants to re-open the channel. **C.** KANAI LAL MANDAL *v.* JADAB LAL GANGOPADHAYA **386**

——— ——— ——— **s. 28** **109**

——— ——— ——— **Sch. I, Arts. 2, 62, 120**—*Refund of money paid on account of octroi, suit for—Limitation.*

A suit for the refund of octroi legally taken by a Municipality but wrongfully refused to be returned is governed by Article 120 of the Limitation Act and not by Article 2 or Article 62. **A.** MUNICIPAL BOARD OF GHAZIPUR *v.* DEOKINANDAN PRASAD, 12 A. L. J. 952; 36 A. 555 **943**

——— ——— ——— **art. 11** **11**

Limitation Act—(1908)—contd.

——— ——— ——— **Sch. I, Art. 14**—Inam—Gadaba *service, whether private or public—Resumption, power of, in whom vested, whether in* zemindar *or Government—Illegal resumption by Collector—Grant on* jeroyiti pattah—*Suit for possession by* zemindar.

Gadaba or palanquin-bearing service is a private service.

The right to resume lands which had been granted by a *zemindar* for the performance of private service to the *zemindar*, is in the latter and not in the Government.

Article 14 of the Limitation Act, 1908, has no application to a case where a *zemindar* sues for possession of certain lands of his on the ground that the Collector, who during his minority was in possession of his estate, treated the suit property, which had been granted to others for *gadaba* service, as the property of the Government and resumed the lands and re-granted them to the then occupants thereof on *jeroyiti pattas*. **M.** SATRACHERLA VEERABHADRA SURYANARAYANA *v.* SECRETARY OF STATE, 1 L. W. 662 **878**

——— ——— ——— **art. 62** **618, 943**

——— ——— ——— **art. 64** — Sorkhol — *Entry of balance—Debt barred—No promise to pay—Account stated—Contract Act (IX of 1872), s. 25.*

A *sorkhol* showing merely a balance due and not containing any promise to pay within the meaning of section 25 of the Contract Act, cannot be relied on to recover a time-barred debt entered therein. **C.** DEBI PROSAD *v.* RAM GHULAM SAHU, 19 C. L. J. 263 **89**

——— ——— ——— **art. 75** — *Instalment bond, default in payment of—Extension of period of limitation—Waiver, what constitutes.*

Where a bond payable by instalments provides that in case of default the obligor would be liable to pay the total amount then due, and default is made:

Held, (1) that the limitation is governed by Article 75, unless it is proved that the creditor waived his right to enforce the default provision;

(2) that though failure to sue may be evidence of waiver, it does not amount to waiver so as to affect limitation. **S.** KIMATRAI KASHIRAM *v.* WADERO SHER MAHOMED KHAN, 8 S. L. R. 63 **938**

——— ——— ——— **arts. 89, 90**—Starting of limitation **136**

——— ——— ——— **art. 90**—*Suit against agent for neglect of duty—Limitation, when begins to run.*

In a suit by a principal against his agent for neglect in discharge of duties, limitation under Article 90 of the Limitation Act begins to run when the agent's neglect becomes known to the principal, and not when the principal comes to know that there is sufficient cause for a good case being run against the agent. **C.** JANKI KOER *v.* MAHABIR PRASAD **706**

——— ——— ——— **art. 97** **618, 933**

——— ——— ——— **art. 108** **704**

——— ——— ——— **art. 115** **812**

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Article 125 of the Indian Limitation Act IX of 1908) covers only suits for land and comes in only when the suit is by the first reversioner.

The words 'set aside' in Article 126 of the Limitation Act (IX of 1908) do not include a suit for a declaration that the alienation objected to should not affect plaintiff's rights after the death of the alienor. To ask for a thing to be 'set aside' implies a prayer for immediate relief.

Where a suit is not on the face of the plaint time-barred, Order VII, rule 6, of the Civil Procedure Code has no application. **P.** DEV RAJ *v.* SHIV RAM, 70 P. R. 1914, 260 P. L. R. 1914; 165 P. W. R. 1914 463

art. 123—Heir of executor, liability of 370

arts. 125, 126, applicability of 463

art. 139 109

art. 142 82

art. 142—*Suit for possession of land free of house and trees - Claim for removal of trees.*

A suit for possession of land free of the house and trees wrongfully built and planted by the defendant as distinguished from a claim merely for the removal of trees is governed by Article 142 of the Limitation Act, 1908. **O.** JAGMOHAN SINGH *v.* TULA RAM DAS, 17 O. C. 252 701

art. 144 82, 611, 871

art. 144 — Adverse possession of equity of redemption 600

art. 144 — *Suit by adopted son —Adverse possession against mother, whether effectual against adopted son —Prescription, right acquired by.*

An adopted son is entitled under Article 144 of the Limitation Act to sue for possession of immoveable property within 12 years from the date of his adoption, inasmuch as like a reversioner his right is not lost to the property by adverse possession against his mother.

Ordinarily the right acquired by the person prescribing is the right of the person in possession, that is to say, ordinarily no one can prescribe for more than what the person against whom he is prescribing is entitled to. **M.** KANCHARLA VENKATARATNAM *v.* KOGANTI VENKATARAMIAH, 16 M. L. T. 435 692

art. 152 — Date of decree same as date of judgment 67

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Limitation Act—(1908)—concld.

Sch. I. Art. 182 -*"Step-in-aid of execution" - Application for continuance of sale.*

An application by a decree-holder for continuance of an auction-sale to secure the attendance of more bidders is a "step-in-aid of execution" within the meaning of Article 182 of Schedule I of the Limitation Act, 1908. **M.** DESIREDDI YELLAMANDER *v.* SEKHAKOLLI CHINNA PITCHAIAH, 1 L. W. 573 58

art. 182 (5), (6)—*Attachment of decree in execution - Application for execution of attached decree – Decree passed in* 1907 *—Application made in* 1909 – *Limitation Act (IX of* 1908), *applicability of.*

A decree was passed on the 19th March 1907. The decree-holder applied on the 8th April 1909 for execution of his decree by attachment of a decree in favour of the judgment-debtor. The Court issued notice on the 27th April 1909. On its return as being unserved another notice was issued on the 18th May 1909. The decree-holder filed an application on the 14th September 1909 moving the Court to execute the decree attached in favour of his judgment-debtor. On the 15th April 1912 the decree-holder made an application asking for a transfer of his own decree for execution to another Court: **A.** MAHARAJA OF JAIPUR *v.* LALJI SAHAI, 12 A. L. J. 1006 728

art. 183 752

Lis pendens. *See* TRANSFER OF PROPERTY ACT, s. 52.

Lower Burma Chief Court - Rules under Insolvency Act, r. 83 222

Madras Abkari Act (I of 1886), s. 22

Toddy-vendor—License, assignment of, whether valid Presumption.

The terms of the license issued to a vendor of toddy determine his previliges and where one of the terms is that he should not assign the license without consent of the Collector, no other person except the licensee can carry on the business. Once a license is issued, it will be presumed that its terms were inserted with the approval and sanction of the Governor-in-Council. **M.** NARAGAM KRISTAYA *v.* PENUMUDI BHADRAYYA 42

Madras City Municipal Act (III of 1904), s. 413—*Election rules made thereunder —Charter Act* 24 & 25 Vic., *C.* 104, 1861, *s.* 15—*Rules empowering Presidency Magistrate to hold inquiry into fitness of candidate for election—Presidency Magistrate, whether Court subject to jurisdiction of High Court.*

A Presidency Magistrate authorized under rule 5 of the rules framed by the Local Government under section 413 of the Madras City Municipal Act to hold an inquiry and decide whether a particular candidate is fit to stand for election to a Municipal Council, is not a Court subject to the superintendence of the High Court under section 15 of the Charter Act, and the High Court will not interfere in revision with an order passed by him. His position is that of a referee between the president of the Municipal Council and the candidate.

When *quasi* judicial functions are delegated to officers whose decisions are ordinarily subject to the revisional powers of the High Court they are not, with reference to the delegated power, necessarily subject to the said Court. **M.** VIJIARAGHAVALU PILLAI *v.* EMPEROR, 16 M. L. T. 128; 27 M. L. J. 227; 51 Cr. L. J. 593 545

Madras Civil Rules of Practice, r. 277—*Pleader retained by one party, when entitled to appear for opposite side—Engagement of other Pleader—Presumption.*

Under amended rule 277 of the Madras Civil Rules of Practice a Pleader, who has been retained for a party and who has drafted a written statement for that party, is entitled to appear for the opposite side when the party originally retaining him does not seek to employ his services and engages other Pleaders in the case.

When another Pleader is engaged, the presumption arises that the services of the Pleader originally retained are not required and that he is free to appear for the opposite side. **M.** ATCHUTARAMIAH *v.* SECRETARY OF STATE, 16 M. L. T. 349; (1914) M. W. N. 785 **712**

Madras Court of Wards Act (I of 1902), s. 49—*Suit on promissory note—Suit relating to property of ward—Notice of suit—Mere demand, no notice.*

A money suit based on a promissory note against a ward is a suit relating to the property of the ward within the meaning of sub-section (1) of section 49 of the Madras Act I of 1902.

A letter that comes to nothing more than a demand cannot be said to amount to a notice of suit. **M.** VENKATACHELAPATHY *v.* BOMMAVARA SATYANARAYANA, 37 M. 283 **890**

Madras Estates Land Act (I of 1908)—Agreement to pay higher rate of rent, executed before the Act—Without consideration—Void **57**

——— ss. 3, 6 and 161—Banjar *land granted on* mokhasa *tenure by life-tenant—Tenant in possession on date, Estates Land Act came into force, right of—Presumption—"Old waste," definition of.*

The presumption of an occupancy right raised in favour of a *ryot* in a *zemindari* should also be extended to a *ryot* to whom *banjar* lands (situated in a *zemindari*) were let at a favourable rate of rent for bringing them into cultivation.

Such a *ryot*, if in possession on the date the Estates Land Act came into force, acquires by virtue of section 6 of the Estates Land Act an occupancy right in such land.

To legalise such acquisition, it is enough if the land granted formed part of a *zemindari*, and it does not cease to be such merely because it was obtained on *mokhasa* tenure from a female who had merely life-interest in the *zemindari*.

Land continually under cultivation since 1884 cannot be classed as "old waste" within the meaning of section 3 7) of the Estates Land Act. **M.** BRUNDAVANA CHANDRA *v.* PRAGADA RAMMAYYA, 26 M. L. J. 600; 1 L. W. 486 **664**

——— s. 3 (2) (d)—*Estate—*Inam *village—Presumption that land revenue alone has been granted—No presumption as to ownership of* Kudivaram *Party seeking to oust jurisdict on of ordinary Civil Court—Burden of proof.*

The party seeking to oust the jurisdiction of the ordinary Civil Courts must establish his right to do so.

A village is an estate within the meaning of section 3 (2) *(d)* of the Madras Estates Land Act (I of 1908) when (1) the land revenue alone has been granted in *inam* and (2) the grantee was a person not owning the *kudivaram*.

Proof or admission of the *inam* character of the village will raise a presumption that the first requirement of section 3 (2) *(d)* has been complied with, but there is no necessary or probable connection between the grant of an *agraharam* and the grantee's possession prior to it of any right in the land and, therefore, no presumption arises as regards the second requirement of the section. **M.** SRIMATH KIDAMBI *v.* PIDIPITI KUTUMBARAYADU, 27 M. L. J. 233 **891**

——— s. 3 (2) (d)—*Land revenue of portion of village granted as* inam—*Estate—Suits for rent—Jurisdiction.*

Where the land revenue only *of a portion of a village* has been granted as an *inam*, the *inam* does not become an estate within the meaning of section 3 (2), clause (*d*) of the Estates Land Act and Civil Courts have jurisdiction to entertain suits for rent. **M.** MUNIAPPA REDDI *v.* SUBBA RAO, 1 L. W. 585 **8**

——— s. 3 (2) d)—*Resumed* jagir, *whether estate.*

Once the Government resumes a *jagir* it is neither a "settled" nor an "unsettled *jagir*" and, therefore, is not an "estate" within the meaning of section 3 (2), clause (*d*), of the Estates Land Act. **M.** VUNGARALA SESHAYYA *v.* TADAPALLI SUBBA RAO **61**

——— ss. 4, 27—*Custom—Rent payable on cultivated area.*

An immemorial custom that no rent should be charged for lands left fallow, in other words, the rent for the whole holding in any particular *fasli* should be calculated only on the cultivated area, is not against the statutory provision in section 4 of the Estates Land Act, which must be read subject to the provisions of section 27 of the Act. **M.** ARUNACHELLAM CHETTIAR *v.* MUTHAYANAI THAVEN, 26 M L. J. 575 **675**

——— s. 6 **664**

——— ss. 6 and 8—*Occupancy right*—Ryoti *land—Purchase by landlord—Merger—Tenant in possession, whether entitled to claim occupancy rights.*

The *ryoti* land purchased by a landlord for arrears of rent in an auction held before the Estates Land Act came into force continues to be "*ryoti*."

Therefore, a tenant in possession of such land on the date the Madras Estates Land Act came into force acquires by virtue of section 6 of that Act occupancy rights in it. **M.** MARKAPULI REDDIAR *v.* THANDAVA KONE, (1914) M. W. N. 798 **916**

——— s. 12 **338**

——— ss. 13 (3), 27—*Improvement made at tenant's expense—Digging well—Raising second crop—Landlord, whether entitled.*

The provisions of section 13 (3) of the Estates Land Act apply whether the increase of rent demanded by the landlord takes the form of a condition that the rent for the *Fasli* shall be larger than that first

Madras Estates Land Act—concld.

provided for in the *muchilika* in case two crops are *raised* instead of *one*, or that a separate or independent amount shall be paid as additional rent for the second crop besides the rent charged for the first crop. The presumption contained in section 27 of the Estates Land Act does not apply when no second crop was raised for the previous *Faslis* and no additional rent is claimed in consequence.

Where a tenant improves his holding by digging a well therein at his own cost and uses the water of the well so dug for raising either a second crop alone or both the first and second crops, thereby increasing the grain yield of the land, such increase is a consequence of the said improvement and under section 13 (3) of the Madras Estates Land Act, I of 1908, the tenant is not liable to pay any higher rent to the landlord for the second crop. **M.** MAHARAJA OF VENKATAGIRI *v.* MOHADEEN SAHIB, 1 L. W. 592 **590**

——— ——— ——— **s. 26** **741**

——— ——— ——— **s. 27** **590, 675**

——— ——— ——— ——— **s. 53**—*Distraint for excess amount, if can be sustained.*

A distraint ought not to be set aside altogether because it is for an amount in excess of the rent actually due but must be sustained in respect of the amount lawfully recoverable. **M.** RAGHUNATHA ROW *v* VELLAMOONJI GOUNDEN, 16 M. L. T. 440; 1 L. W. 934; 27 M. L. J. 597 **941**

——— ——— ——— **ss. 112, 114** **425**

——— ——— ——— **s. 161** **664**

——— ——— ——— **s. 192** **425**

——— ——— ——— **s. 212**—*Landlord and tenant—Decree for ejectment prior to Act—Tenant in possession without consent, whether can be convicted under section* 212.

Where a landlord had obtained a decree for ejectment against the *ryot* prior to the coming into force of the Madras Estates Land Act, the tenant cannot be prosecuted and convicted under section 212 of the Madras Estates Land Act for being in possession of the land without the landlord's consent. That section would apply only if the decree could be treated as one passed under section 163 of the Act. **M.** PRATI APPALA RAJU *v.* MUTHARAJU SUBPA RAJU, (1914) M. W. N. 396; 1 L. W. 338; 27 M. L. J. 676; 15 CR. L. J. 620 **628**

Madras Forest Act (Mad. Act V of 1882), ss. 53, 55—*Compounding offence—Payment of compensation during proceedings in Court—Proceedings, lapse of.*

The provisions of section 53 of the Forest Act (Madras Act V of 1882) that on payment of compensation 'no further proceedings shall be taken' mean that proceedings in progress must lapse. **M.** NARAYANA PADAYACHI, *In re*, 37 M. 280; 15 CR. L. J. 680 **1008**

— — — ——— **s. 55** **1008**

Madras Irrigation Cess Act (VII of 1865), s. 2 **797**

Madras Land Revenue Assessment Act (I of 1876)—*Separate registration—Permanent grantee at favourable rent.*

Regulation XXV of 1802 does not affect the validity of transfers by *zemindars*, but only saves the right of Government.

A permanent lease of a *zemindari* is not a transfer of proprietary rights within the meaning of section 8 of Regulation XXV of 1802. A permanent grant at a favourable rent of the nature of *jodi*, *kattubadi* or *poruppu* is not a transfer of ownership and the grantees are not liable to have their lands separately registered under Act I of 1876 and separate assessment imposed on them. **M.** RAJA OF VIZIANAGARAM *v.* COLLECTOR OF VIZAGAPATAM, 1 L. W. 635; (1914) M. W. N. 610; 27 M. L. J. 278 **780**

Madras Local Boards Act (V of 1884), s. 82 (2) **837**

Madras Revenue Recovery Act (II of 1864), s. 42 **797**

Madras Rent Recovery Act (VIII of 1865), ss. 9, 69—*Civil Procedure Code (Act VIII of 1859), s. 372—Decree of Collector affirmed by District Judge on appeal—Second appeal to High Court, whether lies—Practice of High Court of long-standing—Interference with such practice by Privy Council—Civil Procedure Code (Act XIV of 1882), ss. 584, 585—Second appeal—Concurrent findings of fact by two inferior Courts, whether High Court competent to interfere with.*

A second appeal lies to the High Court from a decree passed by a District Judge in appeal from the decision of a Collector under the Madras Rent Recovery Act (VIII of 1865).

The Judicial Committee would not interfere with a long-standing practice of a High Court even if there is an implied rule of law against such practice.

Where in a suit under section 9 of the Madras Rent Recovery Act (VIII of 1865), the Collector found an arrangement as to rent to be permanent and the District Judge affirmed that finding on appeal·

Held, that the High Court was not competent, under section 584 of the Civil Procedure Code (Act XIV of 1882), to set aside the finding of fact which had been concurrently arrived at by the two inferior Courts. **P. C.** RAVI VEERARAGHAVULU *v.* BOMMA DEVARA VENKATA, 16 M. L. T. 262; (1914) M. W. N. 695; 1 L. W. 779; 27 M. L. J. 451; 20 C. L. J. 375; 37 M. 443; 19 C. W. N. 97; 16 BOM. L. R. 853 **305**

——— ——— ——— **s. 69** **305**

Maintenance. *See* HINDU LAW.

——— ——— ——— **decree,** *whether merely declaratory decree—Enforcement of such decree on execution side.*

Where a decree for maintenance provides for the realization of the money due from the person and property of the defendants, the decree cannot be considered merely a declaratory one but the decree-holder has the right to enforce the recovery of the sum due under the decree by process in execution. **O.** MUNESHAR BAKHSH SINGH *v.* PHUL KUAR, 1 O. L. J. 403 **684**

Malabar Compensation for Tenants' Improvements Act (I of 1900)—Shop erected by tenant on holding—Compensation **623**

Malabar Law—Karnavan *erecting building on* tarwad *property—Burden of proof.*

Where a *karnavan* of a Malabar *tarwad* sets up a title in himself to buildings erected by him while in management of the *tarwad* property, the burden is upon him to establish that the structure and the improvements on the land were made out of his own private property and not out of the *tarwad* property. **M.** GOVINDAN NAMBIAR *v.* KANNAN NAMBIAR . **775**

——— ——*Landlord and tenant—Value of trees wrongfully cut by tenants, suit to set off, against improvements claimed by tenants—Landlord, rights of—Limitation Act (IX of 1908), Sch. I, Art. 108, applicability of.*

Under the Malabar Common Law governing the mutual rights between landlords and their *kuzhi kanom* tenants, a right to deduct the value of trees wrongfully cut by tenants during the 10 years' term of a *kuzhi kanom* lease from the value of the improvements due to the tenant, vests in the landlord.

Article 108 of the Limitation Act applies only when the landlord brings a suit for recovery of the value of trees cut down by the lessee. **M.** PUMPALIYA VENGALIA *v.* KUNHAMINA **704**

——— ——*Malabar Compensation for Tenants' Improvements Act (I of 1900)—Shop erected by tenant on holding—Compensation.*

Under the Malabar Compensation for Tenants' Improvements Act a tenant cannot claim compensation for a shop erected by him on the holding, where the shop is found to be inconsistent with the purpose for which the holding was let. **M.** THEKKA THOTTUM MUKKATH RARAN *v.* NATUKKANDY CHEKKUTI **623**

——— Melcharth—*Validity—Adequate necessity.*

A *melcharth* cannot be upheld unless there was adequate necessity or unless the grant of it was beneficial to the *tarwad*. **M.** PULINHOLIYIL MURIKOLI RAMAN NAMBIAR *v.* PUTHALATH KAKKOTAN RAMAN NAMBIAR, 1 L. W. 540; 27 M. L. J. 175 **578**

Mandatory Injunction—*Trespasser building upon land even after objection.*

Mandatory injunction should be issued when the person who builds on the land is a trespasser and does so, even when objected to. **M.** ALAGAPPAN *v.* KARUPPA CHETTY **503**

Married Women's Property Act (III of 1874), ss. 2, 6—*Insurance policy effected by Hindu husband on his own life for benefit of wife and children, effect of—Money due under such policy, whether available for creditors of assured—Married women—Children—Application of Act to Hindus, Muhammadans and Buddhists—Policy effected under the Act, effect of—Surrender of policy, whether permissible—Powers of Governor-General in Council under s. 2 of Act—Terms 'race,' 'sect' and 'tribe,' refer to what communities.*

Section 6 of the Married Women's Property Act does not apply to a policy of assurance effected by a Hindu on his own life for the benefit of his wife and children. Therefore the money due upon such policy forms part of the estate of the assured and is available for the payment of his debts.

Per *Fletcher, J.*—Section 2 of the Married Women's Property Act prohibits a Hindu married man from effecting a policy under section 6 for the benefit of his wife.

Section 6 of the Married Women's Property Act does not authorise a Hindu married man to effect a policy under the terms of the section for the benefit of his wife.

The Married Women's Property Act of 1874 does not apply to Hindus.

A wife of a Hindu married man is a married woman who or whose husband professes the Hindu religion.

A policy effected under the terms of section 6 of the Married Women's Property Act by a married man coming within the terms of the section for the benefit of 'his wife or his wife and children or any of them', if they come within the terms of the section, is a complete settlement as from the date of the policy on the wife and children and though there is no obligation on the husband to pay the premiums becoming due in the policy, he cannot surrender the policy to the office and receive the surrender value thereof.

Per *Richardson, J.*—When the wife or the husband was a Hindu at the date of the marriage, section 6 of Act III of 1874 applies neither to the wife nor to her children.

Section 6 of Act III of 1874 does not apply to the Hindu, Muhammadan and Buddhist married women, nor does it apply to their children. The reference to children in the section is quite incidental and the only children contemplated by the section were children born of marriages of the kind to which the rest of the Act applies.

Under section 2 of Act III of 1874 the Governor-General in Council has no power to exempt the members of the Hindu, Muhammadan and Buddhist communities from the operation of all or any of the provisions of the Act. The terms 'race', 'sect' and 'tribe' are used with reference to communities which cannot be described as Hindu, Muhammadan or Buddhist. **C.** ISHANI DASI *v.* GOPAL CHANDRA DEY, 20 C. L. J. 44; 18 C. W. N. 1335 **236**

——— ——— ——— ——— s. 6 **236**

Master and servant—*Conditions of service—Work on holidays—Dismissal for refusal to work—Forfeiture of fifteen days' wages—Discretion of Court to determine whether forfeiture justified or not—When dismissal legal—No damages allowable to servant.*

Sundays are customary holidays, but it is open to any employer to stipulate to the contrary, and if his servants having accepted service on these conditions refuse to abide by their terms, they must take the consequences.

Where a servant, who was required according to the rules of his service to work on a Sunday, refused to do so, and was summarily dismissed:

Held, that the master did not act illegally in summarily dismissing the servant, but he certainly acted harshly and the prescribed penalty of forfeiture of pay for fifteen days could not be reasonably exacted.

The Civil Courts have ample discretion to determine in any particular case whether such penalty may be justified or not.

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Where the master is within his rights in dismissing the servant in the middle of the month even though he acts harshly, the Court is not justified in requiring him to pay the servant by way of damages for the remaining days of the month. **P.** AMAR SINGH *v.* KARAM SINGH, 50 P. R. 1914; 251 P. L. R. 1914; 163 P. W. R. 1914 **441**

——— *Misconduct of servant—Dismissal.*

Misconduct inconsistent with the due and faithful discharge by a servant of the duties for which he was engaged is a good cause for his dismissal. **L. B.** PO KIN *v.* MAUNG KALA, 7 L. B. R. 264 **815**

——— *Order given by servant under master's instructions—Liability of master.*

A person is liable to pay for the work done for him, although the order was not given by him personally, if it is proved that it was conveyed by his servant under instructions from him. **A.** REBECCA STEWART *v.* DEBI PRASAD, 12 A. L. J. 271 **779**

Material alteration—*Unsuccessful attempt, effect of.*

An unsuccessful attempt to gain by a material alteration in a document should not put the party making the alteration in the same situation in which that party would have stood had no alteration been made.

Therefore, where the plaintiff in a suit based on a promissory note is proved to have altered the principal sum as well as the rate of interest in the note, the Court would not grant him a decree even for the amount which the defendant admits to be due. **A.** BARU MAL *v.* DWARKA DASS **667**

Melcharth. *See* MALABAR LAW.

Merchandise Marks Act (IV of 1889), ss. 2 (2), 4, 7—*Pattern or design covering whole body of goods, whether trade mark—Penal Code (Act XLV of 1860), ss. 478, 486—Indian Patents and Designs Act (II of 1911), s. 2 (5)—Design—Pattern—Trade mark—Trade description.*

Where a design or pattern covers the whole body of goods and is part and parcel of the goods themselves, it falls within the definition of "design" given in section 2 (5) of the Indian Patents and Designs Act II of 1911, and does not satisfy the ordinary conception of a trade mark. Nor is such a design or pattern a "trade description" within the meaning of section 2 (2) of the Merchandise Marks Act IV of 1889. **S.** NARUMAL KHEMCHAND *v.* THE BOMBAY COMPANY, LTD, 8 S. L. R. 39; 15 CR. L. J. 670 **998**

Merger - *Patnidar* - Tenure specially registered—Revenue sale of parent estate—Purchase by *patnidar* **497**

——— Tenant in possession whether entitled to claim occupancy right **916**

Mesne profits—Purchaser of co-parcener's interest, whether entitled to mesne profits of other members **585**

Minor—Application by minor for restoration of suit—Guardian's laches—Court, duty of **450**

——— Suit by next friend—Next friend indebted to minor—Suit not in interests of minor—Rejection **738**

Minority—Extension of time **448**

Misjoinder of causes of action and parties, effect of, when not raised before Court of first instance **25**

Mitakshara. *See* HINDU LAW.

Mortgage. *See* FORECLOSURE SUIT.

——— *Alienation by mortgagor—Condition empowering mortgagor to sell and pay ¼ths of sale-money to mortgagee Mortgagee, rights of—Registration Notice—Mortgagee not bound to sue at once.*

A condition in a mortgage-deed that if the mortgagor sold a part of the mortgaged property, 12 annas per rupee shall be paid to the mortgagee to be credited towards the mortgage-money, does not destroy the mortgagee's lien on the mortgaged property and in case of a sale, the mortgagee can follow the mortgaged property if he is not paid the ¼ths of the sale-money.

Registration of a mortgage-deed itself is sufficient notice to the persons dealing subsequently with the mortgaged property, particularly where the debtor is a notorious man and his dealings with the mortgagee are very well known in that locality. The contention that the deed was registered in Lahore while the property in dispute is in Sialkot, has no force inasmuch as when a deed affecting properties in more than one District is registered in one of them, a copy is sent for record to each District in which any part of the property is situate.

The mortgagee's laches in suing does not bar him from asserting his right.

A prayer for an alternative relief does not mean that the right to the original relief has been waived. **P.** ALLIANCE BANK *v.* KAHAN SINGH, 111 P. W. R. 1914; 216 P. L. R. 1914, 4 P. R. 1915 **856**

——— *Co-mortgagees—Purchase of property by one of co-mortgagees—Civil Procedure Code (Act V of 1908), s. 66.*

R, M and *G* were three joint mortgagees of certain property. *G* purchased the equity of redemption. *R* brought a suit for sale of two-thirds of the mortgaged property making *M pro forma* defendant to the suit. Subsequently *M* was made a co-plaintiff. The suit was dismissed by the lower Appellate Court on the ground that the purchase made by *G* of the equity of redemption extinguished the entire mortgage. *R* appealed to the High Court and made *M* a respondent to the appeal. The High Court decreed the suit, but made no order to safeguard the interest of *M*. *R* purchased the property himself in execution of the decree. Subsequently *M* brought a suit to recover one-half of the property so purchased by *R*:

Held, that the suit was not barred by section 66 of the Civil Procedure Code, and was, therefore, maintainable. **A.** RAMJAS DAS *v.* MOHAN LAL **735**

——— *Conditional sale clause—Regulation XVII of 1806—Notice—Invalid—Interest for stipulated period—No independent covenant to further interest—Post diem damages, when allowed.*

Notice proceedings under a conditional sale clause in a mortgage-deed are invalid and of no effect

(*a*) if no attempt is made to proceed against all the heirs of the mortgagor;

(*b*) if no reference is made to section 7 of Regulation XVII of 1806;

Mortgage--contd.

(c) if the notice does not specify the amount to be paid by the mortgagor within the year of grace.

Where the mortgage-deed specified that the mortgaged land should be taken over as sold outright on failure of the mortgagor to pay the principal with interest for three years:

Held, that the mortgagee in possession could not in terms of the deed pile up an interest demand against the mortgagor for more than three years, there being no independent covenant as to interest to justify him under the ruling in *Ghulam Haidar* v. *Phaphal*, 92 P. R. 1908; 155 P. W. R. 1908, 29 P. L. R. 1909; 4 Ind. Cas. 932.

Where the mortgagee had enjoyed the profits of a very large area for a comparatively small outlay, the Chief Court refused to exercise its discretion of allowing *post diem* damages in his favour **P.** BULANDA v. FATEH DIN, 57 P. R. 1914; 256 P. L. R. 1914 **504**

——— *of ex-proprietary rights—Possession of mortgagee after ejectment of tenant.*

If an ex-proprietary tenancy is extinguished by virtue of ejectment, the interest of the mortgagee in respect of that holding also ceases from that date. **A.** RAM RACHA DUBE v. GOKUL RAI **201**

——— ———Mortgage of *sir* land -Subsequent mortgage of *zemindari* rights, effects of, on prior mortgage **272**

——— ———*Mortgagee to be put in possession on failure to pay mortgage amount on certain day - Clog on redemption—Condition invalid.*

The provision in a mortgage-deed executed in 1871, that on default of payment on a particular day the mortgagee shall be put in possession of the mortgaged property as if sold to him, is invalid and inoperative as a clog upon the equity of redemption. **M.** RACHMADUGU LAKSHMINARAYANA v. SANNUTHI RAMA SUBBIAH CHETTY, 1 L. W. 503 **108**

——— ——— *Mortgagor admitting payment of consideration prior to mortgage—Finding that item so admitted is fictitious—Suit by mortgagee.*

The Full Bench ruling in *Gokal Chand* v. *Rahman*, 59 P. R. 1907 (F. B); 62 P. L. R. 1908; 95 P. W. R. 1907, applies only to cases where the mortgagee at the time of mortgage undertakes to pay, or to do something for, the mortgagor after the date of execution of the mortgage and fails to carry out his undertaking. It does not apply to a case where the mortgagor states that he has actually been paid or received consideration at a time prior to the mortgage, whereas, in point of fact, payment of the full sum or receipt of full consideration has not been made or taken place. **P.** MUNI LAL v. CHATTAR SINGH, 67 P. R. 1914; 232 P. L. R. 1914 **595**

——— ———*Mortgagor's right sold at auction—Suit for sale on mortgage without impleading vendee—Subsequent suit to eject mortgagor's vendee—Cause of action.*

An unregistered mortgage was executed on the 7th June 1900. In execution of a simple money decree the mortgagor's right and interest was purchased by *H* in 1901. In 1904 the mortgagee brought a suit on the basis of the mortgage of 1900 and did not implead *H* as party to the suit. The mortgagee obtained a decree and on execution thereof purchased the property himself in 1908:

Held, that the mortgagee-purchaser could not eject *H* in a suit for possession. **A.** BHABUTI RAI v. HARBANS RAI **1**

——— ——— *prohibited by law -Occupancy holding mortgaged with possession—Mortgagee neither entitled to recover possession nor his money.*

The transfer of occupancy holdings being prohibited by law, a usufructuary mortgagee of such a holding can recover neither possession nor his mortgage-money. **A.** RAJWANTI KUNWARI v. DOMAN SINGH **182**

——— ———Property mortgaged by mortgagor after mortgage-decree—Second mortgagee having no notice of first mortgage or decree thereon—Representative of judgment-debtor—Notice—Objection—Pleadings **118**

——— ——— *Several mortgagees—Suit by one mortgagee to enforce part of security—All mortgagees made parties—Allegation that other mortgagees had received their share of mortgage money—Plaintiff undertaking to increase amount of claim and pay Court-fee, if other mortgagees' claim not satisfied—Suit as framed competent*

In a suit to enforce a mortgage security, one of the joint mortgagees sued to recover his own share of the mortgage money, on the allegation that the other mortgagees, whom he made defendants, had received from the mortgagors a sum of money sufficient to satisfy their dues. The plaint further stated that if any sum was due to the mortgagee-defendants, the plaintiff was prepared to increase the amount of the claim and pay Court-fees accordingly:

Held, that under the circumstances the suit must be deemed as essentially a suit for recovery of whatever was due on the mortgage security, and thus when all the mortgagees were parties thereto, it could not be defeated on the ground that the plaintiff could not sue for a portion of the mortgage-money.

It was open to the mortgagee-defendants, if anything was due to them, to have themselves transferred from the category of defendants to that of plaintiffs. **C.** RAM CHANDRA MARWARI v. DHADHAI SINGH, 19 C. L. J. 327 **440**

——— ———Severance of mortgage-debt **91**

——— ——— *Subsequent deed of mortgage creating personal covenant not to redeem prior mortgage before satisfaction of subsequent mortgage, effect of.*

Where the executant of a deed of mortgage executes a subsequent deed, by which he creates a personal covenant not to redeem the prior mortgage until he has satisfied the amount due on the subsequent deed:

Held, that the covenant can be enforced against him personally, but not against a subsequent transferee of the mortgaged property. **O.** RAM ADHIN MISRA v. SITLA BAKHSH SINGH, 17 O. C 303 **905**

——— ———Sudhharna *bond—Usufructuary mortgage, conversion of, into simple mortgage Lien on property previously mortgaged usufructuarily, nature of—*

Mortgage—contd.

Principal and interest—Charge, extinguishment of—Sale of mortgaged property in execution of third person's decree—Mortgagee, right of.

Where, under an usufructuary mortgage bond, land is given in possession of the mortgagee in lieu of interest, it forms a security both for principal and interest.

The conversion of a *sudhharna* bond into a simple mortgage bond merely indicates a change in the form of the security.

The mere fact of a charge having been paid off by execution of a second bond does not decide the question whether it is extinguished.

Where, therefore, subsequent to the execution of an usufructuary mortgage the property was sold in execution of the decree of a third person and after the sale the mortgagor executed a simple mortgage in favour of the mortgagee in which he included the amount and the property of the prior mortgage:

Held, that by taking the simple mortgage bond the mortgagee did not intend to extinguish his lien under the earlier bond for the benefit of the intermediate purchaser.

Held, further, that when the mortgagee voluntarily gave up possession of the property and abandoned the only mode in which he could claim interest under the former bond, he could not claim any lien on the property for the interest which was due under that bond after the execution of the second bond. **C.** KUMAR KULANAND SINGH *v.* MOHAN MANDAR **500**

———*Suit for sale—Non-joinder of necessary party, effect of—Civil Procedure Code (Act V of 1908), O. XXXIV, r.* 1.

Where a person mortgaged the joint property of himself and his wife and the mortgagee obtained a decree for the sale of the land in a suit brought against the husband alone:

Held, that the wife was a necessary party to the suit and that the decree obtained by the mortgagee was inoperative as against the wife. **L. B.** MA SEIN *v.* MUTHUCURPAN CHETTY, 7 L. B. R. 135 **931**

———*Usufructuary—Suit for redemption in substance a suit for possession of land—Defence that mortgage is void—Plaintiff establishing title entitled to decree.*

A suit for possession on redeeming a usufructuary mortgage is in substance a suit for possession of the land. If the plaintiff establishes title and the only answer the defendant has is that the mortgage is void in point of law, the plaintiff would be entitled to get the land, because the defendant on his own showing has no title whatever to detain possession of the land. **C.** ANNADA HAIT *v.* KHUDI RAM HAIT, 19 C. L. J. 532 **558**

———**Redemption**—*Absence of stipulation restraining redemption before certain period, effect of—Redemption, postponement of, for specified period as expressed in deed—Principal and interest at specified rate paid out of profits—Contract, essence of.*

In cases where there is no stipulation restraining redemption before a certain period, but only a period is fixed for payment or within which the mortgage-money is likely to be satisfied from the usufruct, the term fixed for payment can only be regarded as a protection for the debtor till the contrary intention

Mortgage—contd.

is shown. In the absence of such an intention the mortgagor may redeem at any time before or at the end of the term.

In each case the important thing is to find out whether it was the intention of the parties as expressed in the deed to postpone redemption till the mortgagee had enjoyed the usufruct for the full period named. Such term may not form an essence of the contract, where the mortgagee is only to take interest at a specified rate from the profits of the mortgaged property and to credit the rest towards the principal money. **O.** GOPAL SINGH *v.* KARAN SINGH, 17 O. C. 218 **302**

———**Redemption** *not before certain date—Covenant in mortgage-deed, effect of—Court's power to allow redemption irrespective of oppressive and unreasonable terms in mortgage-deed.*

As a general rule a mortgagor cannot compel the mortgagee to accept payment of the mortgage-money before the date fixed for redemption, where there is a covenant in the mortgage-deed that redemption shall not take place before that date. But a mortgagor cannot be precluded by any covenant from redeeming altogether, and where the effect of a covenant is to postpone redemption for an unduly long period without any corresponding advantage to the mortgagor or there are circumstances indicating that the covenant postponing redemption is unreasonable and oppressive and intended to fetter the right to redeem, a Court may allow redemption irrespective of that term as it may think fit. **O.** DURGA SINGH *v.* MUHAMMAD RAZA HUSAIN KHAN, 17 O. C. 313 **912**

———*Mortgage sought to be redeemed not proved—Suit to be dismissed—Another mortgage admitted by mortgagee—Admission to be taken advantage of in suit for redemption of that mortgage.*

Where in a suit for redemption the mortgage propounded in the plaint is not proved, the suit must fail, and the fact that the mortgagee has admitted in his written statement a different mortgage may be taken advantage of in another suit to redeem that mortgage. **A.** ANARAGI KUNWAR *v.* KASHI RAI **197**

——— ——— ——— , mortgagor's right as to—Possession of mortgaged property obtained through Court without order absolute having been passed, effect of—Adverse possession **752**

——— ——— ——— *Mortgagee, whether entitled to land revenue paid for other land in mortgagor's patta—Irrigation and other cesses, whether land revenue—Redemption before time specified, if allowed—Provision that no redemption till mortgage-money paid up by usufruct, whether legal—Transfer of Property Act (IV of 1882), s.* 76 (c)—*Madras Revenue Recovery Act (II of 1864), s.* 42—*Madras Irrigation Cess Act (VII of 1865), s.* 2.

Government revenue due upon other than mortgaged lands contained in the *patta* issued in the mortgagor's name is revenue due upon the mortgaged land also.

Therefore, a mortgagee who pays such revenue under section 76 (*c*) of the Transfer of Property Act in order to preserve the mortgaged land, is entitled to the amount on redemption of the mortgage.

Mortgage—contd.

Irrigation and other cesses charged upon the land are part of the land revenue itself and as such section 42 of the Madras Act II of 1864 applies to sales for recovery of these cesses. Section 2 of Act VII of 1865 is superfluous and does not restrict, or modify or repeal the provisions of section 42 of Act II of 1864 as regards sales for arrears of irrigation cesses.

Ordinarily and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period.

Therefore, where the mortgagor and the mortgagee both agreed that the principal mortgage-money and the interest thereon cannot be paid up except through the enjoyment of net profits by the mortgagee, the mortgage cannot be redeemed until the amount is so paid up.

A provision in a mortgage-deed that the mortgage shall be redeemed only after payment by usufruct of the mortgaged properties, is not illegal unless the terms of the mortgage are such that future redemption is made practically impossible. **M.** GUNNAM DORYYA *v.* VADAPALLI AYYAMACHARYULU, 16 M. L. T. 226; (1914) M. W. N. 648; 27 M. L. J. 295 **797**

——— **Redemption** *–Mortgagor, whether can redeem before expiry of term fixed.*

A mortgagor cannot redeem his mortgage before the expiry of the term mentioned in the mortgage-deed unless there is a contract to the contrary in his favour. **M.** BIR MAHAMED ROWTHER *v.* NAGOOR ROWTHER, 16 M. L. T. 163; 27 M. L. J 483 **576**

———————— *, suit for—Original mortgage-deed or its copy not produced – Secondary evidence—Existence of mortgage admitted and mentioned in certain documents – Terms of mortgage not proved—Mortgage whether still redeemable, no proof as to—Mortgagors accepting certain benefits from mortgagee in full settlement of all their claims, effect of—Estoppel.*

Where the descendants of the original mortgagors, being unable to produce the original deed of mortgage or its copy, relied upon secondary evidence in the shape of the existence of such a deed being either mentioned or admitted in certain documents (*viz.*, *Wajib-ul-arziz* of the villages in which the mortgaged properties were situate, a judgment of the Settlement Court and the deposition of a son of one of the original mortgagors), and sought redemption on the strength of this evidence:

Held, that the descendants of the original mortgagors could not succeed, inasmuch as they had not been able to establish the existence of the alleged mortgage by evidence that carried them further than the statements contained in the documents filed, or to establish clearly the terms of the alleged mortgage, or to show how it came into being, or to prove that the mortgage was still in force of which redemption was now possible.

Where the mortgagors claimed proprietary and then under-proprietary rights in respect of the mortgaged properties and at last a compromise was arrived at between them and the mortgagee, whereby the latter handed over certain lands to the former in full settlement of all their claims:

Mortgage—concld.

Held, that the acceptance of the benefits under the compromise effectually estopped the mortgagors from subsequently setting up the right to redeem the mortgage. **O.** NIAMAT KHAN *v.* DEPUTY COMMISSIONER, KHERI, 1 O. L. J. 442 **816**

———— **Redemption** *–Title to redeem—Burden of proof.*

In a suit for redemption the plaintiff must prove a subsisting title.

Where in a suit for redemption the defendant pleaded limitation and the mortgage was found to be in existence just sixty years before the suit, it was not for the defendant to show that the mortgage was really anterior in date to that year **A.** FRANK HAY *v.* RAFIUDDIN, 12 A. L. J. 769 **353**

———— **suit** *– Parties—Mortgage, integrity of, not split up – All mortgagees necessary parties.*

Where the integrity of a mortgage has not been split up, all the owners of the mortgagee rights are necessary parties to the mortgage suit and no part of the mortgage-debt can be recovered, nor can the property be sold to realise any part thereof, except by all the mortgagees bringing a suit within the time prescribed by law. **A.** MUSHTAQ ALI KHAN *v.* BEHARI LAL **508**

———————— *– Person claiming paramount title to mortgagor, whether necessary party.*

A person who sets up a title paramount to the mortgagor is not a necessary party to a suit based on the mortgage. Such paramount title can be established in a separate suit. **A.** SUKH KUNWAR CHANDAR *v.* BHAGWANI, 12 A. L. J. 1088 **233**

Mortgagee, right of—Sale of mortgaged property in execution of third person's decree **500**

Mosque properties—*Suit for possession by worshippers, maintainability of.*

A suit for possession of mosque properties cannot be maintained by the worshippers in their individual or collective capacity. **M.** NOOR MAHAMMAD SAHIB *v.* KARIMA BIBI AMMAL, 16 M. L. T. 165; 27 M. L. J. 270 **559**

Muhammadan joint family—No presumption of joint funds **278**

Muhammadan Law—*Divorce—Hanafia Law – Sufficiency of words used – Onus of proof.*

No special form or formula is prescribed for a divorce under the Hanafia Law. All that the law requires is to see that the words of divorce pronounced by a husband should show a clear intention on his part to dissolve the contract of marriage.

Where witnesses, whom the Court believes, depose that in their presence the wife was divorced by her husband, the burden of proving that the words used by the husband were insufficient and incomplete to support a valid divorce is on the person who questions the validity of the divorce. **A.** WAHID KHAN *v.* ZAINAB, 12 A. L. J. 707; 36 A. 458 **387**

———————— **Marriage**—*Guardian of marriage, who can be, obligations of – Muhammadan ward—Consent of Court—Procedure—Muhammadan Law of guardian of marriage, whether abrogated—Guardians and Wards Act VIII of 1890), ss. 24, 25, 26, 43 (1), 47 (1) – Order of Court—Irregular—Appeal – Revision.*

Under the Muhammadan Law the right of giving

Muhammadan Law—concld.

a male or female minor in marriage falls upon a line of guardians different from that to which the management of his property is entrusted and also from that to which the custody of his person is confided, and although the intervention of a guardian is an essential condition to the validity of the marriage of a minor, it is not obligatory upon the guardian of the person, nor even upon the guardian for marriage, to provide a suitable marriage for the ward.

The Muhammadan Law of guardianship in marriage has not been abrogated by implication by section 24 of the Guardians and Wards Act.

A Ward of Court cannot marry without the consent of the Court. If a proposed marriage is unsuitable the Court can, as representing the Sovereign in whom the guardianship of all infants is in theory vested, restrain the marriage, even though the guardian or the father has given his consent.

The procedure to be followed for the marriage of a Ward of Court pointed out.

If a District Judge irregularly on the basis of a report of a Hindu Nazir selects a husband for a Muhammadan girl who is a ward of his Court, his order is not appealable, as it is not covered either by section 47, clause (*i*), read with section 43, sub-section 1, or sections 24, 25 and 26 of the Guardians and Wards Act, but it can be set aside under the revisional jurisdiction. **C.** MONIJAN BIBI *v.* DISTRICT JUDGE, 20 C. L. J. 91; 19 C. W. N. 290 **229**

——— **Marriage**—*Restitution of conjugal rights, —Apprehension of cruelty and ill-treatment —Decree, whether proper.*

A decree for the restitution of conjugal rights at the suit of the husband is generally a decree directing the wife to return to husband's home to live with him.

Where it is evident from the circumstances of the case that the husband is an impecunious, selfish and unscrupulous young man who cares more for his wife's property than for her and who does not hesitate to resort to violence and abuse to coerce her into yielding to his views, it is not at all safe to leave the young wife to the tender mercies of such an ill-tempered and unkind husband and no conditional decree even for the husband to live with his wife in her father's house can be given, as the danger and apprehension of cruelty and ill-treatment of the wife by the husband exists in the same degree whether she lives at the husband's house or he at hers. **A.** *Musammat* KHURSHEDI BEGAM *v.* KHURSHED ALI, 12 A. L. J. 1065 **213**

——— —— **Sale**—Pre-emption —

Sale by *Shia*—Suit by *Sunni*—*Shia* Law of pre-emption, whether applicable **445**

Mutation proceedings, *nature of—Compromise in mutation proceedings—Registration—Statement—Evidence—Admissibility—Claim withdrawn in mutation proceedings—Estoppel—Declaratory suit.*

The Revenue Courts refused to enter in the *khewat* the name of the plaintiff's predecessor-in-interest, first in 1891 and then in 1897, not on the ground of his title to a share in the property being denied but because the extent of the share could not be ascertained. A similar entry in favour of the

Mutation proceedings—concld.

plaintiff was refused in 1906, but in 1910 there was a compromise arrived at between the plaintiff and the defendants by which the former's name was entered in respect of half of the share that he claimed. Subsequently in 1911 the plaintiff brought a suit in the Civil Court for a declaration that he was also entitled to the remaining half share. The defendants pleaded that the suit was barred by limitation:

Held, that the suit was within time.

An *unregistered* compromise presented before a Revenue Court conducting proceedings in mutation of names and correction of *khewat*, is not admissible in evidence, because the Court does not in that capacity exercise judicial, but executive, functions. The statement made by a party in such proceedings is, however, so admissible.

A party withdrawing a portion, and accepting only the rest, of his claim in mutation proceedings is not estopped from subsequently suing for a declaration that he is entitled to the portion thus withdrawn, if the opposite party has, in no way, been thereby prejudiced, inasmuch as the withdrawal was not made in judicial proceedings. **O.** MAHADEO SINGH *v.* JAGMOHAN SINGH **34**

Negotiable Instruments Act (XXVI of 1881), ss. 93, 94, 105 and 107—

Hundi—*Notice of dishonour—Indorsers—Delay of six months Drawer to be co-defendant—Civil Procedure Code (Act V of 1908), O I, r. 6.*

The holder of a bill of exchange or *hundi* is bound to give notice of its dishonour at the earliest opportunity to all the parties whom he desires to make liable thereon. Consequently his neglect to give such notice within reasonable time from the date of dishonour exonerates the indorsers and others concerned, specially where they are most likely to suffer damage from such neglect, as for instance, where the drawer becomes insolvent or otherwise unable to pay the amount due.

The drawer is a necessary party to the case based on a *hundi*. **P.** JAGAN NATH-NATHU MAL *v.* RAM DAS-BRIJ DAS, 140 P. W. R. 1914; 243 P. L. R. 1914 **881**

——— ——— **ss. 94, 105 and 107** **881**

Nimhowla Tenures—Transferable and inheritable—Permanent tenure **373**

Nikah. *See* RESTITUTION OF CONJUGAL RIGHTS.

Non-joinder. *See* CIVIL PROCEDURE CODE, O. I, R. 13.

——— **of party,** effect of **931**

Notice—Coaching Tariff Rules, North-Western Railway **801**

——— ——, question of—Prior mortgage—Question not raised in first Court or appeal, whether can be allowed at heading of appeal **118**

Occupancy-holding. *See* MORTGAGE.

——— ——— —— —*Non-transferable—Purchaser, rights acquired by—Landlord recognising subsequent purchaser as tenant—Representative-in-interest—Estoppel.*

A purchaser acquires no title by purchase of a non-transferable occupancy-holding which the

Occupancy-holding—concld.

landlord could be called upon to recognise. The vendor or persons deriving title from him might be estopped from raising the question of the validity of the transfer, but the landlord is entitled to ignore the transfer and create a new tenancy in favour of another.

A subsequent transferee of a portion of a non-transferable occupancy holding, who pays rent to the landlord and is recognized by him as a tenant, is a representative-in-interest of the landlord and is not estopped from raising the question of non-transferability of the land in a suit by a prior transferee for possession. **C.** MADHU SUDAN SARKAR *v.* KALI DAS **300**

———————, transfer of, to co-sharer landlord **414**

Opium Act (I of 1878), s. 9—*Mere contemplation of violating a rule, whether punishable.*

A person can be convicted for a breach of the rules framed under section 9 of the Opium Act only when he does some act in contravention of such rule and not merely for contemplating such violation. **M.** *In re* P. VENKATACHALLAM CHETTI, 15 CR. L. J. 667 **995**

Order for abatement of suit, whether decree and appealable **643**

Ostensible owner—Manager on behalf of others, whether ostensible owner **158**

Oudh Civil Digest 1912, r. 573 608

——————— **para 272, r. 9 732**

Oudh Laws Act (XVIII of 1876), s. 9 694

——————— **s. 9**—*Relationship, meaning of—Pre-emption—Illegitimate sons, whether preferred to legitimate collaterals.*

The relationship contemplated in section 9 of the Oudh Laws Act is a legitimate relationship.

Therefore, such persons as illegitimate sons who are entitled to maintenance and not to inheritance, have not a better right to pre-emption than a legitimate collateral relation. **O.** DURGA *v.* MAN, 17 O. C. 250 **688**

Oudh Rent Act (XXII of 1886), s. 3 (8) 675

——————— **ss. 61 and 108 (10)**—*Ejectment of tenant for non-payment of arrears of rent as decreed by first Court—Rent, amount of, subsequently reduced in appeal—Decree of first Court not final—Illegal ejectment—Recovery of possession, tenant entitled to sue for.*

The ejectment of a tenant under section 61 of the Oudh Rent Act for non-payment of arrears of rent as decreed by the first Court is illegal if the amount so decreed is subsequently reduced, however slightly, by the Appellate Court, inasmuch as the decree of the first Court is not final. The tenant, if so ejected, is, therefore, entitled to recover possession under section 108 (10). **U. P. B. R.** RAM LOTAN *v.* COURT of WARDS, AJODHYA ESTATE, 1 O. L. J. 383 **663**

——————— **s. 107H 594**

——————— **s. 108 (5 A)**—*Favourable rent, enhancement of—Lessee holding under heritable but non-transferable lease and not holding under judicial decision—U. P. Land Revenue Act (III of 1901), s. 79—Board's Circulars, 2-I, r. 2, foot-note.*

Oudh Rent Act—concld.

The favourable rent paid by a tenant holding under a heritable but non-transferable lease can properly be enhanced under the provisions of section 108 (5 A) of the Oudh Rent Act if he is not holding under a judicial decision. Section 79 of the U. P. Land Revenue Act is not applicable to such cases, and the footnote to rule 2 of the Board's extant Circulars 2-I is wrong and misleading in so far as it has no force under the present altered law. **U. P. B. R.** BEGAM-UN-NISSA *v.* HABIBULLAH KHAN, 1 O. L. J. 357 **644**

——————— **s. 108 (10) 663**

——————— **s. 108 (10)**—*Recovery of occupancy of land, suit for, maintainability of—Under-proprietor—"Haqiyat mutafarriqa", holder of—Plot proprietor paying revenue to* lambardar, *not under-proprietor—Government revenue, engagement of, right as to.*

A plot proprietor, generally known as a holder of "*haqiyat mutafarriqa* (miscellaneous area), who pays his revenue (and not rent) to the *lambardar* and has his name recorded in the *khewat*, has, like every other proprietor, a right to engage for the Government revenue, although for convenience sake the engagement is made through the *lambardar*, and is thus a co-sharer and not an under-proprietor as defined in the Oudh Rent Act. He is, therefore, not entitled to bring a suit for the recovery of the occupancy of land under section 108 (10) of the Act. **U. P. B. R.** BAIJU SINGH *v.* NARAIN DIN, 1 O. L. J. 364 **646**

——————— **s. 119A 703**

Ownership—*Muhammadan—Near relations living together—Not necessarily indicative of joint ownership.*

The mere fact that two Muhammadan cousins lived together on a certain property would not indicate that they were joint owners thereof. **C.** RADHA KRISTO SAHA *v.* UMES CHUNDER CHUCKERBUTTY, 19 C. L. J. 539 **588**

Pardanashin lady, capacity of, to execute documents **810**

Pardanashin ladies, *transactions by, law as to - Burden of proof - Validity of deed to be established by person relying upon it.*

The strongest and most satisfactory proof ought to be given by the person claiming under or relying upon a deed of power or sale or gift executed by a *pardanashin* lady that the transaction was real and *bona fide* and fully explained to and understood by her, so as to establish the validity of the deed. **O.** *Musammat* MIRO *v.* LACHMAN PRASAD, 1 O. L. J. 466 **861**

Partition—Land belonging to different *mahals* partitioned—Suit for correction of mistake not barred **177**

——————— made by person nominated by parties and appointed by Court—Objection to partition made by Commissioner, entertainability of **227**

Partition—concld.

——— No objection as to proprietary title—Jurisdiction of Civil Court **32**

——— Usufructuary mortgage by father—Decree against father—Joint possession with son—Son, right of **401**

——— **suit** *between two widows—Minor heir not made party - Minor's title to share in deceased's estate recognised - Decree absolute refused until security for person and property of minor given by one of widows—Jurisdiction—Security, order as to,* ultra vires *– Plaintiff entitled to unconditional decree.*

In a partition suit between two Hindu widows it transpired that there also existed a minor heir to the deceased, who was living with the defendant widow and was not made a party to the suit and whose title to a certain fixed share in the deceased's estate was recognised. The Court ordered that the minor should live with one of the widows and that no decree absolute for partition should be passed if either of the widows failed to produce security for the proper care and maintenance of the minor and her property:

Held, that the Court had no jurisdiction to impose any conditions as to the security and that the plaintiff widow was entitled to an unconditional decree for the partition of her share. **O.** MAHARAJA *v.* SUKHRANI, 1 O. L. J. 493 **904**

Partnership, dissolution of—Retirement of one partner—Date on which dissolution takes effect—Statement in pleadings—Admission **22**

Party—Suit by one widow for declaration of maintenance charge—Co-widow, whether necessary party **759**

——— Suit against trustee—Alienee, whether necessary and proper party **794**

Patent and Designs Act (II of 1911), ss. 2, 5—Design—Pattern—Trade-mark—Trade description **998**

Patnidar *–Tenure specially registered—Revenue sale of parent estate—Purchase by* patnidar—Patnidar, *whether entitled to avoid—Bengal Land Revenue Sales Act (XI of* 1859), *s.* 52—*Merger.*

Where a *patnidar*, whose tenure has been specially registered under Act XI of 1859, purchases the parent estate at a sale for arrears of revenue, he does not thereby acquire the right of avoiding under-tenures subordinate to the *patni*.

Quære:—Whether there can be merger in the case? **C.** SATCOWRI CHATTERJEE *v.* PRIYANATH BASU, 18 C. W. N. 672 **497**

Penal Code (Act XLV of 1860), ss. 24, 379—*Acting "dishonestly"—Tenant cutting trees on* jirayati *land after execution of* kudapa—*Theft - Landlord's intent Madras Estates Land Act (I of* 1908), *s.* 12

A tenant cutting trees standing on his own *jirayati* land and for which he has executed a *kudapa*, which gives the landlord only a claim for compensation for trees so cut, cannot be said to be acting "dishonestly" within the meaning of section 24 of the Indian Penal Code and is not guilty of theft, and the provisions of section 12 of the Madras Estates Land Act do not apply. **M.** REDDI YERRANNA *v.* EMPEROR, 1 L. W. 528; 15 CR. L. J. 586 **338**

Penal Code—contd.

——— **ss. 52, 191, 193**—*Perjury—False verification—Statement made therein believed to be true—Good faith, finding of.*

A man cannot be convicted of perjury for having acted rashly, or for having failed to make reasonable inquiry with regard to the facts alleged by him to be true. It must be found that he made some statement or statements which he knew to be false or which he believed to be false or which he did not believe to be true. This finding must be arrived at independently of the definition of "good faith" contained in section 52 of the Indian Penal Code. **A.** MUHAMMAD ISHAQ *v.* EMPEROR, 12 A. L. J. 550; 36 A. 362; 15 CR. L. J. 579 **331**

——— **s. 62**—*Forfeiture of property, when allowed.*

Under section 62 of the Penal Code an order of forfeiture of the convict's property should ordinarily be passed in cases of crimes against the State or affecting the safety of the public generally. **A.** GAYA PRASAD *v.* EMPEROR, 12 A. L. J. 760; 36 A. 395; 15 CR. L. J. 606 **518**

——— **ss. 147 and 149**—*Rioting and some other offence committed in its connection—Sentences, separate for each offence.*

Separate sentences may be passed under section 147, Indian Penal Code, and any other section which becomes applicable to the accused with reference to the terms of section 149, Indian Penal Code. **O.** MAHPAL SINGH *v.* EMPEROR, 1 O. L. J. 328; 17 O. C. 184; 15 CR. L. J. 625 **633**

——— **s. 149** **633**

——— **s. 174**—*Non-attendance in obedience to summons—Competency of officer to issue summons.*

In order to sustain a conviction under section 174, Penal Code, it must be shown that the summons issued was issued by a public servant legally competent as such public servant to issue the same and the accused intentionally omitted to attend in pursuance of the summons.

Under rule 44 of the rules framed by the Local Government in regard to the sale of ancestral land, a Collector is empowered to delegate his powers only to an Assistant Collector of the 1st class. He cannot delegate his authority to an Assistant Collector of the 2nd class and, therefore, the latter is not legally competent to issue summons the disobedience of which would be an offence under section 174, Indian Penal Code. **A.** SHIAM LAL *v.* EMPEROR, 12 A. L. J. 680; 15 CR. L. J. 595 **347**

——— **ss. 177, 182, 193, 199**—*False report to Revenue Surveyor for securing mutation of name—Declaration contemplated by s.* 199, *nature of—Criminal Procedure Code (Act V of* 1898), *ss.* 195, 537—*Sanction to prosecute—Revision—Conviction under s.* 199, *whether can be converted to one under s.* 182.

The declaration contemplated in section 199, Indian Penal Code, is a statement of facts in the form simply of a declaration which, for the purpose of proof of the fact declared to, has by itself all the legal force of evidence given on oath or solemn affirmation, that is to say, it must be a declaration which having been made is afterwards receivable as evidence of the fact declared.

Penal Code—contd.

By reporting falsely that his father had died the petitioner induced the Revenue Surveyor to enter his name in the Revenue Registers as owner of certain gardens and paddy lands in succession to his father:

Held, that the petitioner had not committed an offence under sections 199, 177 or 193, but that he had committed an offence under section 182, Indian Penal Code.

A conviction under section 199, Indian Penal Code, in respect of which no sanction is necessary, cannot be converted in revision to a conviction under section 182 in respect of which a sanction is necessary, especially where the attention of the trying Magistrate was drawn to the necessity of such sanction. **L. B.** ISMAIL *v.* EMPEROR, 15 CR. L. J. 603 **515**

——— ——— ——— **s. 182** **515, 524**

——— ——— **ss. 182, 211**—Autrefois acquit—*Burden of proof—Offence under s.* 182—*Complaint to public servant, whether necessary.*

The burden of establishing the existence of facts necessary for the application of the doctrine of *autrefois acquit* lies upon the accused.

To sustain a prosecution for an offence under section 182, Indian Penal Code, it is not necessary that the complaint should have been made to a public servant with the intention of inducing such public servant to take action of a sort which a public servant of the description in question could take and which would not be open to a private individual. **M.** IMANDY APPALASWAMI *v.* EMPEROR, 1 L. W. 847; 15 CR. L. J. 672 **1000**

——— ——— **s. 182**—*False information to Police Officer—Statements made by persons to corroborate informant during investigation—Criminal Procedure Code (Act V of* 1898*), ss.* 161, 162.

A statement made under section 161, Criminal Procedure Code, 1898, in answer to questions put by the Police Officer investigating the case does not amount to giving information within the meaning of section 182, Indian Penal Code.

The expression "give information" in the latter section means to volunteer information and is not intended to apply to a statement made in answer to questions put by a public servant. **P.** MANGU *v.* EMPEROR, 35 P. W. R. 1914 CR.; 227 P. L. R. 1914; 15 CR. L. J. 650 **978**

——— ——— **ss. 191, 193** **331**

——— ——— ——— **s. 193** **515, 524**

——— ——— ——— **s. 193,** *stay of proceedings under, pending disposal of civil proceedings—Discretion.*

Criminal proceedings under section 193, Penal Code, for statements made in a civil suit pending appeal, should not ordinarily be ordered to be stayed till the disposal of the appeal, but that is a matter entirely within the discretion of the Magistrate. **S.** MATHRADAS *v.* EMPEROR, 8 S. L. R. 20; 15 CR. L. J. 661 **989**

——— ——— **s. 195** **515**

——— ——— **s. 211** **1000**

——— ——— ——— **s. 211**—*Telegram to Police, whether amounts to false charge—Subsequent statement in writing containing false statement—Criminal Procedure Code (Act V of* 1898*), ss.* 154, 157 *and* 228—"Information received," *meaning of—Amendment of charge by Sessions Judge—No objection and no prejudice—Irregularity.*

The mere despatch of a telegram falsely stating that a dacoity had been committed without mentioning the names of any persons alleged to have been concerned or suspected of complicity in the offence does not amount to the institution of a false charge within the meaning of section 211, Indian Penal Code.

The phrase "information received" in section 157 of the Criminal Procedure Code refers to information furnished and recorded under section 154, and a telegram is not such information.

Every inquiry which a Police Officer makes is not necessarily an investigation under section 157, Criminal Procedure Code, and an informal inquiry, preliminary to a formal investigation, is an inquiry of that kind.

There is no specific provision in the Criminal Procedure Code regarding the procedure to be followed by a Station House Officer receiving information of the commission of a cognizable offence outside his station limits. Section 154 does not prevent his receiving and recording the information, though he has no power to conduct an investigation under section 157.

Where a Committing Magistrate framed a charge in respect of Exhibits A and B, but the Sessions Judge, at the very outset of the trial, and without any objection on the part of the accused, amended the charge into one with reference to Exhibits B and C, and it was not shown that the accused was prejudiced thereby:

Held, that the case was covered by section 228 of the Criminal Procedure Code and that the conviction was legal. **M.** NANDAMURI ANANDAYYA, *In re*, 1 L. W. 355; (1914) M. W. N. 382; 15 CR. L. J. 622 **630**

——— ——— **s. 228** **629**

——— ——— **s. 290**—*Skinning an animal which died natural death—Public nuisance.*

The mere act of skinning an animal which dies a natural death does not in itself constitute a public nuisance. **A.** EMPEROR *v.* BENI, 12 A. L. J. 349; 15 CR. L. J. 600 **352**

——— ——— **s. 300, cl. (iv)**—*Distinction between fourth clause and first three clauses—Intention.*

The cases in which the fourth clause of section 300, Indian Penal Code, has any application are extremely rare, and though it is not easy, and perhaps not desirable, to attempt to define with any strictness the kind of cases in which that clause comes in, still there is one very broad distinction between it and the first three clauses—in the latter the important thing is an *intention* to kill or to hurt, while the fourth clause says nothing about intention. **P.** NAWAB *v.* EMPEROR, 263 P. L. R. 1914.; 31 P. R. 1914 CR.; 45 P. W. R. 1914 CR.; 15 CR. L. J. 610 **522**

——— ——— **s. 328**—*Offence—Mere administration of drug is not enough—Intent must be proved.*

In order to convict a person of an offence under section 328, Indian Penal Code, mere administration

Penal Code—contd.

of the drug will not do. There must also be evidence to show that such administration was with the intent specified in the section and to cause injury to the person to whom it was administered. **M.** MURUGA GOUNDAN *v.* EMPEROR, 15 CR. L. J. 599 **351**

——— ——— **ss. 353, 358**—*Madras Local Boards Act (V of 1884), s. 82, cl. (2)—Illegal distraint of doors of house—Assault while distraining—Offence.*

The act of a bill collector in distraining the doors of a house under section 82, clause (2), of the Madras Local Boards Act (V of 1884) is illegal, and if while so distraining, he is assaulted, an offence under section 358, and not under section 353, of the Indian Penal Code, is committed. **M.** CHINNASWAMI PILLAI *v.* CHAIRMAN OF THE ARKONAM UNION, 16 M. L. T. 429; 15 CR. L. J. 637 **837**

——— ——— **s. 358** **837**

——— ——— **ss. 361 and 366**—*Kidnapping from lawful guardianship—"Taking" to be physical.*

The word "taking" in section 361, Indian Penal Code, is nothing but physical taking.

Where a father sent his daughter to live in a house with certain of his relations and one of those relations married in that house the daughter without the consent of the father:

Held, that no offence under section 366, Indian Penal Code, was committed by the relative, because there was no taking out of lawful guardianship, inasmuch as the daughter never left the house where she was residing with the consent of her father. **O.** JAGAN NATH *v.* EMPEROR, 1 O. L. J. 330; 15 CR. L. J. 630 **638**

——— ——— **s. 361**—*Lawful guardian—Hindu girl, custody of—Paternal uncles, setting up adverse title, kidnapping by—Guardians and Wards Act (VIII of 1890)—Order by Deputy Magistrate making over minor to lawful guardian*, ultra vires.

Where an orphan minor Hindu girl, who was entrusted to the care of her maternal uncles and had obtained mutation in her favour of certain property which was claimed by her paternal uncles, after having lived for 18 months with the maternal uncles, was forcibly carried away by her paternal uncles and was caused to be married:

Held, that the paternal uncles were rightly convicted under section 361 of the Penal Code.

Held, also, that though under the Hindu Law, paternal uncles are preferential guardians to maternal uncles, where paternal uncles claim an interest in the minor's property adverse to her, they are not entitled to the custody of the minor's person under the provisions of Act VIII of 1890.

Held, further, that the order of the Deputy Magistrate making over the girl to the maternal uncles on certain conditions and entrusting the girl to a trustee until those conditions were fulfilled, was *ultra vires*, and it was open to them to take such legal steps for the minor's custody as they thought fit. **O.** BAIJ NATH *v.* EMPEROR, 1 O. L. J. 416; 15 CR. L. J. 640 **840**

——— ——— **s. 363**—*Father, when not liable for kidnapping his own child—*Kumhar, *whether bound by strict Hindu Law.*

Penal Code—contd.

M, a *Kumhar*, betrothed his minor daughter to a minor son of *B*. Later on *B* objected to the marriage when arranged and in consequence *M* married the girl to *C*, a minor. The girl returned almost immediately to the house of her father and was made over to *B*.

On this *B* was convicted under section 363, Indian Penal Code, and *M* under section 363/109, Indian Penal Code:

Held, that strict Hindu Law on the subject could not be applied to the parties and that neither *B* nor *M* had committed any offence.

In such a case even if it be supposed that a technical offence has been committed, only a nominal sentence is appropriate. **P.** BALLIA *v.* EMPEROR, 24 P. W. R. 1914 CR.; 161 P. L. R. 1914; 15 CR. L. J. 639 **839**

——— ——— **s. 366** **638**

——— ——— **s. 379** **338**

——— ——— **ss. 404, 424**—*Mother of deceased owner taking possession of her son's effects, whether guilty under section 404—Debtor discharged by mother, whether liable under section 424.*

Section 404 of the Indian Penal Code is intended to punish servants and strangers who can have possibly no right to or interest in the effects of a dead man and not near relatives who take possession under a claim of right. Similarly section 424 is intended to punish fraudulent debtors and their accomplices and is not intended to punish persons who claim as heirs of a deceased man and deal with the property.

Where, therefore, a mother takes possession of her son's moveables as against her daughters-in-law and discharges one of the debtors of her son from his obligation, she cannot be convicted of an offence under section 404, nor can the discharged debtor be convicted under section 424, Indian Penal Code. **M.** KARRI MANGADU, *In re*, (1914) M. W. N. 791; 15 CR. L. J. 602 **514**

——— ——— **s. 411** **330**

——— ——— **s. 411**—*Receiving and disposing of stolen property—Guilty knowledge necessary—Concurrent findings—Revision—Criminal Procedure Code (Act V of 1898), s. 439.*

The mere fact that a person was in possession of a stolen animal and he sold it to another, is not in itself sufficient for his conviction under section 411 of the Penal Code. His denial of having any connection with the animal does not prove his guilty knowledge specially when there is some enmity between the alleged vendor and the vendee. **P.** ALLU *v.* EMPEROR, 34 P. W. R. 1914 CR.; 229 P. L. R. 1914; 15 CR. L. J. 654 **982**

——— ——— **s. 424** **514**

——— ——— **s. 447**—*One co-sharer building upon common waste land after refusal of permission by others.*

A co-sharer who builds a house on the common land despite refusal of permission by other co-sharers is not guilty of an offence under section 447 of the Penal Code.

The mere fact that a co-sharer asked another co-sharer to consent to his appropriating to his own use a portion of a plot of waste land, would not necessarily imply that the co-sharer whose consent he asked was admitted by him to be the sole owner of the plot in question. **A.** RAM SARUP *v.* EMPEROR, 12 A. L. J. 790; 36 A. 474; 15 CR. L. J. 584 **336**

Penal Code—concld.

——— **ss. 478, 486** **993**

——— **s. 499, Exceps. 8, 9**—*Defamation—Receiving property from unadjudicated insolvent, whether receiving stolen property—Imputation—Good faith.*

Where the creditors of an unadjudicated insolvent saw the complainant leave his shop with a bundle in his arm and suspecting that it contained the insolvent's property, accused him of receiving stolen property but on opening it was not found to contain the expected stolen property:

Held, that the imputation was not made in good faith within the meaning of exception 8 or 9, to section 499 of the Penal Code and that the creditors were guilty of defamation. **S.** BULCHAND RAMCHAND *v.* EMPEROR, 8 S. L. R. 55; 15 CR. L. J. 675 **1003**

Perjury—False verification — Statement made therein believed to be true—Good faith, finding of **331**

Plaint—Amendment of plaint — Discretion of Court **567**

———*Cause of action—Suit on title—Title found against — Decree on prior possession — Validity — Practice.*

Mere possession of property gives an interest which can be enforced in a suit against a trespasser.

A suit should not be decreed on the basis of a claim not set up in the plaint or raised in the issues or even in the memorandum of first appeal. **M.** MAIKAL SERVAI *v.* THAMBUSWAMI SERVAI, 1 L. W. 853; (1914) M. W. N. 784 **934**

———, whether can be signed and verified by one partner **131**

Pleader—*Application for enrolment—Concealment of conviction—Misconduct—Dismissal.*

A Pleader who conceals his past conviction by intentionally omitting to recite it in his application for admission is liable to be dismissed. **L. B.** A SECOND GRADE PLEADER, *In the matter of*, 15 CR. L. J. 587 **339**

——— retained by one party, when entitled to appear for opposite side—Engagement of other Pleader—Presumption **712**

——— *undertaking to prepare paper-book, duty of—Contract between Pleader and High Court enforceable like similar contracts by Attorneys.*

An undertaking by a Pleader to prepare the paper-book in lieu of having it prepared in the office of the High Court is an agreement between him and the Court, which the Court expects him to fulfil.

It is a contract which is capable of being enforced by the Court, and which will, if necessary, be enforced in the same way as similar contracts by Attorneys of the High Court can be enforced.

The trust given to a Pleader who is allowed to undertake the preparation of a paper-book would not be fulfilled if he were allowed to have reservation of any kind in mind and to take an undertaking to mean only an undertaking to prepare a paper-book if he is paid for it. It is the business of a Pleader who gives an undertaking of this description, if he wants to run no risk, to see that he is indemnified before he gives the undertaking. **C.** SATIS CHUNDER BHAUMIK *v.* SARODA PRASAD RAY, 19 C. L. J. 432 **510**

Pleaders' fee, assessment of—Land acquisition reference **732**

Pleadings—*Execution of deed denied—Burden of proof — Contract — Minority, plea of—Proof of majority—Discharge of burden of proof—Facts elicited in cross-examination of opposite party's witnesses—Endorsement as to age made by registering officer, effect of—Registration Act (XVI of 1908), s. 35—Burden of proof shifted in appeal—Opportunity to produce fresh evidence, when to be granted.*

Where in a mortgage-suit a defendant pleaded that he never executed the mortgage-deed, that if it was signed by him it was done under undue influence and that if the execution of the deed was proved the contract was void by reason of his being minor at the time of the execution:

Held, that on the above pleadings it must be taken that the defendant did positively deny the execution of the deed.

Where in a suit upon a contract, *e.g.*, a mortgage, a plea of minority is raised by the defendant, the burden of proving that he was of age when the contract was entered into, lies upon the plaintiff seeking to enforce the contract, for he must show that the contract is valid and legally enforceable.

An endorsement made on a document by a Registering Officer at the time of registration showing that the executant described himself as a major, is no proof that he was so at that time, when no inference as to the age of the executant can be drawn from the body of the document itself, inasmuch as under the provisions of the Registration Act a Registering Officer is not bound to record the age of any person appearing before him.

In considering whether or not the defendant discharged the burden laid upon him of proving a certain fact, he is, apart from the evidence of his own witnesses, entitled to have taken into consideration the statements elicited from the plaintiff's witnesses in their cross-examination as regards that fact.

A party to whom the burden of proof is shifted on by the Appellate Court cannot be allowed an opportunity to produce fresh evidence in order to discharge that burden, if he is not put to any disadvantage or in any way taken by surprise in the matter by the lower Court's putting the burden on the wrong party. **O.** MUHAMMAD HUSAIN *v.* LALJI SINGH, 1 O. L. J. 366 **648**

——— ——, *falsification of, whether punishable.*

Pleadings are statements required by law to be true; and, therefore, a wilful falsification is punishable by the criminal law. **L. B.** BRITISH INDIA STEAM NAVIGATION CO. LTD. *v.* FAKIR MAHOMED, 7 L. B. R. 257 **805**

———Hindu Law—Widow's estate—Permission given by widow to plant grove, whether binding on reversioner—Relief **280**

——— ——— Inconsistent pleadings—Practice **283**

———Issue clearly raised—Form of pleadings immaterial **123**

Pleadings—concld.

——— — Jurisdiction—Consent or contract, whether can give jurisdiction to Court—Plea of jurisdiction raised neither before High Court nor before Privy Council on appeal but pressed in argument before Privy Council—Facts not disputed—Plea allowed **451**

——— ——— Plaintiff cannot ask Court to go behind his plaint **560**

——— Possession, suit for—Trespasser, ejectment of—Trespasser can question plaintiff's title—Consideration **657**

——— ——Property mortgaged by mortgagor after mortgage-decree—Second mortgagee having no notice of first or decree thereon—Representative of judgment-debtor · Objection **118**

——— — , *statements made in, interpretation of—Admission of claim—Hindu Law—Reversioners to prove their nearest reversionary relationship to deceased—Pedigree filed in Settlement proceedings—Admissibility in evidence - Relevancy—Evidence Act (I of 1872), s 32 (5)—Plaintiff's claim controverted by all defendants—Cross-examination of defendant, co-defendant not obtaining opportunity as to—Evidence of defendant not operative against co-defendant—Opinion, statement of, weight of.*

Where plaintiffs claimed as reversionary heirs of a deceased person and in the written statement the defendant denied this allegation, but further on stated that they were near relations and heirs of the deceased:

Held, that the defendant not having admitted that the plaintiffs were the nearest reversionary heirs of the deceased, there was no admission in the written statement of the plaintiffs' claim.

In order to establish that certain persons are entitled to succeed as reversioners to a deceased person, they must prove their relationship to the deceased and also that they are the nearest reversioners to him.

Where a pedigree put forward in the Settlement proceedings was produced in evidence, and it was found that it had been prepared by a person who was neither a member of the family nor an official bound to record such pedigree, that there was not sufficient evidence that it had been signed by any member of the family, that its contents were adopted by the members of the family who were privy to its preparation, and that upon its basis the entries in the *khewat* made at the time of the Settlement were recorded:

Held, that the pedigree was relevant and admissible under section 32 (5) of the Evidence Act.

Where both the defendant and the co-defendant controvert the plaintiff's claim, the evidence of the defendant does not operate against the co-defendant as the latter does not obtain an opportunity of cross-examining the former.

No attention can be paid to the mere statement of opinion of a witness. **O.** RAM DIN v. KAYESTH PATHSHALA, ALLAHABAD, 1 O. L. J. 447 **823**

Political pension—*Sanad*—Grant, interpretation of—Absolute estate granted to descendants of grantee—Property whether liable to be attached and sold in execution of decree **120**

Possession—*Dispossession—Title to possession.*

A person who has been in possession of a piece of land and paying rent for it to the admitted landlord for a number of years, if dispossessed, has a right to possession. **C.** ADHAR CHANDRA PAL v. DIBAKAR BHUYAN, 41 C. 394 **76**

——— ——, *suit for—Trespasser, ejectment of—Trespasser can question plaintiff's title—Consideration—Pleadings.*

A person in possession can resist a suit for ejectment against all but the true owner. In other words, it is always open to a person sued in ejectment, even though his possession is that of a trespasser and without title, to show that the assignment to the plaintiff was only a sham transaction and to resist the suit on this ground. **M.** RAJAMMAL v MAHADEVA YOGI, 1 L. W. 777; (1914 M. W. N. 717; 27 M. L. J. 445 **657**

Post diem damages, when allowed **504**

Power-of-attorney—*Construction — Power of agent appointed to carry on business of money-lending partnership to sue for dissolution of partnership—Amendment of plaint—Formal defect—Civil Procedure Code (Act V of 1908), O. VI, r. 14.*

A power enabling an agent to carry on the business of a firm shall not entitle him to sue for a dissolution of the firm. The proper course for the Court is to allow amendment of the plaint by requiring the principal himself to sign the plaint, since the defect does not go to the root of the case but is a mere irregularity which does not affect the merits and which would not justify the reversal of a decree on appeal. **L. B.** P. L. K. PALANEAPPA CHETTY v R. M. A. R. ARUNACHELLAM CHETTY, 7 BUR. L. T. 202 **140**

——— ——— ———, special—Evasion of law relating to Pleaders and Advocates **163**

Practice—Additional grounds of appeal put in at a latest stage, whether allowable **443**

——— ——Claim not set up in plaint or in issues or in appeal—Decree on bases of such claim, whether valid **934**

——— ——*Defendant's plea not stated in written statement but contained in* robkar *drawn up at first hearing, whether can be considered.*

In a suit for defendant's ejectment from a house the defendant did not allege in his written statement that he had built the house with the license of the plaintiff. However, a *robkar* was drawn up at the first hearing wherein the defendant said that the plaintiff had permitted him to occupy the land fifteen years before the suit in lieu of service rendered by him and that the defendant had erected some buildings on the land:

Held, that the plea raised in the *robkar* could be considered by Courts. **A.** KISHUN SAHAI v. GANGA BUX, 12 A. L. J. 455 **408**

——— ——Judgment provisionally admitting appeal as within time—Competency of Court at hearing to decide question of limitation **369**

— ——— *Order passed by District Magistrate in absence of statutory authority, effect of—Power of Magistrate to do an act, where to be derived from.*

An order passed by a District Magistrate cannot be supported as an executive order in the absence of any statutory authority which would justify the making of it.

Practice—concld.

The authority of every Magistrate to do an act as Magistrate or as Collector, if such authority exists, must ultimately be found in the powers conferred by Parliament. The immediate power may be an executive order of the local administration, but the power of the local administration to make an order must be derived, either directly or indirectly, from Parliament, and it is a mistake to assume that because an officer is an Executive Officer or a Judicial Officer, he has any power to interfere with private or public persons which cannot be derived from a lawful origin. **O.** *Musammat* GAUHAR *v.* EMPEROR, 17 O. C. 263; 1 O. L. J. 481; 15 CR. L. J. 668 **996**

——— ——Pleadings—Inconsistent pleadings **283**

——— ——Power of Court to return plaint for presentation to another Court **81**

———*Re-trial ordered by High Court on certain finding of fact—Re-trial Court, whether competent to go behind that finding—Criminal Procedure Code (Act V of 1898), s. 439.*

When a case is directed, to be re-tried the Judge re-trying it cannot go behind the findings of fact which were accepted by all the Courts and which were the basis on which a re-trial was ordered. **M.** SUBBARAYA PILLAI *v.* KRISHNASWAMI PILLAI, 15 CR. L. J. 619 **627**

——— ——*Sessions trial—Murder case—Cross-examination of witnesses—Application for postponement, refusal of—Prejudice—Re-trial.*

In capital cases every reasonable opportunity should be given to the accused to clear themselves of the charge if they can.

Counsel for an accused applied for permission to cross-examine a witness on the day following as he was not prepared to cross-examine them that day, but the Court refused permission. Upon this the Counsel, being unable to accept the responsibility of conducting the case on behalf of the accused, did not appear and a number of witnesses were consequently not cross-examined:

Held, that the application was a reasonable one and should have been granted as no adjournment was asked and the case was a fit one in which the Court should have shown an indulgence although the accused was not entitled to a postponement as of right.

Held, further, that the accused was prejudiced and the trial should commence *de novo* before another Judge. **C.** SADASIV SINGH *v.* EMPEROR, 41 C. 299; 15 CR. L. J. 596 **348**

— Suit against minor—Appointment of guardian *ad litem*—Father when fit to be appointed **620**

Pre-emption—Illegitimate sons, whether preferred to legitimate collaterals **688**

— ——*Muhammadan Law—Sale by Shia—Suit by Sunni—Shia law of pre-emption, whether applicable.*

Where a Musalman of the Shia sect sells his property to a Hindu and a Sunni claims a right of pre-emption based on Muhammadan Law according to the Shia law of pre-emption, the Sunni has no right to pre-empt. **A.** PIR KHAN *v.* FAYAZ HUSAIN, 12 A. L. J. 813; 36 A. 488 **445**

Pre-emption—contd.

——— ——*Oudh Laws Act (XVIII of 1876), s. 9—*Pattas *or leases of* birt sankalap *granting heritable and transferable rights*—Nazrana *or premium taken in advance—Rent reserved*—Birt, bai birt *and* birt sankalap, *meanings of—Proprietary or under-proprietary rights, sale of.*

A grant of under-proprietary rights by means of *pattas* or leases of *birt sankalap* giving heritable and transferable rights, in lieu of a *nazrana* or premium taken in advance and an annual rent reserved thereby, cannot be treated as a sale of either a proprietary or an under-proprietary tenure.

The right of pre-emption arises only in case of transfers by sale or foreclosure and not in case of transfers by lease, although perpetual, mortgage or gift. **O.** DATA RAM TEWARI *v.* DEOKALI TEWARI, 1 O. L. J. 463; 17 O. C. 299 **855**

——— ——*Pre-emption money paid into Court—Money paid by Court to wrong person, effect of.*

A pre emptor does not lose his decree if the pre-emption money paid by him into Court is allowed to be withdrawn by a wrong person. The Court will recover back the money wrongly withdrawn. **P.** MUHAMMAD HAYAT *v.* NARSING DASS, 62 P. W. R. 1914; 158 P. L. R. 1914 **717**

——— ——————*Pre-emptor and vendee both occupying position of co-sharers—Oudh Laws Act (XVIII of 1876), s. 9—Pre-emptor or vendee, effect of circumstances arising subsequent to decree of first Court in determination of right of—Co-sharer holding subject to danger of being attacked by claim for pre-emption, position of.*

A vendee, defendant in a pre-emption suit, occupied, when that suit was instituted against him, the position of a co-sharer with an absolute right of transfer and of enjoyment but subject to the danger of being attacked by a claim for pre-emption by virtue of recent purchases. A decree for pre-emption was passed against him in that suit. Before his appeal came to be decided a suit for pre-emption in respect of one of the other properties had been brought and had been dismissed and the decree had become final in his favour:

Held, that the vendee and the pre-emptors having become persons equally entitled to purchase the property in dispute before the case was finally disposed of in appeal, lots must be cast under section 9, Oudh Laws Act, in order to determine which of them shall exercise the right to buy the property.

In a pre-emption suit, in determining the right of the pre-emptor or of the vendee, the Appellate Court may consider any circumstances which have arisen during the pendency of the suit in appeal, even though these circumstances may have come into being subsequent to the decree of the first Court. **O.** ONKAR SINGH *v.* BHAGWAN DAT SINGH, 17 O. C. 242 **694**

—— Pre-emptor's suit to recover from vendee after paying vendor whether maintainable **939**

——— ——————*Price alleged to be paid fictitious—Evidence.*

When it is alleged in a pre-emption suit that the sale-price is fictitious and put in the deed for defeating pre-emption, the pre-emptor, notwithstanding the evidence that the amount stated in the deed was

Pre-emption—concld.

paid before the Sub-Registrar, can show that the market-price is far below that stated in the sale-deed. But it is open to the vendee to show the circumstances why he was ready to give and did give the actual price mentioned in the deed. **A.** RAM SARUP SAHA *v.* KARAM ULLAH KHAN. 12 A. L. J. 692; 36 A. 464 **403**

——— *Vendor becoming owner by exchange of land before sale—Sanction given by Collector under Punjab Alienation of Land Act (XIII of* 1900) *—Date of operation.*

A permanent alienation of land subject to the sanction of the Deputy Commissioner under the Punjab Alienation of Land Act, if eventually sanctioned by that officer, becomes effective from its original date. Consequently a suit for pre-emption on the ground of the vendee not being an owner in the sub-division in which the land in dispute is situate must fail if before the sale of the land under pre-emption the vendee had become an owner therein by an exchange, although it was sanctioned during the pendency of the suit of pre-emption against him. **P.** MUHAMMAD BAKHSH *v.* CHHANGA, 56 P. W. R. 1914; 143 P. L. R. 1914 **59**

——— Wajib-ul-arz—*Contract or custom.*

Prima facie references in *Wajib-ul-arzes* to pre-emption are to be taken as references to customs rather than to contracts.

The mere fact that a *Wajib-ul-arz* is for a settlement which is to continue only for a certain number of years, does not prevent the co-sharers from recording therein their customs. **A.** GHANSAM *v.* BIRANCHI LAL, 12 A. L. J. 527 **301**

——— Wajib-ul-arz—*Custom of pre-emption on simple sale only—Mortgage by way of conditional sale—Ripening into complete transfer by foreclosure suit—Right of pre-emption.*

Where the evidence of the custom of pre-emption is a *Wajib-ul-arz*, which deals first with the case of a simple sale and makes provision for pre-emption in the case of such a sale and then deals with the case of a conditional mortgage, it would be quite wrong to hold that the custom applying to the case of a simple sale equally applies to a transfer of property which takes place after a mortgage by conditional sale has ripened into a complete transfer by a foreclosure suit. **A.** KAMTA PARSHAD *v.* GULZAR SINGH, 12 A. L. J. 611 **413**

suit—*Alternative claim for possession as full owner—Pleadings—Inconsistent pleadings—Practice.*

A suit for pre-emption is maintainable even if the pre-emptor claims a right of possession as full owner of the suit property. **A.** BHAGWATI SARAN *v.* PARMESHAR DAS, 12 A. L. J. 798; 36 A. 478 **283**

———, *suit for—Ex-proprietary tenant, right of, to pre-empt—Village community, member of, meaning of.*

An ex-proprietary tenant in Oudh cannot be regarded as a member of the village community and is not, therefore, entitled to pre-empt as such. **O.** JANKI *v.* BEHARI LAL 1 O. L. J. 405 **718**

——— Plaint omitting to mention portion of property claimed—Amendment after expiry of period of limitation—Amendment allowable—Date of institution date of presentation of original plaint **439**

Prescription, right acquired by **692**

Presidency Magistrate, whether Court subject to jurisdiction of High Court **345**

Presidency Small Cause Courts Act (XV of 1882), s. 38 **647**

Presidency Towns Insolvency Act (III of 1909), ss. 17, 99—*Firm adjudicated insolvent—Property of each partner affected—Lower Burma Chief Court—Rules under Insolvency Act, s.* 83, ultra vires.

Under sub-section 1 of section 99 of the Presidency Towns Insolvency Act, III of 1909, an adjudication order can be made against a firm in the name of the firm and the order operates on the property of each partner.

Rule 83 of the Lower Burma Chief Court Insolvency Rules is *ultra vires*. **L. B.** I. A. SOFAER, *In the matter of* **222**

——— **s. 99** **222**

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Presumption—Account books summoned but not produced to rebut plea of payment, effect of—Money-lender taking no steps to recover money due on mortgage-bond even after it rose considerably above value of mortgaged property, whether believeable **749**

——— Agent, authority of **852**

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——— as to rate of rent, how arrested **552**

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——— Rent determined by reference to area—Consolidated rent **532**

——— Separation of one member—Unity of other members, when presumed **689**

Principal and agent—Agent buying property with principal's money—Agent, liability to account **88**

——— *Principal bound by his agent's acts—Ratification—Full knowledge of transaction—Evidence—Memorandum of arrangement, whether admissible in evidence without registration—Registration—*Mourasi *and* mokarari *tenure—Specified maximum rent—Enhanceability of rent.*

A memorandum embodying an arrangement for reclamation of land and the terms on which the grantees are to hold the land, does not demise any property and is neither a lease nor an agreement to

Principal and agent--concld.

lease and is, therefore, admissible in evidence without registration.

Where the memorandum contained an express recital that the tenure was *mourasi* and *mokarari* and there was no provision to enhance the rent after a certain maximum was reached:

Held, that the tenure was intended to be not enhanceable after the specified maximum was reached.

Every act done by an agent in the course of his employment on behalf of his principal and within the apparent scope of his authority binds the principal, unless the agent is in fact unauthorized to do the particular act and the person dealing with him has notice that in doing such act he is exceeding his authority.

A principal cannot, on his own authority, ratify a transaction in part and repudiate it as to the rest; and hence the general rule is that where ratification is established as to a part, it operates as confirmation of the whole of that particular transaction of the agent.

But before a principal can be held bound by his ratification, he must be proved to have full knowledge or at any rate means of knowledge of all the essential facts of the transaction into which the agent has entered on his behalf. **C.** KATYAYANI DEBI *v.* PORT CANNING AND LAND IMPROVEMENT CO., 19 C. W. N. 56 **274**

——— Suit against agent for neglect of duty--Limitation, when begins to run **706**

——— Suit for claim, either from agent or principal—Decree against one - Plaintiff whether entitled to claim decree against other **132**

———*Suit by principal against agent for neglect or misconduct—Limitation Act (IX of* 1908), *Sch. I, Arts.* 89, 90—*Starting of limitation from time misconduct of agent became known to principal—Knowledge--Presumption—Books of account—Recognised agent, power of.*

In a suit by a principal against his agent for damages for misconduct and neglect, knowledge of the acts of agent's misconduct can be fully obtained only when the principal gets back his books of account from the agent.

Where after the termination of an agency, the agent first handed over the books of account to a *Punchayat* from whom the principal secured them after sometime:

Held, that the period of limitation under Article 90, Schedule I, of the Limitation Act for the principal's suit against the agent for his misconduct would run from the day on which he got the books of account from the *Punchayat*

An agent authorized to enter appearance in suits can sign the amended plaint when once the suit has been instituted with the approval of the plaintiff. **L. B.** P. R. N. PALANIAPPA CHETTY *v.* P. M. R. M. FIRM, 7 BUR. L. T. 199 **136**

Priority—Oral sale to mortgagee—Subsequent sale under registered sale-deed to third party **772**

Privy Council Practice—Concurrent finding of Courts below on questions of fact, when can be disturbed **309**

——— Evidence—Established rules not to be superseded unless unjust **467**

Probate—*Revocation—Fraud and collusion—Revocation not allowed—Evidence Act (I of* 1872), *s.* 44 *—Party applying for revocation barred in subsequent suit for recovery of property of deceased*—Locus standi *of debtor of deceased to challenge probate—Power of Subordinate Judge to decide questions of probate.*

Where the application for revocation of probate on the ground of fraud and collusion has been dismissed by the District Court, the party applying will be barred by the decision in the revocation matter from raising again the same question in a suit by the executor to recover the estate to which the probate relates.

Where demand is made by the executor claiming title under an unrevoked probate, a debtor to the estate has no answer, unless possibly he is sued in a Court having jurisdiction to revoke the probate.

A Subordinate Judge's Court has no jurisdiction to deal with the question of probate.

Quære. - Whether a debtor of the deceased and one who holds property admittedly forming part of the estate would have any *locus standi* in applying to the District Court for revocation of the probate? **B.** KISHORBHAI REVADAS *v.* RANCHHODIA DHULIA, 16 BOM. L. R. 459; 38 B. 427 **37**

Probate and Administration Act (V of 1881), ss. 69, 90 (4)—*"Person interested in the property", meaning of—Creditor's interest in property of deceased debtor—Charge—Creditor's* locus standi *to object to Probate or Letters —Fraud—Succession Act (X of* 1865), *s.* 250.

Section 90 of the Probate and Administration Act refers to immoveable property only.

A creditor has no interest in the immoveable property of his deceased debtor unless he has a charge on that property under section 69 of the Probate and Administration Act or section 250 of the Succession Act.

As a creditor of the estate of a deceased debtor is not merely as such "interested in the property" within the meaning of section 90 (4), he has no *locus standi* to come in and object to the grant of Probate or Letters of Administration unless he objects to the grant on the ground that the Will is set up in fraud of the creditors. **L. B.** MA E ME *v.* MA E, 7 L. B. R. 293 **48**

——— **s. 90 (4)** **48**

Procedure—*Benami* purchaser—Actual purchaser—Defence **821**

———Interpretation — Power to invent rules **1004**

——— Questions to Jury **1005**

——— Suit against trustee—Alienee whether necessary and proper party **794**

——— Suit improperly valued **24**

——— Vested right **668**

Promissory note--*Execution admitted—Plea of material alteration, whether proper.*

Where one of two joint promisors admits execution of a promissory note and receipt of consideration it is not open to him to plead that the promissory note was not executed on the date it bears, or that the other promisor did not join in execution **M.** TUNUGUNTLA BRAHMAYYA *v.* SANGAM RAMI REDDI, 16 M. L. T. 185; (1914) M. W. N. 705 **590**

Proof. *See* EVIDENCE ACT.

——— Easement—Cesser of easement—Mere failure to repair servient tenement, whether sufficient **383**

Provincial Insolvency Act (III of 1907), ss. 3, 43, 46 (1)—*Court of Additional Judge, whether subordinate to District Court—Order under s. 43—Appeal, whether lies to High Court—Nature of appeal—Jurisdiction.*

Held, by *Richards, C. J.*, and *Banerji, J.*, *(Knox, J.*, dissenting) that the Court of an Additional Judge is not subordinate to a District Court within the meaning of section 46 (1) of the Provincial Insolvency Act and that, therefore, when the Additional Judge in exercise of the jurisdiction conferred by section 43 of the Act convicts and sentences a debtor for having fraudulently or vexatiously concealed his books of account, an appeal from the order of conviction lies to the High Court.

Per *Banerji, J.*—The Court subordinate to the District Court, referred to in section 46 (1), is the subordinate Court mentioned in section 3 of the Act.

Held, by the *Full Bench*, that an appeal from an order under section 43 is a civil appeal. **A.** CHIRANJI LAL *v.* EMPEROR, 12 A. L. J. 1105; 36 A. 576; 15 CR. L. J. 658 **986**

——— ——— ——— **s. 5**—*Fraudulent alienation of deceased's property by heir—Petition to get heir adjudged insolvent, whether lies.*

A petition to get one adjudged insolvent cannot be entertained unless the petitioner and the person against whom the order of adjudication is sought occupy the relative positions of creditor and debtor.

Therefore, an heir of a deceased insolvent cannot be adjudged insolvent at the instance of the creditor of the deceased. **S.** SHIVJI DHAMJI, *In the matter of an application by*, 8 S. L. R. 93 **930**

——— ——— ——— **s. 6 (2)**—*Jurisdiction of Court—Applicant working as domestic servant in one district and having agricultural holding in another.*

A Court is competent to entertain the insolvency petition of a person working as a domestic servant within its jurisdiction although he has got an agricultural holding beyond its jurisdiction which he has not relinquished. **O.** KISHAN *v.* RAJ BAHADUR **41**

——— ——— ——— **s. 16, sub-s. (2)**—*Prohibition contained in section 16, sub-s. (2), Provincial Insolvency Act, applicability of—Order of discharge, operation of.*

The prohibition which is contained in section 16, sub-section (2), of the Provincial Insolvency Act is aimed at creditors to whom notice of the insolvency proceedings has been given, and does not affect persons having claims against the insolvent to whom no notice whatever of the insolvent's application has been delivered.

An order of discharge operates only to free debtors from the debts entered in the Schedule. **O.** FIDA HUSAIN *v.* COLLECTOR OF SHAHJAHANPUR, 17 O. C. 267 **708**

——— ——— ——— **s. 22** **610**

——— ——— ——— **ss. 36, 46 (1)**—*Sale to defraud creditors, validity of—Part payment of consideration—Vendor and vendee nearly related—Vendor permitted to retain possession—Vendee, fraudulent intent of.*

Provincial Insolvency Act—concld.

Where an insolvent executes a sale-deed in favour of his relations in order to defraud his creditors and retains possession of part of the property sold, an intent to defraud should be imputed to the vendees also.

A sale made with intent to defraud creditors is wholly void, even where there has been part payment of consideration. **M.** PALANIAPPA MUDALI *v.* OFFICIAL RECEIVER OF TRICHINOPOLY **948**

——— ——— ——— **s. 43** **986**

——— ——— ——— **s. 43**—*Bad faith of debtor, Judge's power to take cognizance of—Act of bad faith, effect of—Adjudication, order of.*

Under section 43 of the Provincial Insolvency Act, a Judge can take cognizance of the bad faith of a debtor at any time, whether before or after the making of the order of adjudication, although it may be that the Court has no power to refuse to make an order of adjudication merely because an act of bad faith is proved. **O.** NANHE MAL *v.* EMPEROR, 17 O. C. 138 **363**

——— ——— ——— **s. 46 (1) 948, 986**

Provincial Small Cause Courts Act (IX of 1887), s. 23—*Power of Court to return plaint for presentation to another Court—Practice.*

The Judge of a Small Cause Court has a discretion to return a plaint under the provisions of section 23 of the Provincial Small Cause Courts Act merely on a finding that the relief claimed by the plaintiff would depend upon the proof or disproof of title, which that Court could not finally determine. The Judge should be careful to frame his order so as to put this point beyond doubt, because certain legal consequences follow an order under that section which do not follow on an order merely holding that the Small Cause Court had no jurisdiction in the matter. **A.** MUHAMMAD ABDUL GHAFUR KHAN *v.* GOKUL PRASAD, 12 A. L. J. 334. **81**

——— ——— ——— **s. 25**—*"Decided," meaning of.*

The word "decided" in section 25 of the Provincial Small Cause Courts Act (IX of 1887), does not mean "decided on the merits." It simply means "disposed of," and the High Court's power to interfere is not restricted only to cases where there is a decision on the merits. **M.** RAMANATHAN CHETTY *v.* MARUTHAPPA KONE, 27 M. L. J. 494; 16 M. L. T. 502 **643**

——— ——— ——— **s. 25**—*Revision—Small Cause Court assuming facts without evidence and not receiving written pleas—Landlord and tenant—House fallen in earthquake—Non-liability of tenant for rent.*

The judgment of a Court of Small Causes is liable to be set aside on revision under section 25 of Act IX of 1887, if it

(1) assumes the existence of some facts;

(2) refuses to receive and consider the pleas of the defendants;

(3) omits to decide all material points in dispute.

A tenant cannot be made liable for the rent of the house let to him if it falls on account of earthquake and rain, *i.e.*, through no fault of his. **P.** PIR BAKHSH *v.* HIRA LAL, 54 P. W. R. 1914; 146 P. L. R. 1914 **26**

Provincial Small Cause Courts Act—concld.

——————— **Sch. II, Art. 8**—*Jurisdiction of Small Cause Court—Fishery and collection of produce, rights of,* theka *as to—Lease—License—Rent—Fee.*

A *theka* of a right to fish and to collect produce is not a lease but merely a license, and the money that the *thekadar* is bound to pay is not rent, but fee. Hence, a suit for money due under the *theka* is not exempted from the cognizance of a Small Cause Court. **O.** SADIQ HUSAIN *v.* SECRETARY OF STATE **666**

——————— **Sch. II, Art. 18**—*Suit for pension by school master—Suit relating to trust—Jurisdiction of Civil Court.*

Where a school master who was subscribing to the school masters' pension fund sued after his removal for his pension in a Small Cause Court:

Held, that the cognizance of the suit by the Small Cause Court was barred by Article 18 of Schedule II of the Small Cause Courts Act. **M.** SEIBER *v.* DANIEL VARKI **41**

——————— **Sch. II, Art. 24**—*Suit to enforce award—Jurisdiction.*

A suit to enforce an award is not the same as a suit to enforce a contract; and the Small Cause Court has jurisdiction to take cognizance of such a suit.

The jurisdiction of the Small Cause Court is excluded only in respect of suits which are specifically mentioned in Schedule II of the Provincial Small Cause Courts Act, IX of 1887 **C.** SUKAR HAJAM *v.* OLI MOHAMMAD **826**

——————— **Sch. II, Art. 35 (1)**—*Contract to allow plaintiff to drain plaintiff's land—Breach of contract—Damages—Jurisdiction.*

Defendant agreed with plaintiff for consideration that he may drain the water from his field into defendant's land. On the defendant going back upon his contract the plaintiff sued for damages:

Held, that the case was triable by a Court of Small Causes as Article 35 (*i*) of Schedule II of the Small Cause Courts Act was inapplicable to such cases. **M.** SOORIYAN MUTHIRIAN *v.* NATESAM PILLAI, (1914) M. W. N. 497 **44**

Public charities—*Trust created by non-resident foreigner—Trust property in British India—Succession by foreigner.*

In cases of public charities (not coming within the terms of the Trusts Act) a Hindu is not incapable of succeeding to the office of hereditary trustee, under a deed of trust created by a non-resident foreigner, of property situated in British India, merely on the ground that such trustee resides outside British India. **M.** VENKATACHELLA MUDALY *v.* ARUNACHELLA MUDALY, 16 M. L. T. 104; 1 L. W. 574 **80**

Public highway—*Special damage—Passage narrowed—Two decrees in same terms—Only one decree appealed against—Other decree, effect of.*

Where a public passage of 2½ cubits width has been narrowed down to 22 inches, there is special damage inasmuch as leaving such a narrow passage as 22 inches is practically blocking the road.

Public highway—concld.

Where there are two decrees in the same terms and only one of them is appealed against, the other decree would stand even if the decree appealed against is set aside. **A.** RAM KISHUN *v.* BANWARI RAI **266**

Public nuisance—Skinning an animal which died natural death **352**

Public path—*Obstruction—Suit by private person—Special damage must be both alleged and proved.*

An individual member of the public has no cause of action to bring a separate suit in respect of an obstruction to a public way without both alleging and proving special damage of a substantial character to himself. **M.** SIVA SANKARA REDDY *v.* MUTHUSAMI KONAN **603**

Public policy—Turf Club Sweep tickets—Confederacy buying tickets—One member of confederacy selling half his share—Nature of transaction **355**

Punjab Alienation of Land Act (XIII of 1900),—Sanction given by Collector—Date of operation **59**

Punjab Courts Act (XVIII of 1884), s. 13 **513**

——————— **s. 40** **511, 715**

——————— **s. 75 (2)** **480**

Punjab Land Revenue Act (XVII of 1887), s. 158 (8) **622**

Punjab Limitation (Ancestral Land Alienation) Act (I of 1900) **724**

Punjab Pre-emption Act (II of 1905)—*Punjab Alienation of Land Act (XIII of 1900)—Right to realize arrears of rent of agricultural land, not land—Objection as to omission of portion of property sold taken at late stage not entertainable—Amendment of plaint—Estoppel.*

The right to realize arrears of rent of agricultural land, is not agricultural land within the meaning of the Punjab Pre-emption Act (II of 1905), and the omission to include that right in a suit for pre-emption in respect of the land with which the said right is sold is not fatal to the suit.

'A right to receive rent', which is included in the definition of 'land' as given in the Alienation of Land Act, means a right to receive rent which would become payable in future. It does not mean a right to realize arrears of rent which have already accrued due and are recoverable as a liquidated sum.

An objection taken by the vendee as to the omission in a pre-emption suit of a portion of the property sold after the evidence of both parties has been recorded and on the date fixed for arguments in the case, is raised at too late a stage and should not be entertained by the Court. The Court, however, would be perfectly right in allowing amendment of the plaint, if it ever entertains the objection.

The Court will not draw vague general inferences as to estoppel by conduct against a pre-emptor from the mere fact that a large number of the residents of the village in which the land in dispute is situate attempted to purchase it but failed before the sale in dispute took place. **P.** SHANKAR LAL *v.* DALLU, 182 P. W. R. 1914; 231 P. L. R. 1914; 13 P. R. 1914 **68**

Punjab Pre-emption Act -concld.

——— ——— — s. 11, proviso—*'Tribe'—Lohars and Tarkhans same tribe in Village Harnauli, District Mianwali—Limitation qua second vendee—Six years—Additional grounds of appeal put in at a late stage disallowed—Practice.*

In a pre-emption suit, the rule of limitation applicable to the case of a second vendee is Article 120 of the Limitation Act, which allows six years from the time of transfer to the said vendee.

The word 'tribe' in the proviso to section 11 of the Punjab Pre-emption Act should be construed broadly and each case should be decreed on its merits.

The *Lohars* and *Tarkhans* of the village Harnauli, District Mianwali, form one tribe within the meaning of the proviso to section 11 of the Punjab Pre-emption Act

Where additional grounds of appeal were put in the Chief Court more than two years after presentation of the appeal, none of which were taken in the lower Appellate Court, the Chief Court disallowed them summarily without discussion. **P.** FAZAL HUSAIN *v.* MALIK JINDA, 49 P. R. 1914, 252 P. L. R. 1914; 160 P. W. R. 1914 **443**

Punjab Tenancy Act (XVI of 1887), ss. 14, 84 (5)

—*Ejectment—Person in adverse possession of land made over to another in partition proceedings—Not party to proceedings—Cannot be ejected under ejectment proceedings — Revision — Grounds - Broad principle—Injustice or failure of justice—Perversity in findings - Serious misapplication of law of evidence.*

A person found to be in adverse possession of land which was made over to another in partition proceedings to which the former was not a party, would not be liable to ejectment as a tenant under the Punjab Tenancy Act.

The Financial Commissioner, acting under section 84 (5) of the Punjab Tenancy Act, has, within the limits prescribed for the revisional jurisdiction of the Chief Court, an absolute discretion to determine whether his intervention is expedient The broad principle to follow is to interfere only when a refusal to interfere would result in injustice or failure of justice.

The circumstances which would justify the Financial Commissioner on the revision side in holding that a subordinate Court has acted either without jurisdiction or illegally or with material irregularity, when on the facts found by that Court there is no such lack of jurisdiction and no illegality or material irregularity, would have to be of a very exceptional kind, though absolute perversity in the finding or a serious misapplication of the law of evidence in arriving at it might justify such interference. **P.** MAHAN SINGH *v.* NARAIN SINGH, 1 P. R. 1914 REV. **867**

——— ——— ——— ——— ss. 38, 59 (1) (b)—*Abandonment by widow—'Tenant having the right of occupancy'—Requirements of s. 38—Actual possession of tenancy.*

Abandonment, like ejectment, terminates the rights of the widow, and the right of occupancy at once devolves upon the next claimant.

At the very moment that the widow completes the period required to bring section 38 of the [illegible] Act into operation, she ceases to

Punjab Tenancy Act—concld.

be the 'tenant having the right of occupancy' by the operation of section 59 (1) (*b*).

In order to establish the conditions contemplated by section 38 the tenant, whose abandonment of his tenancy is alleged, must have been at some time in possession of the tenancy in question. **P.** RUGHA *v.* MUGHLI, 2 P. R. 1914 REV **854**

——— ——— ——— s. 59 (1) (b) 854

——— ——— ——— ——— s. 77 (3) (i)—*Jurisdiction—Civil or Revenue Court—Suit by occupancy tenant for possession of land as threshing floor.*

The plaintiffs sued for possession of a piece of land on the allegation that they were occupancy tenants of other lands in the village and in consequence of their holding these occupancy rights they were entitled to the use of the land in suit as a threshing floor. The defendants were the landlords:

Held, that the suit fell within the purview of section 77 (3) *(i)* of the Punjab Tenancy Act and was cognisable by the Revenue Courts alone. **P.** BIR SINGH *v.* KAHAN SINGH, 44 P. R. 1914; 254 P. L. R. 1914 **502**

——— ——— ——— ——— s. 84 (5) 867

——— ——— ——— ——— s. 84 (5) — *Revision — Powers of Financial Commissioner—Substantial justice—Material irregularity—Technical irregularity no ground for revision*

A technical irregularity is not a good ground for interference on the revision side.

The Financial Commissioner will exercise his powers under section 84 (5) of the Punjab Tenancy Act (within the limits set by the Civil Procedure Code to the revisional jurisdiction of the Chief Court) only when interference is necessary in order that substantial justice may be done.

The fact that ejectment proceedings were twice in succession decided otherwise than upon the merits, does not justify interference upon the revision side in the absence of any indication of material irregularity.

The inclusion in the notice of ejectment, and in the subsequent delivery of possession, of a particular field held in previous judicial proceedings to be a part of the land from which the tenants were not liable to ejectment, was a material irregularity. The omission of the direction for ejectment from the order of dismissal of the suit to contest liability to ejectment, is only a technical irregularity. **P.** HIRA *v.* NIHAL SINGH, 4 P. R. 1914 REV. **831**

——— ——— ——— ——— ——— s. 100 (2)—*Registering Collector's decree—Prejudicial to a party—Registration inadmissible.*

Clause (2) of section 100, Punjab Tenancy Act, gives the Chief Court power to act only where it appears that the parties have not been prejudiced by a mistake as to jurisdiction. If they have been prejudiced, registration is inadmissible.

Where the effect of registering the Collector's decree in a suit of value under Rs. 500 (a Small Cause) would apparently be to deprive the defendant of all further remedy, the Chief Court will not intervene, especially where there is doubt as to the correctness of the Collector's decision on the merits. **P.** NAWAB KHAN *v.* KARAM CHAND 56 P. R. 1914; 235 P. L. R. 1914; 154 P. W. R. 1914 **506**

Question of law -Affidavit on question of law, weight of **9**

Railways Act (IX of 1890), s. 47 - *"Day," definition of—Coaching Tariff Rules, North-Western Railway—Notice.*

The provision in rule 74 that the interval between the time of issue of a return ticket and the midnight of the same day shall be counted as one day, is neither unreasonable nor *ultra vires*.

The fact that the day of expiry of the return ticket is specified on the ticket, is enough notice of the Regulations of the Company. **S.** SECRETARY OF STATE *v.* SAHIJRAM ASANMAL, 8 S. L. R 14 **801**

——— **s. 80** - *Claim for compensation and damages—Consignment of goods at Railway for delivery—Loss on other railway—Cause of action—Omission of essential facts in plaint—Replication filed—Civil Procedure Code (Act V of 1908), O. VII, rr. 5, 11.*

A suit was brought against the Bombay, Baroda and Central India Railway Company for the shortage of goods consigned to the plaintiff's address from a station on the Bengal and North-West Railway to the Agra Fort Railway Station. The plaint omitted to state that the Agra Fort Railway Station was under the control of the railway administration impleaded as defendant; but taken as a whole it alleged the existence of a cause of action against the defendant Company, asserting that they were bound to deliver the entire goods consigned to the plaintiff. The defendant Company pleaded that the plaint disclosed no cause of action against them and that the suit without impleading the original booking line was bad in law and not maintainable.

Thereupon a replication was filed by the plaintiff alleging that the Company had accepted the liability for loss:

Held, that the plaint together with the replication disclosed a cause of action against the defendant Company and that the plaintiff had the option of taking action either against the railway administration to which the goods were delivered by the consignor or against the railway administration on whose line the loss occurred. **A.** MAKHAN LAL *v.* B. B. AND C. I. RAILWAY COMPANY, 12 A. L. J. 339 **77**

Railway receipt - *Mercantile document of title—Rights of endorsee.*

A railway receipt is a mercantile document of title, and its endorsee has sufficient interest in the goods covered by it to maintain an action for their loss. **B.** DOLATRAM *v.* B. B. AND C. I RAILWAY COMPANY, 16 BOM. L. R. 525; 38 B. 659 **380**

Ratification—Full knowledge of transaction—Principal bound by his agent's act **274**

Receiver, *appointment of—Appointment of party—Jurisdiction—Small estate.*

A Court has jurisdiction to appoint, under special circumstances, one of the parties to the suit as Receiver even without the consent of the other, *e.g.*, where the estate is small and cannot afford to have a paid Receiver. **M.** THAYYANAYAKI ACHI, *In re* **602**

——— *Discretion to spend money on litigation—Appellate Court, interference by—Security for restitution—Civil Procedure Code (Act V of 1908), O. XL, r. 1 (d)—Appeal.*

Receiver—concld.

A Receiver's discretion to spend money on litigation ought not to be interfered with by an Appellate Court. If necessary or desirable the Court of first instance will take security from him for restitution to the estate of such expenses in certain events.

Quære.—Whether an appeal lies against an order of the lower Court regulating such expense? **M.** JAMBAGATHAMMAL *v.* KANAKATHAMMAL **645**

———Party in possession of property in dispute—Gross mismanagement **406**

Recognized agent **136**

Redemption. *See* MORTGAGE.

Registration - *Mourasi* and *mokarari* tenure—Specified maximum rent—Enhanceability of rent **274**

———Notice **856**

——— *Notice—Civil Procedure Code (Act V of 1908), s. 34—Interest after date of suit—Discretion.*

The mere fact that a person resides at the place where a deed is registered is insufficient to fix him with notice of the deed.

Where the delay in the decision of a case is wholly due to some erroneous action of the plaintiff, the Court is justified in not awarding, under section 34, Civil Procedure Code, 1908, further interest after the institution of the suit upto the date of the realization of the decretal money. **P.** HIRA LAL *v.* CHANAN KHAN, 98 P. W. R. 1914; 199 P. L. R. 1914 **658**

———Partition by private arrangement **498**

Registration Act (III of 1877), s. 47 - *Sale-deed executed before but registered after another—Conflict—Transfer of Property Act (IV of 1882), s. 41.*

A deed, executed and registered after the execution but before the registration of another deed, must give way to the earlier deed.

Section 41 of the Transfer of Property Act should not be so construed as to conflict with section 47 of the Registration Act. **A.** MATHURA KALWAR *v.* AMBIKA DAT, 12 A. L. J. 993 **725**

Registration Act (XVI of 1908), s. 17 - *Compromise—Registration—Matter extraneous to litigation Hindu widow, right of, to compromise—Legal necessity—Surrender of right to one reversioner—Right of other reversioners.*

A compromise of a suit in so far as it relates to a settlement touching property extraneous to litigation, requires registration to be valid and admissible in evidence.

A Hindu widow is not entitled to enter into a compromise so as to affect her life-interest, unless the compromise is for the purpose of legal necessity.

A surrender of her rights by a Hindu widow, in favour of one only of many reversioners living at the time, cannot operate to create an absolute title in favour of that reversioner and he or his transferees cannot resist the right of the reversioners at the date of the widow's death **C.** SHAIKH RAFIC *v.* BHAGABAN CHANDAR DHAR **377**

——— **ss. 48, 49**—Usufructuary mortgage—Immoveable property below Rs. 00 in value Oral sale to mortgagee—Delivery, if necessary—Subsequent sale under registered sale-deed

Registration Act—(1908)—concld.

to third party—Priority—Sale-deeds of immoveable properties, whether compulsorily registrable—Unregistered sale-deed, whether admissible to prove nature of possession held thereunder—Adverse possession, title by—Transaction affecting immoveable property **772**

——— ——— ——— ——— **s. 49**—*Evidence Act (I of 1872), s. 65 (b)—Unregistered lease—Essential term of tenancy—Proof—Evidence.*

If a deed of lease is inadmissible in evidence for want of registration, it cannot be received in evidence to prove an obligation contained therein to remove reeds from the leased land when the obligation was a condition of the tenancy and a consideration for fixing a low rent, nor can secondary evidence be adduced to prove the obligation. **M.** KANDURU VENKATA SESHAYYA *v.* ADAM SAIB **661**

——— ——— ——— ——— **s. 49**—*Evidence Act (I of 1872), s. 116—Unregistered deed, when admissible in evidence—Landlord and tenant—Estoppel.*

A document which simply proves that a document executed previously was only *benami* in its nature, is admissible in evidence even if unregistered, as it is not used as evidence of any transaction affecting land.

It is only the parties to a *benami* transaction that can be estopped from showing that a transaction is otherwise than what it really is.

Section 116 of the Evidence Act applies only to cases where the tenant has been put in possession by the landlord and not to cases where he has been in possession previously. **M.** YERRAGUNTLA SESHACHARLU *v.* MUKKUMALLA CHINNIAH **721**

Regulation XVII of 1806 **504**

——— ——— ——— ——— **s. 3**—"Certain date"—Tender **93**

Regulation V of 1812, s. 3 **540**

Religious endowment —*Appointment of additional trustees Temple Committee, power of—Trusts Act (II of 1882), s. 49—Civil Court, jurisdiction of.*

A power to appoint an additional trustee, when such appointment is not a variation of the scheme framed for the management of the temple, is necessarily vested in the temple committee as successor to the Board of Revenue. Such a power is properly incidental to the duties and responsibilities of the Committee and is inherent in their power of general superintendence.

Where no person is deprived of his free-hold there is no duty cast on the temple committee to show affirmatively that the appointment was for just and sufficient cause. The only limit to be imposed on the committee in the exercise of their discretion is by an analogy to section 49 of the Trusts Act.

A Civil Court has jurisdiction to decide if this discretionary power has been exercised reasonably and in good faith. **M.** THIRUVENGADATHA AIYANGAR *v.* PONNAPPAIYANGAR, 28 M. L. J. 209 **965**

Relinquishment. *See* HINDU LAW.

Rent-free tenure, *creation of—Law as to rent-free grants, applicability of—Contracts, valid and binding, overruled by law as to resumption of rent-free tenures—Oudh Rent Act (XXII of 1886), s. 107H—Under-proprietary rights, accrual of—"Land acquired, in perpetuity, by a written instrument and for a valuable consideration"—Purchaser of muafi land, status of—Interpretation of Statute—Legislature, intention of, to be discussed only in case of ambiguity in words of law.*

A rent-free tenure is created whenever the proprietor of a land creates rights by which the land can be held without payment of rent by one person whilst the liability for revenue rests on another, and the law as to rent-free grants applies to every case where such rights are created.

The law as to resumption of rent-free tenures overrules in view of Government interests contracts which would otherwise be perfectly valid and binding, and in considering their effect considerations other than those which apply to ordinary transactions must be taken into consideration.

A rent-free holding transferred by a sale-deed is a "land acquired, in perpetuity, by a written instrument and for a valuable consideration" within the meaning of section 107H of the Oudh Rent Act. The view that the acquisition by a written instrument and for valuable consideration must be from the original proprietor and not from a person who had acquired rights as a rent-free holder without payment of valuable consideration, is wrong.

Courts can discuss the intention of the Legislature only when there is any ambiguity in the words of the law. **U. P. B. R.** GHULAM SARWAR *v.* MUHAMMAD AMBAR ALI KHAN, 1 O. L. J. 325 **594**

Representative-in-interest—Landlord recognising subsequent purchaser as tenant—Subsequent purchaser whether representative **300**

Res judicata. *See* CIVIL PROCEDURE CODE, 1908, s. 11.

——— Admission of evidence, whether question of law or of jurisdiction—Exclusion of document from evidence—Document, nature of **204**

———*Defendant pleading that he is* benamidar—*Decree against him as real owner, whether binds real owner.*

If a litigation is carried on with the full knowledge and authority of the real owner and the latter does not wish to come forward, he is bound by the decree against his *benamidar*.

Where the defendant protested that she was a mere *benamidar* and she did not want to carry on the litigation which was brought against her though not in her capacity of a *benamidar*, but wanted her sons, who were the real owners, to be brought on the record as defendants in the case, and the plaintiffs in the case not only failed to take advantage of this information but contradicted it:

Held, that the decree passed in their favour could not bind the real owners, the sons of the defendant, and could not constitute *res judicata* so as to bar the subsequent suit brought by the real owner. **A.** MATA PRASAD *v.* RAM CHARAN SAHU, 12 A. L. J. 701; 36 A. 446 **381**

Res judicata—contd.

——— ——— ——— *Ejectment—Lease for certain period—Before expiry of period new lease executed—Condition to enhance rent on completion of certain repairs etc.—Suit for ejectment—Decision that rent could not be enhanced under second lease as no repairs had been made—Second suit for ejectment—Question whether tenant held in continuation of first lease or as trespasser—Decision in first suit not* res judicata *—Interpretation of second lease—Payment of additional rent for additional rooms built under new lease—Defendant not bound to occupy unless rooms duly completed.*

The premises in suit consisted of an original building and a new building which was erected some time in 1909. The defendant had been a tenant of the original building under a lease for three years from the 1st of April 1907 to 1st March 1910 at a rental of Rs. 110 per mensem. During the continuance of this lease in April 1909 the plaintiff, the proprietor of the premises, entered into a further contract in writing with the defendant to let him the said premises from the 1st of October 1909 to the 30th September 1917 at an enhanced rent of Rs. 170 per mensem. There were various conditions in this second lease as to completion of certain repairs and additions to the existing building.

In January 1910 the plaintiff sued to eject the defendant, but it was held that the defendant had not incurred any forfeiture of his rights to hold as a tenant, the condition for the payment of enhanced rent not having come into force, because the plaintiff had not carried out the additions agreed upon.

The plaintiff again sued for ejectment and recovery of rent and damages. In this suit the contention of the plaintiff was that the second lease never came into effect at all and that as the first lease determined on the 31st March 1910, the defendant was in possession as a trespasser and liable to ejectment. In support of this contention plaintiff relied on the judgment in the previous case. The defendant contended that the second lease was a mere modification and in continuation of the first, that by it the period fixed in the earlier lease was extended and that he was entitled to occupy the building at the original rent of Rs. 110 per mensem until the 30th September 1917:

Held, that all that was held in the previous case was that the defendant was not holding under the new lease so far as the condition as to enhanced rent was concerned; that there was no necessity in that case to come to any decision about the period for which the defendant was holding and there was no discussion of any sort upon the point; and that the question whether the defendant's tenancy determined on the 31st of March 1910, therefore, was not *res judicata*.

Held, further, that there was nothing whatever in the second lease to show that the term of eight years was to be dependent on the plaintiff carrying out the additions and repairs specified and that such could never have been the intention of the parties:

Held, also, that the defendant was not bound to occupy the new rooms erected in accordance with clause 8 of the second lease and to pay a rent for them until they had been duly completed. Moreover the defendant could hardly be expected to spend money on occupying and furnishing the rooms during the pendency of the previous case. **P.** ABDUL RAHMAN *v.* W. O'BRIEN, 257 P. L. R. 19'4 **357**

Res judicata—concld.

——— ——— ———Ex parte *decree—Status as reversioners declared—Alienation after decree—Status, whether* res judicata.

On the suit of reversioners a lease of property, which a Hindu widow had inherited from her son, was declared by a compromise decree to be inoperative beyond her life-time. So far as the lady was concerned that decree was *ex parte*. After the decree the widow mortgaged the property and when the reversioners challenged this mortgage by suit, the mortgagee pleaded that the plaintiffs were not reversioners:

Held, that the question of the status of the plaintiffs as next reversioners was *res judicata* and though the mortgagee was no party to the former suit, yet his mortgagor, the lady, under whom he claimed, was a party to it, and as he was a transferee from her after the decree, he was bound by the adjudication arrived at against her to the same extent as she was bound by it.

An *ex parte* decree is as much binding upon the parties as a decree based upon a judgment passed after contest between the parties. **A.** GANGA BISHAN *v.* MEHAR ILAHI KHAN, 12 A. L. J. 1011 **224**

——— ——— ——— *Former suit against* Taluq *President for cancellation of order—Second suit against private parties for declaration of title—Same land—Second suit, whether barred.*

Where the former suit of the plaintiff against the Union Chairman and the *Taluq* Board President for the cancellation of an order forbidding the erection of his warp on a land, failed on the ground of limitation, he is not prevented by the rule of *res judicata* from suing to establish his title to the land as against private parties and procuring the removal of the *koradus*. **M.** ARUNACHALA MUDALI *v.* GOVINDARAJA MUDALI, 1 L. W. 673 **434**

——— ——— ——— *Landlord and tenant—Tenant setting up adverse possession in Civil Court—Decision of Revenue Court no bar.*

Where an alleged tenant sets up in a Civil Court an independent title against his landlord the decision of a Revenue Court is not a bar to the same. **M.** POTINENI GANGAYYA *v.* RAJA VENKATA RAMAYYA **372**

——— ——— ——— Suit to enforce recurring charges—Certain properties not included in former suit—Amendment of plaint before decree—No notice to defendant — Decree absolute — Defendant given notice—Second suit including those properties **284**

Restitution of conjugal rights —Legal cruelty, what amounts to **728**

——— ——— ——— ——— Muhammadan Law — Apprehension of cruelty and ill-treatment—Decree whether proper **213**

——— ——— ———Nikah—Iddat — *Difference between widow and divorced woman—Want of consent of divorced woman, whether invalidates marriage.*

Iddat must be kept if the first marriage is terminated by death of [illegible] woman whose [illegible] *iddat* is not

Where

as [illegible]

Restitution of conjugal rights—concld.

tantamount to consent. But in case of her not being virgin her consent must be expressed in person. A divorced woman whose marriage has not been consummated is a virgin for the purposes of such consent. **P.** JAINAN v. RULIA, 50 P. W. R. 1914; 145 P. L. R. 1914 **43**

Resumption of muafi—Settlement with particular person does not alter position of settlee with regard to property **697**

Retracted confession. *See* CONFESSION.

Re-trial. *See* PRACTICE.

Revenue Officers, value and weight of proceedings of Estoppel **309**

Reversioners. *See* HINDU LAW.

——— Surrender of right to one reversioner—Right of other reversioners **377**

Review Order granting review, when appealable **903**

Revision (Civil). *See* CIVIL PROCEDURE CODE, s. 115.

——— Arbitrator appointed without agreement of parties—Decree based on award—Revision **583**

——— Error of law, whether High Court competent to interfere—Remedy **592**

——— Grounds Broad principle—Injustice or failure of justice—Perversity in findings—Serious misapplication of law of evidence **867**

——— Jurisdiction — Workmen's breach of contract **979**

——— Remand by Judicial Commissioner of Chota Nagpore **899**

——— Order of Court—Irregular **229**

——— Small Cause Court assuming facts without evidence and not receiving written pleas—Landlord and tenant—House fallen in earthquake—Non-liability of tenant for rent **26**

——— Wrong decision on point of law, whether ground for **647**

——— **(Criminal).** *See* CRIMINAL PROCEDURE CODE, s. 435.

——— *Concurrent findings of two Courts—Evidence not convincing—Criminal Procedure Code (Act V of 1898), s. 439.*

Where the complainant was an enemy of the accused and other circumstances also made the case against the accused doubtful he was acquitted despite the concurrent findings of the lower Courts. **P.** RATTU RAM v. EMPEROR, 28 P. W. R. 1914 Cr.; 168 P. L. R. 1914; 15 Cr. L. J. 591 **343**

——— Magistrate's order—Finality of jurisdiction **324**

…or section 145, …—High Court, **997**

…—Con… can

Revocation—Probate—Fraud and collusion **37**

——— Trust **428**

Sale, *auction—Deposit of purchase-money—Decree-holder, whether bound to withdraw before confirmation of sale—Interest, up to what date allowable.*

As a decree-holder is not bound to withdraw the money deposited by an auction-purchaser before the sale is confirmed, he is entitled to interest on the decretal amount up to the date of confirmation. **C.** UPENDRA NATH CHOWDHURY v. BHUDEB CHANDRA ROY CHOWDHURY **859**

——— **certificate** not obtained—Auction-purchaser, title of, not vitiated **8**

——— **or mortgage** *Question of intention—Transfer of Property Act (IV of 1882), s. 58 (c) Regulation XVII of 1806, s. 3—"Certain date"—Tender—Tender, if denied, cannot be questioned as insufficient.*

Whether a particular transaction is an out and out sale or a mortgage by conditional sale depends on the intention of parties to be gathered from circumstances.

Regulation XVII of 1806 and section 58 (*c*) of the Transfer of Property Act both make time the essence of a mortgage by conditional sale and there is no difference between the two laws.

The words "on a certain date" in section 58 (*c*) do not imply that the mortgagor cannot make a tender before that date. The "certain date" means only the last date.

A person who denies that any tender was made to him cannot question its sufficiency or validity. **C.** MAHOMED MOZAFFER ALI v. ASRAF ALI **93**

Sanction to prosecute. *See* CRIMINAL PROCEDURE CODE, s. 195.

——— Jurisdiction of Sessions Judge to set aside sanction where lower Court not subordinate **524**

——— Revision—Conviction under section 199, Indian Penal Code, whether can be converted under section 182 **515**

——— Sanction granted in appeal Further appeal to High Court, whether lies **528**

Sapindas. *See* HINDU LAW.

Second trial—Correction of Board's order, whether can be challenged **323**

Service of notice. *See* CIVIL PROCEDURE CODE, O. 5.

Sessions trial—Practice—Cross-examination of witnesses—Application for postponement, refusal of—Prejudice—Re-trial **348**

Set-off—Cross-debt—Payment of Court-fee **375**

——, plea of—Written statement necessary **361**

——— Pro-notes, suit on—Value of building work done **560**

Settlement decree, interpretation of **743**

Shahjog Hundi. *See* HUNDI.

Sind Incumbered Estate Act (XX of 1881), s. 28 949

Sohag grant. *See* CUSTOM.

Sonthal Parganas Act (XXXVII of 1885), s. 2 451

Sonthal Parganas Justice Regulation (Act V of 1893), Part 2 451

Sonthal Parganas Settlement Regulation (III of 1872), ss. 5, 6 451

Specific performance, suit for 973

Specific Relief Act (I of 1677), s. 9—*Suit for possession—Prayer for mesne profits, how far inconsistent.*

The mere fact that mesne profits cannot be recovered in a suit under section 9 cannot in any way affect the Court's ability to grant restoration to possession. It can reject the one prayer and grant the other without immediate or probable inconsistency. **M.** YALAMANCHILI PURNAYYA *v.* PAMU RAMASWAMY, 16 M. L. T. 190 802

——— **s. 21** 220

——— **s. 27** - *Specific performance, suit for - Contract of sale to plaintiff - Subsequent sale to defendant - Notice of prior contract after execution of sale-deed and before registration—Consideration for sale, adjustment prior of mortgage-debt 'Paid his money in good faith', meaning of—Decree, proper, form of - Civil Procedure Code (Act V of 1908), O. XLI, r. 33.*

The words 'paid his money in good faith' in section 27 of the Specific Relief Act I of 1877 do not cover the case of a person who, after the execution of his conveyance and before its registration, has notice of a prior contract to sell the property to a third person and who does not pay any cash for his sale but takes it in adjustment of a prior outstanding mortgage in his favour.

The correct decree to be passed in such a case is to direct both the vendor and the subsequent purchaser to execute a proper sale-deed to the plaintiff. **M.** GUDUR RANGA REDDI *v.* GUNDALA PITCHI REDDI, 1 L. W. 879 973

——— **s. 42** 810

——— **s. 42**—Declaration discretionary, mere question of law, whether justifies grant of declaration 603

——— **s. 42** — Decree purely declaratory and incapable of execution, not to be passed 908

——— **s. 42**—*Possession for less than twelve years — Declaration of title—Penal assessment—Not to be levied unless land communal.*

Unless the land sought to be assessed is shown to be communal land, the Secretary of State would have no right to collect penal assessment from a person in possession thereof simply on the ground that he is not the legal owner of the land, but somebody else.

Per *Abdur Rahim, J.* (*Ayling, J.*, dubitante).—In a suit for declaration of title under section 42 of the Specific Relief Act if the plaintiff has been in possession even though for less than 12 years, he is entitled to a declaration that he is in lawful possession as against a wrong-doer who interferes with his possession. **M.** AYYAPARAJU *v.* SECRETARY OF STATE, 37 M. 298 894

——— **s. 42**—*Suit for declaration—Right to kill one's own cattle—Cause of action—Individual right, suit for declaration of—Joinder of persons with similar right, if necessary—Custom, essentials of—Forbearance.*

Where evidence proves that the defendant has all along denied and has all along been interested in denying the plaintiff's right, the plaintiff has a cause of action against such defendant within the meaning of section 42 of the Specific Relief Act, 1877.

Where the plaintiff claims an individual right of his own, he is entitled to sue for a declaration of it, whether other persons who have a similar right join him or not.

Mere non-exercise of a right will not defeat it.

Where, therefore, evidence shows that circumstances and practice have introduced among Muhammadans a certain amount of abstention from cattle-killing which has not in fact been practised as constantly and openly as in a purely Muhammadan village but in many cases with precautions for secrecy out of consideration for the feelings of the *Malik* and the Hindus, it cannot be said that such abstention was so universal or certain as to have ripened into the custom contended for.

There is no analogy between suits for damages for wrong done and suits for declaration of right against persons who deny those rights in which no compensation is sought. In the latter cases the denial may clearly be perfectly honest and may be made in perfectly good faith, but that would not affect the rights of the person whose right was denied. **C.** MAHADEO PRASAD *v.* NABI BUKHSH 104

Stridhanam. *See* HINDU LAW.

Succession. *See* HINDU LAW.

Succession Act (X of 1865), s. 250 48

Succession Certificate Act (VII of 1889), s. 4 Promissory note in adoptive father's name—Suit by adopted son Whether adopted son can sue on note without succession certificate 206

——— **ss. 16, 18**—*Suit to have succession certificate and decree based thereon set aside, whether maintainable—Certificate, how revocable.*

A succession certificate is conclusive as against the debtors under section 16 of the Succession Certificate Act, and can be revoked only by the District Court under section 18 of the Act. No suit will lie to have a certificate and the decree based on it set aside on the mere ground that the certificate was obtained by the use of false evidence. **A.** RUPAN BIBI *v.* BHAGELU LAL, 12 A. L. J. 524; 36 A. 423 320

——— **s. 18** 320

Suddharna bond. *See* MORTGAGE.

Suit against Ruling Chief—Consent of Governor-General in Council 271

——— against trespasser—Plaintiff to prove his own title 901

Suit - contd.

——— by adopted son —Adopted son, whether can sue on promissory note without succession certificate **206**

——— *by reversioner on death of Hindu widow—Defence, legal necessity—Loan taken to pay rent to superior landlord—Legal necessity—Intention.*

A person who claims title under an alienation from a Hindu widow must prove that there was legal necessity for it, that is, such a pressure on the estate at the time the loan was taken or alienation made as justified her act. He can also protect himself by proof of *bona fide* inquiry and if the fact of such inquiry is established, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his title.

The true rule is that the creditor, to protect himself, where he is not shown to have made a *bona fide* inquiry, must prove that there was an actual pressure on the estate.

A widow is at liberty to bind herself or to bind the estate in her hands. Whether in a particular case she did the one or the other would be a question of intention to be gathered from the statement, if any, in the deed, or from the surrounding circumstances. **C.** RAMESWAR MANDAL *v.* PROVABATI DEBI, 20 C. L. J. 23; 19 C. W. N. 313 **84**

——— *for claim either from agent or principal—Decree against one—Plaintiff, whether entitled to claim decree against other.*

The plaintiff sued to recover moneys due to him for the printing of certain papers which he had printed on an order given by one *C* for or on behalf of one *M* and asked for a decree against one or other only of these two persons. The first Court decreed the suit against *C*. The plaintiff appealed against *M* and got a decree against him. *M* applied in revision:

Held, that the decree obtained against *C* exhausted the plaintiff's claim under the relief and that he could not get a decree against *M*. **A.** MANGALI PRASAD SINGH & Co. *v.* RAKHPAT SAHAI **132**

——— for declaration that decree has been satisfied, whether maintainable **642**

——— Right to kill one's own cattle —Cause of action **104**

——— *of title to hold land rent-free—Jurisdiction of Civil and Revenue Courts.*

It is not competent to a Civil Court to make a declaration that a person who has failed to prove that he is the proprietor of the land, is entitled to hold it rent-free. **A.** MOHAMMAD ABDUL GAFOOR *v.* ARTHUR BARBAR, 12 A. L. J. 805 **206**

——— for possession—Decree, form of **198**

——— ——— ——— of land free of house and trees—Claim for removal of trees **701**

——— ——— ——— by tenant against landlord and another person claiming to be tenant—Value of subject-matter—Court-fees **507**

——— ——— ——— under section 9, Specific Relief Act—Prayer for mesne profits, how far inconsistent **802**

——— for refund of money paid as octroi—Limitation **943**

Suit- concld.

——— in name of firm—Firm must consist of two or more persons—Plaint, whether can be signed by one partner **131**

——— to have succession certificate and decree based thereon set aside whether maintainable - Certificate how revocable **320**

Suits Valuation Act (VII of 1887), ss. 3 and 4 and rules—*Declaratory suit by occupancy tenant against landlord that latter was not entitled to recover from him more than a certain share of produce—Jurisdictional value—Fifteen times land revenue.*

The plaintiffs, occupancy tenants, sued their landlords for a declaration that the latter are not entitled to recover from them by way of rent more than 1/16th share of produce known as *lichh*:

Held, that under the provisions of sections 3 and 4 of the Suits Valuation Act and rules, the jurisdictional value of the suit was clearly 15 times the land revenue payable for the land. **P.** JAMAL *v.* QADIR BAKHSH, 54 P. R. 1914; 238 P. L. R. 1914; 153 P. W. R. 1914 **437**

——— ——— ——— **s. 4** **437**

——— ——— ——— **s. 8** **975**

——— ——— ——— **s. 8** - Suit for declaratory and consequential relief **375**

——— ——— ——— **s. 8** - Valuation of suit - Jurisdiction—Court-fees—Declaration and possession, suit for **683**

——— ——— ——— **s. 11** — Jurisdiction — Objection as to **25**

——— , withdrawal of, with permission to bring fresh suit - Sufficient ground **175**

Taluq, purchaser of, right of **741**

Taluqdari property — *Question of law—Affidavit on question of law, weight of—Injunction, temporary, grant of—Sale in execution, stay of—Civil Procedure Code (Act V of 1908), O. XXXIX, r. 1.*

The question whether a certain property is "*taluqdari* property" is principally a question of law.

Hence, an affidavit to the effect that a property is "*taluqdari* property" carries no weight as it is simply an interested party's declaration on a question of law.

The sons of a judgment-debtor filed a suit for declaration that the property notified for sale was their joint family property and applied for a temporary injunction to stay the sale. The decree-holders resisted the application and filed an affidavit to the effect that the property was "*taluqdari* property" belonging absolutely to the judgment-debtor. A counter-affidavit could not, owing to some difficulties, be filed on behalf of the sons:

Held, that under the above circumstances an injunction might properly be granted. **O.** NARINDRA BAHADUR SINGH *v.* ABDUL HAQ **9**

Temple—*Trustees*—Inam *granted to vritikars to recite the* Vedas *by* zemindar *and confirmed by Government—Power of resumption in Government*

Temple-concld.

alone—Powers of trustees-Burden of proving that minor, female, or person not learned in Vedas cannot perform service of reciting the Vedas.

Where the lands in question were granted by a *zemindar* to certain *vritikars* for reciting the *Vedas* in a temple and the *inam* was confirmed by the British Government the right of resumption is in Government, and the trustees of the temple have no right to take possession of the lands.

The question whether in the case of such a grant the trustees would have the right to dismiss the *vritikars*, is one to be tried and not to be decided on any assumption.

There is no basis for the assumption that a minor, a female, or a person unlearned in the *Vedas* would lose the right to the service (of reciting the *Vedas*) in the temple; the onus would be on the *dharmkartas* to prove any such disqualification **M.** TANGIRALA CHIRANJIVI *v.* RAJA MANIKYA RAO RAJYA, 27 M. L. J. 179 **283**

——— **trusteeship**—*Hereditary right—Evidence—Descent from father to son conclusive when supported by corroborative evidence.*

The descent of a temple trusteeship from father to son when supported by corroborative evidence establishes an hereditary right to the office. **M.** ANANTHANARAYANA AIYAR *v.* ATHIMUTHU AIYAR, (.914) M. W. N 385 **74**

Toddy-vendor. *See* MADRAS ABKARI ACT.

Trade Mark. *See* MERCHANDISE MARKS ACT.

Transfer of case. *See* CIVIL PROCEDURE CODE, s. 24.

——— ——— ——— Convenient place of trial **723**

Transfer from one Court to another—Suit capable of institution in two Courts—Evidence of defendant available outside jurisdiction, whether sufficient reason **874**

Transfer of non-transferable occupancyh-olding creates no interest as against landlord—Purchased by one of landlords, effect of **546**

Transfer of Property Act (IV of 1882), s. 2 **401**

——— ——— ——— **ss. 4, 54**—*Registration Act (XVI of 1908), ss. 48, 49—Usufructuary mortgage of immoveable property below Rs. 100 in value—Oral sale to mortgagee—Delivery, if necessary—Subsequent sale under registered sale-deed to third party—Priority—Sale-deeds of immoveable properties, whether compulsorily registrable—Unregistered sale-deed, whether admissible to prove nature of possession held thereunder—Adverse possession, title by—Transaction affecting immoveable property.*

In case of sale of immoveable property both section 48 of the Registration Act and section 54 of the Transfer of Property Act require delivery of possession to the vendee.

In cases of oral sale of immoveable property below Rs. 100 in value the mere fact that the vendee is already in possession of the property which is the subject of the sale, does not invalidate the same, provided the vendor has, by appropriate acts or declarations, converted the possession of the vendee (which was that of a mortgagee in the present case) into that of a purchaser.

Transfer of Property Act—contd.

There is no reason to construe section 54 of the Transfer of Property Act as requiring all sales of immoveable property of value less than Rs. 100 to be only by a registered instrument, in cases where the vendee is already in possession as tenant or mortgagee.

The effect of sections 4 and 54 of the Transfer of Property Act is to make all *sale-deeds* of immoveable property compulsorily registrable, irrespective of the value of the property comprised therein.

An unregistered sale-deed, which is required by law to be registered, is not admissible in evidence even for the purpose of showing the nature of possession held thereunder.

So far as the Madras Presidency is concerned, the establishment of a title by adverse possession is a transaction affecting immoveable property. **M.** MUTHUKARUPPAN SAMBAN *v.* MUTHU SAMBAN, 1 L. W. 754; 16 M. L. T. 344; (1914) M. W. N. 768; 27 M. L. J. 497 **772**

——— ——— ——— **s. 41** **725**

——— ——— ——— **s. 41**—*Bona fide* purchaser for value **810**

——— ——— **s. 41**—*Ostensible owner—Finding of fact—Second appeal.*

A manager on behalf of others cannot be treated as its ostensible owner within the meaning of section 41 of the Transfer of Property Act. **A.** JAMNA DAS *v.* UMA SHANKER, 12 A. L. J. 411; 36 A. 308 **158**

——— ——— ——— **s. 44** **401**

——— ——— ——— **s. 52** **133**

——— ——— ——— **s. 52**—*Lis pendens*—Sale of attached property after order or claim—Petition before suit by unsuccessful party **11**

——— ——— ——— ——— **s. 53**—Fraudulent transfer—Fraudulent alienation and acquisition, distinction between **123**

——— ——— ——— ——— **s. 53**—*Fraudulent transfer—Preference given to one creditor over another, effect of*—Data *for determining intention of parties and nature of interest sought to be created.*

The mere fact that preference has been given to one creditor over the other does not in itself render the transaction in favour of the preferred creditor voidable under section 53 of the Transfer of Property Act, provided that the transferee is innocent of the fraud intended by his debtor.

The motive with which a *benami* purchase is entered into, the position of the parties to the transaction and their relation to one another, the possession of the property concerned and of the title-deeds relating thereto, the source and adequacy of the purchase-money and the previous and subsequent conduct of the parties to the transaction afford valuable *data* for determining the intention of the parties and the nature of the interest, if any, sought to be created. **O.** AHMADI BEGAM *v.* RAJA UDIT NARAIN SINGH, 17 O. C. 173 **164**

——— ——— ——— **s. 54** **772**

——— ——— ——— **s. 55 (4) (b)**—Claim for recovery of unpaid purchase-money—Limitation—Vendor's lien—Charge under section 55 (4) (*b*) of Transfer of Property Act, whether enforceable against transferees from vendees **208**

Transfer of Property Act—contd.

——— ——— ——— ——— s. 55 (2)—*Limitation Act (IX of 1908), Sch. I, Arts. 62, 97, 116—Breach of covenant for title—Suit for compensation.*

In all registered conveyances executed after the Transfer of Property Act came into force a covenant for title is implied by section 55, clause (2), of that Act, and the registered conveyance should be read as if it expressly embodied that covenant and the breach of that covenant is the breach of a contract in writing registered within the meaning of Article 116, Schedule I, of the Limitation Act.

The limitation, therefore, for a suit to recover compensation for such a breach is six years under Article 116 of Schedule I of the Limitation Act and not merely three years either under Article 62 or 97 of the Act. **M.** ARUNACHALA AIYAR v. RAMASAMI AIYAR, 1 L. W. 849; 27 M. L. J 517; 16 M L. T. 397 **618**

——— ——— ——— s. 55, cl. (4) - *Unpaid purchase-money—Vendor's lien on purchase-money deposited by pre-emptor - Money withdrawn by vendee—Suit by vendor to recover - Defence - Pre-emptor's suit to recover from vendee after paying vendor, whether maintainable.*

A vendor left a part of the price with the vendee for payment to a creditor of the former, but before the creditor was paid the sale was pre-empted and the whole of the pre-emption money was received by the vendee without the vendor or pre-emptor taking exception to this. Then the vendor's creditor recovered his debt from the vendor by suit and the latter in his turn sued the vendee as well as the pre-emptor for recovery of the unpaid purchase-money under section 55, clause (4), of the Transfer of Property Act. The vendee appeared, but the pre-emptor did not and the Court passed a decree for sale of the pre-empted property to enforce the alleged statutory charge for the unpaid purchase-money. Upon this the pre-emptor paid the amount of the decree in order to save the property and sued the vendee for the amount:

Held, that the pre-emptor's suit ought to fail inasmuch as had he defended the vendor's suit, no decree would have been passed against him. **A.** MAHADEO SAHU v. MAHIPAL RAI, 12 A. L. J. 921 **939**

——— ——— ——— s. 56 118

——— ——— ——— s. 58 (c) 93

——— ——— ——— s. 67 (d) - *Severance of mortgage-debt—Previous suit by co-mortgagee for his share of debt—Subsequent suit by other co-mortgagee for his share of debt not barred.*

A mortgage-debt can be said to be severed with the consent of the mortgagor under section 67 (*d*) of the Transfer of Property Act, where in a suit brought by one of the co-mortgagees for his share of the debt in which the mortgagor was also a party, the Court passes a decree for sale to recover his share of the debt. On the basis of such severance, another co-mortgagee can legally maintain a suit to recover his share of the mortgage-debt. **M.** VIJAYA BHUSHANAMMAL v. EVALAPPA MUDALIAR **91**

——— ——— ——— s. 76 (c) 797

——— ——— ——— s. 76 (c)—*Mortgagee's duty to pay enhanced Government revenue—Contract to contrary—Construction of deed of mortgage.*

Transfer of Property Act—contd.

Under section 76 (*c*) of the Transfer of Property Act a mortgagee is bound, in the absence of a contract to the contrary, to pay the Government revenue

Where a mortgage-deed provided that out of the produce of the properties "60 *paras* 15 *nazhis* (of paddy is) allowed for the Government revenue of 60 *fanams* 4 *rasams*" due on the land, followed by an appropriation of the balance of the total produce estimated at a specified quantity to interest on the mortgage amount at a specified rate, and the assessment on the lands was subsequently enhanced:

Held, that this constituted a contract to the contrary as referred to in section 76 (*c* of the Transfer of Property Act and that the mortgagee was not bound to pay the amount by which the revenue was enhanced. **M.** PANAMBATTA KALATHIL KUNCHU MENON v. KALATHINPADIKIL NARAYANAN EZHUTESSAN, 16 M. L. T. 317 **641**

——— ——— ——— s. 81 118

——— ——— ——— ——— ss. 83, 84—*Deposit by mortgagor of mortgage money in Court—Cessation of interest - Tender before action and tender after action—Tender and deposit, distinction between.*

A mortgagor deposited in Court, under section 83 of the Transfer of Property Act, the amount due upon the mortgage, but subsequently withdrew it and tendered the same in Court at the hearing of the suit brought on the mortgage.

That a deposit so made is not such a *"deposit"* within the meaning of section 84 of the Transfer of Property Act as to make interest cease to run from the date of the deposit.

Per *Tyabji, J.* -Out of the two conditions essential to make interest cease to run under section 84 of the Transfer of Property Act, (1) that there should be a deposit in Court, (2) that the mortgagor should have done all in his power to make the mortgagee draw money from Court, the mortgagor having satisfied in this case the latter condition was entitled to claim exemption from payment of interest. It is not necessary that the mortgage-money should always remain in Court in deposit. it is enough if the mortgagee is, otherwise, in a position to draw money from Court

The rule of English Law, that a tender before action followed up by a tender in Court after action, is a legal tender, applies also to India even in cases of deposit of mortgage-money under section 83 of the Transfer of Property Act. **M.** THEVARAYA REDDY v. VENKATACHALA PANDITHAN, 16 M L. T. 131; 1 L. W. 395 **96**

——— ——— ——— ——— s. 83—*Deposit of money—Mortgagee drawing money—Mortgagor, whether can object.*

When a mortgagor deposits the mortgage-money into Court under section 83 of the Transfer of Property Act, it is no longer his, and he cannot object to the mortgagee drawing the same from the Court. **M.** MOTAVENGATTILL v. KEZATATH KRISHNA MENON **369**

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——— ——— ——— **s. 108 (a)**—*Limitation Act (IX of 1908), Sch. I, Art. 115 - Lessor and lessee —Breach of covenant for quiet enjoyment—Disturbance by trespasser, whether breach—Trespasser acting under lessor's instructions — Breach—Deposit money, suit to recover—Limitation.*

A covenant for quiet enjoyment, as between lessor and lessee, even in its more extended form, is only a covenant against disturbance by somebody claiming under a lawful title, and does not extend to disturbance by trespasser.

Section 108 (*c*) of the Transfer of Property Act, though made inapplicable to agricultural leases, can still be made applicable to such leases, as embodying the rules of equity, justice and good conscience.

Where a trespasser, acting under instructions from the lessors themselves, interferes with the peaceful enjoyment by the lessees and harvests crops on the land and the lessors themselves accept delivery of such crops from him, there is a clear breach of the covenant for quiet enjoyment, and the lessors are not entitled to recover anything from the lessees for the period during which they were so kept out of enjoyment.

A suit to recover deposit amount payable on the execution of lease by the lessees is a suit to recover compensation for breach of contract within the meaning of Article 115 of the Limitation Act, Schedule I, and such a suit must be brought within three years from the date of the breach. **M.** Srinivasa Aiyangar *v.* Rangasami Aiyangar, 1 L. W. 858 **812**

——— ——— ——— **s. 111**—*Forfeiture of lease Denial of landlord's title—Overt act not essential Setting up third person's title.*

Where a tenant merely sets up the title of a third person in a suit to which the landlord is not a party, and does not deny payment of rent to him before suit, there is no such denial of the landlord's title as would entail the forfeiture of the lease.

A right in the landlord to eject should not be extended in this country further than the extent to which by long established precedents he has become so entitled.

Where a tenant merely disputes the extent of the landlord's interest, it is not a denial of his title and no forfeiture of the lease is thereby incurred. **M.** Abbakka Shetthi *v.* Seshamma, 16 M. L. T. 442, (1914) M. W. N. 9 5 **944**

——— **s. 114**—*Forfeiture of lease—Sub-lessee's position.*

Where a lessee is permitted by law to transfer, mortgage or sub-lease his rights, the transferee of the rights must be deemed to stand in the shoes of the transferor for the purpose of making payment of the rent in arrears and costs of the suit, under section 114 of Act IV of 1882, and he is as much entitled to be relieved of the forfeiture as the original tenant. **A.** Ahmad Husain *v.* Riaz Ahmad, 12 A. L. J 1085 **186**

——— ——— ——— **s. 123**—*Registration—Partition by private arrangement.*

A partition of joint family property can be effected by private arrangement without an instrument in writing. The provisions of the Transfer of Property Act do not apply to such a partition. **L. B.** Ma Shin Nyun *v.* Maung U **498**

Transfer by tenant-at-will—Transfer illegal—Sub-tenant and transferee, relation between **6**

Treasure Trove Act (VI of 1878), ss. 4, 20—*"Finder", meaning of—Labourer, whether "finder"—Finder taking no share of treasure, liability of—Possession taken by employer—Impossible act—Criminal liability.*

The petitioners discovered a treasure buried in the ground while they were cutting a tree under the orders and in the presence of their employer. The latter at once assumed control over the treasure of which the former obtained no share at all:

Held, that even though the petitioners found the treasure in the course of the performance of labour for an employer, they were "finders" of it within the meaning of section 4 of the Treasure Trove Act.

Obiter.—Nobody can be convicted under the criminal law for not doing an impossible act unless the terms and intention of the Statute are absolutely clear and inflict a penalty even on an innocent person. **M.** Mala Naicken, *In re*, 27 M. L. J. 477; 15 Cr. L. J. 632 **640**

——— ——— **s. 20** **640**

Trespass—*Improvements—Compensation—Building constructed upon land of another—Suit for possession—Decree, form of.*

No one can, by merely trespassing upon the land of another and constructing costly buildings upon it, claim a right to retain its possession. He has no right to compel the real owner to receive compensation for his land instead of the land itself.

In a case like this the decree should reserve leave to the trespasser-defendant to remove his materials within a time to be fixed by the Court, failing which the plaintiff, the true owner, should be put in possession of his land with or without the buildings, which he may pull down at his pleasure. **A.** Ganga Din *v.* Jagat Tiwari, 12 A. L. J. 1026 **198**

Trust. *See* Public Charities Act.

——— *Dedication of property, what constitutes — Share of income, whether can be dedicated —Charge on family property—Evidence.*

In order to constitute a dedication, it is not necessary that any specific property should be set apart. A share of the income derivable from the family properties may be dedicated.

Where, therefore, a family owns a temple and appoints *poojaris* to carry on worship in the temple and spends a sufficient portion of the income from the family lands, the dedication is complete and the whole family property remains charged with the payment of the amount actually expended for carrying on the worship in the temple. **M.** Nagar Damodhara Shanghog *v.* Ramappaya **399**

——— Revocable trust—Valid, how far **480**

——— *Revocation—Trusts Act (II of 1882), s 78.*

A valid trust once created is irrevocable by any subsequent act of the author of the trust. **M.** Krishnasawmy Pillai *v.* Kothandarama Naicken, (1914) M. W. N. 703; 27 M. L. J. 582; 16 M. L. T. 513 **428**

Trusts Act (II of 1882), s. 49 **965**

——— ——— **s. 78** **428**

Trustees—Appointment of new trustees **985**

——— —— Temple—*Inam* granted to *vritikars* to recite the *Vedas* by *zemindar* and confirmed by Government—Power of resumption in Government alone—Powers of trustees—Burden of proving that minor, female, or person not learned in *Vedas* cannot perform service of reciting the *Vedas* **283**

Trustee and cestui que trust—Re-opening of account settled between **218**

Under-proprietary rights, *claim for—"Kabiz darmiani," meaning of—Civil Court, power of, to interpret settlement decree—Alienation of absolute estate, condition in restraint of, null and void—Transfer, absolute right of—Compromise, deed of, interpretation of—Settlement decree, interpretation of.*

The words "*kabiz darmiani*" mean an under-proprietor in the sense in which it is used in the Oudh Rent Acts (XIX of 1868 and XXII of 1886).

A Civil Court has power to interpret a Settlement decree so as to make it comprehensible.

A condition in restraint of alienation of an absolute estate even although it is contained in a Settlement decree is null and void, and in spite of the insertion of such addition, such a Settlement decree conveys an absolute right of transfer.

A deed of compromise filed in a case before the Settlement Court stated that the plaintiff and his heirs should take in perpetuity into their enjoyment the profits of a certain village and that the defendant *Talukdar* should have no right to resume possession or enhance the rent, and it further requested that a decree for "*kabiz darmiani*" rights should be given. Thereupon the Settlement Officer passed a decree saying that the plaintiff had under-proprietary rights in the village without rights of transfer and subject to the conditions mentioned in the deed of compromise:

Held, that the deed of compromise conferred upon the plaintiff absolute under-proprietary rights in the village.

Held, further, that the plaintiff had a complete right to transfer the whole or any portion of his under-proprietary rights in the village in spite of the Settlement decree containing the clause forbidding him to do so. **O.** LAL SRIPAT SINGH *v.* LAL BASANT SINGH, 1 O. L. J. 421 **743**

Under-proprietor, *definition, status and rights of—Re-entry, right of proprietor as to, effect of—Proprietor and under-proprietor, distinction between—Oudh Rent Act (XXII of 1886), s 3 (8)—Lease, interpretation of.*

The right of an under-proprietor is not exhaustively defined in section 3 (8) of the Oudh Rent Act.

In addition to the elements of heritability and transferability there is one essential factor in under-proprietary rights, *viz.*, that in no circumstances is the proprietor afforded a right of re-entry against the under-proprietor.

Where an under-proprietary right exists the position of the under-proprietor is that he holds rights almost as great as those of the superior proprietor, subject to the limitation that he has to pay the land revenue and the cesses and usually something by way of *malikana* to the superior proprietor,

Under-proprietor—concld.

Where a lease imposed upon the lessee certain conditions to be fulfilled by him and provided for the lessor resuming the lease-hold in case the lessee failed to satisfy any of those conditions:

Held, that the lease did not confer an under-proprietary right on the lessee. **O.** RAMESHAR BAKHSH SINGH *v.* SANKATA BAKHSH SINGH, 1 O. L. J. 389 **675**

Undue influence. *See* CONTRACT ACT, s. 16.

U. P. Court of Wards Act (III of 1899), *rules made thereunder—District Officer or Special Manager, power of—Grant of land for hundred years for planting grove.*

There is nothing in the Court of Wards Act or in the rules made thereunder, which gives any powers to District Officers or to a Special Manage to make any grant of land out of an estate unde the management of the Court of Wards for a hundred years for the planting of a grove. **O.** RAM NATH *v.* BINDESHURI PRASAD SINGH, 17 O. C. 291 **399**

——— —— **s. 48**—*Attachment of property in execution of decree—Objection—Suit—Notice.*

A Court of Wards attached certain property in execution of a decree. The judgment-debtors objected to the attachment and sued for a declaration of their right without giving any notice to the Court of Wards under section 48 to the Court of Wards Act:

Held, that, as the suit did not relate to the person or property of the Ward, no notice to the Court of Wards was necessary. **A.** LAL SINGH *v.* COLLECTOR OF ETAH, 12 A. L. J. 485; 36 A. 331 **398**

——— —— **s. 55**—*Application for execution of decree against person of ward, whether maintainable—Procedure—Vested right.*

An application for execution of a decree against the person of a Ward of Court after the U. P. Court of Wards Act, 1912, came into force, is barred by section 55 of the Act.

As no one has a vested right in an older form of procedure prescribed in a previous Act, the rules relating to the new procedure prescribed in the new Act must be strictly followed. **O.** SANKATHA PRASAD *v.* RAJA KRISHNA DAT SING **668**

U. P. Land Revenue Act (III of 1901), s. 32 (d)—*Land held revenue-free, whether part of mahal—Finding—Second appeal.*

Section 32 *(d)* of the Land Revenue Act shows that there may be in a *mahal* persons holding land revenue-free and the land so held yet forms part of the *mahal*. Where the Government holds a land revenue-free in a *mahal* the land thereby does not cease to be a part of the *mahal*.

The finding of the lower Appellate Court that as a plot of land was held revenue-free by the Government it ceased to be a part of the *mahal*, is a mixed finding of fact and law and can be interefered with in second appeal. **A.** ABDUL RAHIM KHAN *v.* AHMAD KHAN, 12 A. L. J. 303; 36 A. 231 **162**

——— —— **ss. 33 and 34**—*Mutation of names—Possession must be by succession or transfer—*Benamidar's *name recorded in annual registers—Real purchaser, though in possession, not entitled to mutation on* benamidar's *death—Mutation granted under section not concerned with*

U. P. Land Revenue Act—contd.

mutation, illegal · Heirs of deceased proprietor, not in possession, when entitled to mutation.

Section 34 of the U. P. Land Revenue Act does not provide for the record of possession of a proprietary right, unless the possession is obtained by succession or transfer.

Hence the real purchasers who allow the name of the *benamidar* to be maintained in the annual registers for a long time without any objection, cannot on the latter's death claim mutation under section 34 of the U. P. Land Revenue Act on the ground that the entry of the *benamidar* is fictitious and that they have actually been in proprietary possession.

The case of the real purchasers is not covered even by section 33 of the U. P. Land Revenue Act, as no error is made in the entry.

Where a mutation is applied for under the terms of one section (*i. e.*, section 34), it is illegal to grant it under the terms of another section (*e. g.*, section 33) not concerned with mutation.

The heirs of a deceased proprietor, although not in possession, are entitled to mutation as against those persons who have no lawful possession under section 34 of the U. P. Land Revenue Act and who possibly may be found to have no legal possession at all. **U. P. B. R.** MUHAMMAD MOHSIN *v.* MUHAMMAD HADI, 1 O. L. J. 452 **827**

——— **s. 34** — Mutation of names —Possession to be by virtue of succession **758**

——— **s. 79**—Board's Circulars, 2-I, r. 2, foot-note **644**

——— **s. 111** **316**

——— **s. 118,** *applicability of —Suit for possession of land allotted in partition—Whether Courts should wait for result of application to Revenue Court.*

Where an application is made to the Collector under section 118 of the Land Revenue Act, the Civil Courts are not bound to await the result of the application or to dismiss the claim for possession of land allotted to the plaintiff under an order of partition on the offer of the appellants to pay rent for the plot in suit. **A.** SAGWA *v.* RAM SARAN **197**

——— **s. 233 (k)** —*Partition — Land belonging to different* mahals *partitioned—Suit for correction of mistake not barred.*

Under the U. P. Land Revenue Act the Revenue Courts are given exclusive jurisdiction to partition a *mahal*. In respect of each *mahal* separate proceedings for partition have to be instituted. If parties are co-sharers in more *mahals* than one it is not necessary for them to bring all the *mahals* into Court for partition.

A village was partitioned into two *mahals* D, and G. *Mahal* D was allotted to the plaintiff. In a subsequent Settlement a plot belonging to *mahal* D was by mistake of a clerk included in *mahal* G. The plaintiff, who was the owner of *mahal* D, then purchased a share in *mahal* G. When *mahal* G was partitioned the plot belonging to *mahal* D, which had by mistake been included in *mahal* G, was allotted to the defendant. The plaintiff, after completion of his partition, brought a suit for declaration that the plot in question belonged to *mahal* D and that the partition proceeding in respect of *mahal* G did not affect it:

Held, that the suit was not barred by section 233 (*k*) of the U. P. Land Revenue Act and was, therefore, maintainable. **A.** DHARAM SINGH *v.* RAM DIAL SINGH FULLER, 12 A. L. J. 1126 **177**

——— **s. 233 (k)**—*Partition —No objection as to proprietary title—Jurisdiction of Civil Court.*

A co-sharer in a certain *mahal* brought a suit in the Civil Court for joint possession of a plot of land against his co-sharers. Before the institution of his suit, another co-sharer had made an application for partition. Notice was issued to co-sharers including the plaintiff to raise objections The plaintiff did not raise any objection:

Held, that his suit in the Civil Court became barred by section 233 (*k*) of the Land Revenue Act. **A.** GANESH TEWARI *v.* SALIK PANDE, 12 A. L. J. 949 **32**

——— **s. 233 (k)**—*Suit filed within three months in Civil Court withdrawn—Fresh suit beyond three months—Limitation—Civil Procedure Code (Act V of 1908), O. XXIII, r. 2.*

Under an order of a Revenue Court in a partition proceeding the plaintiff was required to institute a suit within three months in a Civil Court for the determination of his claim. He instituted the suit within three months, but for some defect withdrew it and re-instituted it next day but beyond three months. The lower Appellate Court dismissed the suit, on the ground that the order of the Revenue Court to file a suit in a Civil Court within a limited time involved a suspension and supersession of the ordinary period of limitation prescribed for such a suit and as the suit was beyond three months it was barred by time:

Held, that under the circumstances there was no failure to institute a suit within the period prescribed by the order of the Revenue Court and that no question of limitation being involved, the suit, when instituted afresh after the order of withdrawal, was not obnoxious to the provisions of Order XXIII, rule 2, of the Civil Procedure Code. **A.** SHAIKH MUHAMMAD *v.* QADIR BAKSH, 12 A. L. J. 989 **188**

U. P. Motor Vehicles Act (II of 1911), s. 13 (b) —*'Employs', meaning of—Licensee to drive motor.*

The word 'employs', as used in section 13 *(b)* of the U. P. Motor Vehicles Act (II of 1911), means 'has' or 'retains' in his employ and not 'takes into his employ'.

The section provides *imprimis* for the case of a man who at the time in question is driving a motor vehicle without a license and, therefore, clearly refers to the case of a license in force at the time of such driving. **O.** MUHAMMAD ALI MUHAMMAD KHAN *v.* EMPEROR, 17 O. C. 311; 15 CR. L. J. 677 **1005**

U. P. Municipalities Act (I of 1900), ss. 27, 152—*Permission for repair refused—Remedy—Suit or appeal.*

The remedy of a person aggrieved by an order of a Municipal Board refusing to give him leave to repair and re-erect his gallery and arches, is an appeal as provided in section 152 of the Municipal Act and not a suit for perpetual injunction and damages. **A.** ABDUL SAMAD *v.* MUNICIPAL BOARD, MEERUT, 12 A. L. J. 445; 36 A. 329 **207**

U. P. Municipalities Act—concld.

——— **s. 147**—*Board's order disobeyed—Conviction—Disobedience persisted in—Second trial—Correctness of Board's order, whether can be challenged at second trial.*

On his disobeying the order of the Municipal Board to remove an objectionable *chajja* the applicant was prosecuted and fined Rs. 5 under section 147 of the Municipalities Act. He challenged the correctness of that conviction by applications to the District Magistrate and to the High Court, but his applications were thrown out. On his persisting in disobeying the Board's order he was again prosecuted. At the second trial he wished to challenge the correctness of the first conviction by showing that the Board's notice was illegal and so forth:

Held, that he could not now challenge the correctness of the first conviction. **A.** SITAL PARSHAD *v.* MUNICIPAL BOARD, CAWNPORE, 12 A. L. J. 595; 36 A. 480; 15 CR. L. J. 571 **323**

——— **s. 152**—*Invalid notice—Accused not prevented from raising question of invalidity of notice—Duty of Magistrate to ask prosecution to prove validity of notice.*

Section 152 of the Municipalities Act does not prevent an accused person from setting up the defence that the paper served upon him was not a notice issued by the Board or by the authority of any person to whom the powers exercisable by the Board as a whole had been lawfully delegated. If such a defence is set up the Magistrate ought to inquire into it and call upon the prosecution to produce evidence sufficient to satisfy him on the point. **A.** HAZARI LAL *v.* EMPEROR, 12 A. L. J. 312; 36 A. 227, 15 CR. L. J. 574 **326**

Upper Burma Civil Courts Regulation (I of 1896), ss. 25, 26 **163**

Valuation of suit—Jurisdiction—Court-fee—Suit for possession of colony land—Custom—Alienation by father—Market-value of land determines valuation of suit—Suit improperly valued—Procedure **24**

Vendor and purchaser—*Transfer of Property Act (IV of 1882), s. 55 (4) (b)—Claim for recovery of unpaid purchase-money—Limitation—Vendor's lien—Charge under s. 55 (4) (b) of Transfer of Property Act, whether enforceable against transferees from vendees.*

A vendor is entitled to recover the unpaid purchase-money as a debt from the vendee either by enforcement of payment against him personally or by enforcement of the charge on the property sold. The latter remedy is available to the vendor even if the personal remedy is barred by lapse of time. Where the purchase-money is left with the vendee for payment on behalf of the vendor, the money is payable to the latter and he has a lien for it so long as it is not paid. A personal remedy against a vendee is not enforceable against his transferees, but where the charge is on the property whosoever obtains the property, either by inheritance or by transfer, does so subject to the burden of the charge. **A.** MEGH RAJ VAISH *v.* ABDULLAH KHAN, 12 A. L. J. 1034 **208**

——— Estoppel—Sale—Consideration, receipt of, acknowledged—Non-receipt, whether can be proved **27**

Vendor's lien—Claim for recovery of unpaid purchase-money—Charge under section 55 (4) (*b*) of Transfer of Property Act, whether enforceable against transferees from vendees **208**

———Unpaid purchase-money **939**

Vizagapatam Agency Rules, Rules 17 and 20—*Agent refusing to admit special appeal, whether decree.*

Rule 17 of the Vizagapatam Agency Rules cannot be regarded as conferring on the party concerned a limited right of appeal. He has no right of appeal at all except with the leave of the Agent. The Agent's order refusing to admit an appeal against an appellate judgment of a Special Assistant Agent cannot be held to be a decree and, therefore, Rule No. 20 is inapplicable to it. **M.** LAKSHMINARAYANA PANIGRAHI *v.* PASUPUREDDI GOPI, 27 M. L. J. 177 **282**

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Wagering contract. *See* CONTRACT ACT, s. 30.

Waiver, what constitutes—Instalment bond, default in payment of **938**

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———, interpretation of **869**

Waste Land Rules, land purchased under **680**

Widow's estate. *See* HINDU LAW

Will. *See* HINDU LAW.

———*Appointment by implication.*

The mere fact that a testator has appointed by Will his elder son to be trustee of his minor younger son and directed him to deal with a certain house as the trustee of the minor in the event of the testator's death during the younger son's minority is not sufficient to indicate that the elder son was appointed the executor of his Will. **L. B.** JANNAT ALLY, *In re*, 7 L. B. R. 266 **820**

———*Compromise—Construction.*

According to a Will the plaintiff was to manage the estate of the deceased testator and was to keep the income entirely in his hands and to pay to the heirs of the deceased their proportionate shares of the income. One condition of the Will was that he was to spend a certain sum of money on '*dcorhi* expenses'. The Will led to litigation which resulted in a compromise whereby the heirs got their proportionate shares in the property and agreed to pay out of its profits certain sum every year towards the expenses mentioned in the Will:

Held, that the plaintiff was entitled to the payment of money under the compromise from the heirs, that it was his duty to spend this money upon the purposes mentioned in the Will, that he was liable to account to the defendants for the expenditure of the money, but that the rendering of account was not a condition precedent to the payment of the money to the plaintiff. **A.** ZAINULABIDIN *v.* ZAKIR HUSAIN, 12 A. L. J. 513 **313**

———*Residuary legatee, right of, to claim account from executor—Account filed in Probate Court—*

Will—concld.

Executor, whether discharged from all liability—Limitation Act (IX of 1908), Sch. I, Art. 123—Heir of executor, liability of.

As a residuary legatee is entitled to recover his legacy or share granted under a Will, he has a right to get such an account from the executor as is necessary for the purpose of ascertaining what the residuary share is.

In a suit brought against an executor for the purpose of enforcing a right to the residue under a Will, the executor cannot plead that he is discharged from all liability to account because he has filed certain accounts in the testamentary jurisdiction.

A suit by a residuary legatee to recover her legacy or share falls under Article 123 of the Limitation Act of 1908 and is not barred if brought within 12 years from the time when the share became payable.

The heir or representative of a deceased executor is not personally liable for any breach of obligation by executor, but is liable to the extent of the assets received from the executor's estate. **C.** KHETRAMANI DASEE *v.* DHIRENDRA NATH ROY, 41 C. 271 **370**

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incurable **968**

information received **630**

interest **366**

kabiz darmiani **743**

malik **869**

married woman **917**

old waste **664**

paid his money in good faith **973**

person interested in the property **48**

race, sect, tribe **236**

shikmi **177**

sub-tenancy **741**

[illegible]king **638**

unable **365**

Workmen's Breach of Contra Act (XIII of 1859), s. 1, *scope of—'A cer, workman or labourer'—'Work'—Contract to c rey clay in complainant's boat by means of accus own labour and that of another hired and paid for him—Daily wages—Jurisdiction—Criminal Revis*

Where, for a daily wage of twelve annas, *M* agr to convey clay from a certain riverside to factory of the complainant in the latter's boat means of his own labour and that of another per to be employed and paid for by him and received sum of money as advance therefor, but afterwa neglected to do the work:

Held, that he came within the purview of the ter 'workman, artificer, or labourer' in section 1 of XIII of 1859 and that the mere fact that the wo was to be done with the assistance of another per to be employed and paid for by him, did not ta away the jurisdiction of the Court to proceed un the Act. **M.** *In re* MAMU BEARI, 1 L. W. 657; 16 L. T. 285; 15 CR. L. J. 651; (1914) M. W. N. 651; M. L. J. 392 **97**

——— ——— s. 2 *Advances in sto — Act inapplicable.*

Section 2 of Act XIII of 1859 is inapplicable a case where the advances are made in stores a not in money. **P.** EMPEROR *v.* CHIRAGH, 23 P. 1914 CR; 15 CR. L. J. 603; 278 P. L. R. 1914 **51**

——— ——— ss. 2, 5—*Workman ear ing his living by laying and burning bricks, wh ther labourer within Act—Order for refund aft lapse of time fixed for performance of contra whether valid.*

A workman earning his living by laying an burning bricks is a labourer within the meaning of A XIII of 1859. The mere fact that the period of tim within which the contract was to be performed h elapsed cannot prevent a Magistrate from passi an order for refund of the money advanced. **A** BHAROSA *v.* EMPEROR, 12 A. L. J. 490; 15 CR. L. 599 **35**

——— ——— ——— ——— s. 2—*Workman ordered work for period of contract—Order disobeyed—Im prisonment Refund of advance and work for contra period, whether can be ordered in addition to im prisonment.*

Where on a complaint under Act XIII of 1859, Magistrate orders the workman to work for th period of contract and does not order him to re-pay th advance, on the workman's failure to comply with th order the Magistrate can do no more than sentenc the workman to imprisonment. He cannot add to th sentence of imprisonment and order that the work man should work for a further period and also re-pay the advance. **A.** TIRKHA *v.* ITWARI, 12 A. L. J. 678 15 CR. L. J. 592 **344**

——— ——— ——— ——— s. 2—*Workman told no to do any more work—Settlement to re-pay balance advanced—Failure to pay—Workman, liability of.*

If an employer tells his workman not to do any more work and arrives at a settlement with him for the re-payment of the balance due, the case is taken out of the Workmen's Breach of Contract Act, the liability of the workman becomes purely a civil liability and his failure to act on the settlement cannot bring the case back under the Act. **U. P. B. R.** JUGARAM *v.* NGA TUN BAW, U. B. R. (1914), II, 18 15 CR. L. J. 662 **990**

——— ——— ——— ——— s. 5 **351**